House of Commons

Defence, Foreign Affairs, International Development and Trade and Industry Committees

Strategic Export Controls: 2007 Review

First Joint Report of Session 2006–07

Fourteenth Report from the Defence Committee of Session 2006-07
Seventh Report from the Foreign Affairs Committee of Session 2006-07
Eleventh Report from the International Development Committee of Session 2006-07
Tenth Report from the Trade and Industry Committee of Session 2006-07

Report, together with formal minutes, oral and written evidence

Ordered by The House of Commons
to be printed 23 July 2007

HC 117
Published on 7 August 2007
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Committees on Strategic Export Controls (Quadripartite Committee)

The Defence, Foreign Affairs, International Development and Trade and Industry Committees are appointed by the House of Commons to examine the expenditure, administration, and policy of the Ministry of Defence, the Foreign and Commonwealth Office, the Department for International Development, the Department of Trade and Industry , and any associated public bodies.

Current membership

DEFENCE: Rt Hon James Arbuthnot*§, Mr David S Borrow*, Mr David Crausby*, Linda Gilroy*, Mr David Hamilton, Mr Mike Hancock, Mr Dai Havard, Mr Adam Holloway, Mr Bernard Jenkin, Mr Brian Jenkins, Mr Kevan Jones, Robert Key*, Willie Rennie, John Smith.

FOREIGN AFFAIRS: Mike Gapes*§, Mr Fabian Hamilton*, Rt Hon Mr David Heathcoat-Amory*, Mr John Horam*, Mr Eric Illsley, Mr Paul Keetch*, Andrew Mackinlay, Mr Malcolm Moss, Sandra Osborne, Mr Greg Pope, Mr Ken Purchase*, Rt Hon Sir John Stanley*, Ms Gisela Stuart, Richard Younger-Ross.

INTERNATIONAL DEVELOPMENT: Malcolm Bruce*§, John Battle*, Hugh Bayley, John Bercow*, Richard Burden*, Mr Quentin Davies, James Duddridge*, Ann McKechin, Joan Ruddock, Mr Marsha Singh, Sir Robert Smith.

The following Member was also a Member of the Committee during the period covered by this report: John Barrett*

TRADE AND INDUSTRY: Roger Berry (Chairman of the Committees' joint meetings)*, Mr Brian Binley*, Mr Peter Bone, Mr Michael Clapham, Mrs Claire Curtis-Thomas, Mr Lindsay Hoyle*, Mr Mark Hunter, Miss Julie Kirkbride, Peter Luff*§, Judy Mallaber*, Rob Marris, Anne Moffat, Mr Mike Weir, Mr Anthony Wright.

* Member who participated in the inquiry leading to this Report
§ Chairman of a participating Committee

Powers

The Committees are departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in Standing Order No 152. The powers of the Committees to work together and agree joint reports are set out in Standing Order No. 137A. These Standing Orders are available on the Internet via www.parliament.uk.

Publication

The Reports and evidence of the Committees are published by The Stationery Office by Order of the House. Joint publications of the Committees (including press notices) are on the Internet at http:www.parliament.uk/parliamentary_committees/quad.cfm. All other publications of the Committees are on the Internet at www.parliament.uk and can be found by going to the webpage of any of the four participating Committees. A list of Reports of the Committees in the present Parliament is at the back of this volume.

Committee staff

The staff who currently work for the Committees on their joint inquiries into strategic export controls are: Glenn McKee (Clerk) and Anwen Rees (Committee Assistant).

Contacts

All correspondence should be addressed to the Clerk of the Quadripartite Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8367; the Committee's e-mail address is quadcom@parliament.uk

Contents

Report

Conclusions and recommendations

1. We conclude that the Export Control Act 2002 has provided a sound legislative basis for controlling and regulating the UK's strategic exports but with gaps and shortcomings. The challenge of increased globalisation of the defence industry, the fast pace of technological development, changing proliferation patterns and procurement methods for weapons of mass destruction (WMD) programmes and the threat from terrorists suggest to us that the 2002 Act may not surpass the record of its predecessor, the Import, Export and Customs Powers (Defence) Act 1939, to remain on the statute book for over 60 years without extensive amendment. We expect the current legislation will need to be reviewed, and possibly amended, regularly. (Paragraph 6)

2. We recommend that the Government agree to reply fully—other than in exceptional circumstances—within six weeks to our letters on decisions to grant or withhold export licences. (Paragraph 9)

3. We recommend that the Government carry out a government-wide assessment of the effectiveness of the export control legislation since 2004 and that the assessment encompass all the agencies with responsibility for the monitoring and enforcement of export controls. (Paragraph 29)

4. We recommend that the Government in responding to this report produce detailed evidence to demonstrate the effectiveness of export controls. (Paragraph 31)

5. We found no evidence to reach a conclusion that the balance between the requirements for the affirmative and the negative resolution procedures in the Export Control Act 2002 need to be re-examined or altered. (Paragraph 34)

6. We recommend that any secondary legislation to implement conclusions arising from the Government's review of export controls be shown in draft to our Committees. (Paragraph 35)

7. We recommend that the Government give an undertaking to consult interested parties—the defence manufacturers, the non-governmental organisations and our Committees—before deciding to make significant changes to the guidance on strategic export controls. (Paragraph 39)

8. On the basis of the evidence supplied to us we conclude that the secondary legislation is intelligible to those to whom it applies. We recommend, however, that the Government clarify in guidance the distinction between applied and basic research scientific projects and that it defines the "public domain" in greater detail. (Paragraph 43)

9. The absence of successful challenges in the courts is not conclusive proof that the legislation is working satisfactorily but we conclude that it provides an indication that the legislation is accepted by exporters and interested parties. Once the case that is currently before the courts is concluded, we recommend that the Government supply us with a note describing the case and the lessons, if any, that it has for the operation of the legislation. (Paragraph 44)

10. We recommend that the Government continue to provide notice and adequate explanation of any changes proposed to the secondary legislation. (Paragraph 45)

11. We recommend that at the end of the review process the Government set out in its conclusions to the Review the reasons for the small number of applications for trade control licences from British citizens overseas. (Paragraph 59)

12. Where a British citizen working overseas for a reputable and responsible organisation applies for a trade control licence we recommend that there be a presumption that a licence will be granted. We conclude that to do otherwise may penalise the responsible British citizen and may undermine the UK's extra-territorial controls on brokering and trafficking. (Paragraph 60)

13. We recommend that the Government enquire whether the extra-territorial provisions in the legislation have placed British citizens overseas in unacceptable positions. (Paragraph 74)

14. We conclude that the Government should bring forward proposals to extend the extra-territorial provisions of the export control legislation to encompass trade in all items on the Military List. In our view the experience of the past three years has shown that the current arrangements have failed and that the extension of the extra-territorial provisions is overdue. We therefore recommend that the Government require all residents in the UK and British citizens overseas to obtain trade control licences, or be covered by a general licence, before engaging in any trade in the goods on the Military List. In order not to undermine the employment prospects of British citizens working for reputable organisations, we further recommend that the Government issue general licences covering British citizens working overseas and engaged in categories of trade between specified countries or in certain activities such as advertising. (Paragraph 76)

15. We conclude that the EU Common Position on the control of arms brokering sets the best practice and we recommend that the Government follow best practice to establish a register of arms brokers. We conclude that a register will help to ensure that brokers meet defined standards, requirements and checks as well as deterring those—for example, with a relevant criminal conviction—for applying for registration. We also recommend that any brokering or trafficking in arms by a person in the UK or a British citizen abroad who is not registered be made a criminal offence. (Paragraph 82)

16. We recommend that the Government obtain and publish in its reply to our Report definitive legal advice setting out whether primary legislation is required to publish a register of brokers and, if the conclusion is reached that primary legislation is required, that the Government bring forward an amendment to the Export Control Act 2002 to permit publication. (Paragraph 83)

17. We conclude that the imposition of a duty on exporters to enquire into the intended use of their goods and to withhold exports where they have a suspicion that goods could be used for WMD purposes is not yet justified. There are, however, a number of steps that the Government could take to improve the operation of the current system. First, we conclude and recommend that the Government regularly remind

exporters of the provisions of WMD end-use and encourage exporters voluntarily to report any suspicions that they may have about WMD end-use. Second, for the system to work the Government has to gather intelligence from its own sources and exchange information with its EU partners and other services, as well as carrying out market surveillance in the same way as the Zollkriminalamt, the German Customs Criminological Office. In addition, it must use its powers under the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. No. 2764/2003) to inform exporters where a WMD end-use is suspected and to bring the prospective exports within export control. We recommend that the Government in responding to our Report confirms that this is the approach it has adopted. Third, we are concerned that HMRC cannot seize goods destined for a WMD end-use without evidence that the exporter was aware of the intended use. We recommend that in its reply the Government explain whether this requirement has been an impediment preventing enforcement action against proliferators of WMD or whether other legislation provides HMRC with adequate alternative powers to seize goods. If the absence of a provision is an impediment to effective enforcement, we recommend that the regulations be changed to allow HMRC to seize goods where there is good intelligence that they are likely to be used for a WMD end-use, irrespective of the knowledge and intentions of the exporter. (Paragraph 89)

18. We recommend that the Government in responding to this Report clarify whether each e-mail exchange within a group containing participants from within and outside the EU working on the collaborative development of IT source code requires a licence under the legislation and, if it does, whether an open or general licence or exemption could be provided. (Paragraph 91)

19. We recommend that the Government request COARM to examine whether Member States are following a consistent interpretation of Criterion 8. (Paragraph 106)

20. We conclude that there is no strong case for amending the primary legislation to require greater weight to be given to sustainable development. (Paragraph 107)

21. We accept that the list of countries eligible for IDA loans provides a foundation on which to build the first stage of the filtering arrangements for consideration of applications for export licences against Criterion 8. The Government itself has recognised that the IDA list needs to be supplemented with the addition of 14 countries. We conclude that the Government's approach gives the correct degree of flexibility to the system. We recommend that the Government also consider adding countries such as Morocco to the list. (Paragraph 114)

22. From the information we obtained during the inquiry we conclude that the system for assessing applications against Criterion 8 appears sound and that it is underpinned by a robust methodology. We recommend that the Government publish the methodology in the Annual Report on Strategic Export Controls along with a list of the countries on the IDA list, as supplemented. (Paragraph 119)

23. We recommend that DFID consider including an assessment in the Criterion 8 methodology applied by Government to test whether the contract behind an

application for an export licence is free from bribery and corruption. (Paragraph 122)

24. We recommend that, in any case where intent to evade export controls is suspected, the case should be investigated and where there is evidence of intent, irrespective of the sensitivity of the goods exported or of their destination, prosecution should always be initiated under section 68(2) of the Customs and Excise Management Act 1979. (Paragraph 126)

25. We conclude that, because of the need to secure evidence or witnesses from abroad or to reveal evidence provided by the intelligence services in court, prosecutions under section 68(2) of the Customs and Excise Management Act 1979 against those posing most threat to the UK's strategic export controls are problematic. (Paragraph 131)

26. To ensure that the process of levying compounding fines is as transparent as possible we recommend that HMRC continue to provide full disclosure of the details of all cases, but without names. In addition, we recommend that, when a suitable opportunity arises, the Government bring forward legislation to require HMRC to publish the names of those paying compounding penalties. (Paragraph 138)

27. From the evidence we received about the enforcement of export controls in other Member States of the EU we concluded the following. First, the level and pattern of prosecutions in the UK is not significantly out of line with that in other EU States, but further examination is required for a comprehensive analysis of procedures, approaches and court rulings across the EU. Second, given the similarity of work and problems faced we are disappointed that the 2007 Consultation Document fails to draw in evidence from other EU Member States. Third, we recommend that the Revenue and Customs departments continue to develop arrangements to share information and experiences with enforcement authorities across the EU. (Paragraph 143)

28. We conclude that in those cases where evidence is required from overseas HMRC is correct to concentrate on those cases involving sensitive goods and destinations where there is a likelihood of cooperation to obtain evidence. (Paragraph 144)

29. We recommend that the Government increase resources for investigations and prosecutions under section 68(2) of the 1979 Act, particularly, to ensure the coordination and exchange of information with EU and other governments. (Paragraph 144)

30. We recommend that as a matter of course HMRC consider all breaches of export control for prosecution under section 68(2) of the Customs and Excise Management Act 1979 and that where the evidential and other tests carried out by the Revenue and Customs Prosecutions Office are met prosecution should be initiated. (Paragraph 145)

31. We conclude that no change should be made in the operation of the reviews and tests carried out by the Revenue and Customs Prosecutions Office before a prosecution can be launched. (Paragraph 145)

32. We conclude that it would be detrimental to industry if the Government were to increase the administrative burdens on exporters without convincing evidence that the existing measures were being fully enforced against those who with intent flout export controls. (Paragraph 147)

33. We recommend that in any case of breach of export control where prosecution under section 68(2) of the Customs and Excise Management Act 1979 is not possible, the Revenue and Customs Prosecutions Office as a matter of course consider, and take steps to maximise successful prosecution under section 68(1) of the 1979 Act and that the outcome of successful prosecutions be publicised by HM Revenue and Customs. (Paragraph 149)

34. We conclude that a warning letter should not be an alternative to a prosecution that meets the Revenue and Customs Prosecutions Office's tests for a viable prosecution and we recommend that, in those cases where a letter is issued, HMRC follow it up to ensure that all deficiencies have been rectified. We also recommend that HMRC examine the opportunities for greater publicity about warning letters subject to ensuring that the reputation and legitimate commercial interests of exporting companies are not unjustifiably damaged, and report its conclusions in the Government's response to this Report. (Paragraph 151)

35. We received no evidence that the power to disrupt had been abused and we accept that it is a legitimate and crucial weapon in HM Revenue and Customs' armoury. The exercise of the power by HMRC is not, however, usually subjected to review by the courts and it therefore needs careful supervision by ministers and Parliament. We recommend that HMRC as part of the review of export controls bring forward proposals to provide more information about the use of the power to disrupt exports of concern and to provide suitable safeguards, and provide information about how this is handled in partner countries. (Paragraph 155)

36. We recommend that the Government in replying to this Report provide an explanation for the reduction in the number of seizures since 2000-01. (Paragraph 157)

37. We reiterate our recommendation made last year that the Sentencing Guidelines Council conduct a review of the guidelines on sentences for breaches of export control and we press the Council as a matter of urgency to include the review in its programme for 2007-08. (Paragraph 165)

38. We recommend that the Government examine the effect of the Export Control Act 2002 on academic institutions and on postgraduate research and consider whether the legislation is working as intended. We also recommend that the Government formulate and adopt a publicity strategy to inform academic institutions, research councils and similar bodies of their responsibilities under the Export Control Act 2002. (Paragraph 175)

39. We recommend that HMRC produce and publish a report on the outcome of the exercise it is conducting on the operation of Open General Export Licences and that HMRC conduct a similar exercise on the operation of the Open General Transhipment Licences in time for the results to be taken into account by the

Government before it reaches conclusions on its Review of Exports Controls. In our view it is of crucial importance that not only sensitive goods such as landmines, torture and paramilitary equipment and goods destined for use in a WMD programme or goods destined for embargoed destinations are denied transit and transhipment through the UK but also goods destined for terrorists. (Paragraph 183)

40. We recommend that those who fail to comply with open licences should be denied the privilege of open general licences for at least a year. We also conclude that for the public to have confidence in the system of open licences there needs to be a thorough system of regular compliance checking of those who use open general licences. We welcome the ECO's and HMRC's consideration of additional enforcement options and conclude that, when the Government has reached its conclusions, we should look at this matter again in our next report. At this stage we do not wish to pre-empt the ECO's and HMRC's consideration of additional enforcement options but we recommend that the Government also review whether resources dedicated to compliance visits and to outreach to industry are sufficient and ensure that the ECO and HMRC produce a joint strategy which, for example, could include joint compliance visits. (Paragraph 190)

41. We recommend that as part of its review of export controls the Government bring forward proposals for penalties such as fixed fines to be imposed in cases where the authorities discover dual-use goods exported in breach of export controls but which would normally be given an export licence had the exporter applied for one. (Paragraph 193)

42. We conclude that the appeals procedures are working satisfactorily. (Paragraph 195)

43. We conclude that the secondary legislation has not impeded the provision of support to British armed forces. (Paragraph 197)

44. We conclude that the Export Control Act 2002 does not impose an excessive burden on those organising arms fairs and exhibitions in the UK and that the current legislation provides a reasonable framework for regulating arms fairs provided that the legislation is actively enforced by the authorities and the organisers of arms fairs and similar exhibitions. We have, however, serious concerns about enforcement. We recommend that the Government in responding to this report set out the criteria for HMRC attending arms fairs and similar exhibitions. It would also assist us to have an account (a) from HMRC of the breach of export controls which arose at IFSEC 2007 and what information about the requirements of the Act had been conveyed to the defendant in the recent court case; and (b) from the Crown Prosecution Service about the charges brought and why no charges concerning breach of export controls were initiated. We further recommend that where HMRC attends a fair or exhibition its officers patrol during the opening hours, inspect the goods being displayed and put questions to those on stalls to ensure that export controls are not being breached. In addition, we recommend, where HMRC does not assign officers to attend a fair or exhibition at which goods subject to export control are displayed, that HMRC send officers to carry out spot checks and provide expeditious access to officers to deal with matters raised by the organisers, exhibitors or those attending. (Paragraph 208)

45. While we accept that little can now be done in respect of the proposed export of British-made maritime-patrol aircraft from India to Burma, we recommend that it should become a standard requirement of licensing that export contracts for goods on the Military List contain a clause preventing re-export to a destination subject to UN or EU embargo. In addition, the contracts should include a subrogation clause allowing the UK Government to stand in the place of the exporter to enforce the contract in British or foreign courts. We also recommend that the Government require as a condition of licensing that all export contracts make provision to allow for end-use inspections. (Paragraph 217)

46. We recommend that the Government bring forward proposals for an end-use control on equipment used for torture or to inflict inhuman or degrading treatment. We conclude that given the range of items that could potentially be caught it would be unreasonable to impose a requirement of due diligence on all exporters for all goods. There are, however, two less stringent obligations we recommend the Government impose on exporters. First, there be a requirement to withhold an export where an exporter has reason to believe that the goods are to be used for torture or degrading treatment. Second, there be an obligation on exporters to inform the Government if they know or have reason to believe that an export is to be used for torture or degrading treatment. Irrespective of the duty on the exporter, we recommend that there should be an obligation on the Government to investigate reports that exports from the UK are being used for torture or to inflict cruel, inhumane or degrading treatment. We recommend that, where the Government establishes a reasonable suspicion of abuse, it be under an obligation to inform exporters who would then be in breach of export control if they exported the goods to the destinations or end users notified by the Government. (Paragraph 225)

47. On the basis of the evidence we have received this year and the work done by our predecessor Committees we conclude that the current controls over licensed production overseas are inadequate and need to be extended. We conclude that there are advantages in pursuing the third option put forward by the Government in the 2007 Consultation Document: the Government make export licences for supplies to licensed production facilities or subsidiaries subject to conditions relating to the relevant commercial contracts. (Paragraph 238)

48. In addition, we recommend that where licences encompass overseas production the Government make it a condition of the license that the contract underpinning the agreement prevent exports from the overseas facilities in breach of EU and UN embargoes and allow inspection. In addition, the contract should include a subrogation clause allowing the UK Government to stand in the place of the exporter to enforce the contract in British or foreign courts. (Paragraph 238)

49. We recommend that the Government ensure that its database identifies licences which encompass overseas production. (Paragraph 239)

50. We recommend that the Government extend export controls to encompass exports of goods and destinations subject to EU or UN embargo by overseas subsidiary companies, in which a majority shareholding is held by a UK parent or where UK beneficial ownership can be established. In such cases the parent company would be

required to obtain a UK export licence or, in the absence of a licence, would be in breach of the Export Control Act 2002. (Paragraph 242)

51. On the basis of the evidence we received we conclude that the feasibility and practicability of a Military End-Use Control "catch-all" provision has not yet been established. We recommend that the Government examine other countries' experience with Military End-Use Control "catch-all" provisions before reaching its conclusions. (Paragraph 251)

52. We recommend that the Government in responding to this Report explain how the existing WMD end-use controls work and why no prosecutions have been initiated. (Paragraph 258)

53. We recommend that the blanket exemption from controls of Government and its agencies as exporters of licensable goods and technology be ended and that details of the Government's and its agencies' exports be reported on the same basis as those of industry. There should, however, be one exception. In order to ensure that exports by the Government and its agencies to UK forces overseas are made expeditiously they should continue to be covered by Crown exemption. (Paragraph 268)

54. We reiterate the conclusion we set out in our Report last year that a prior scrutiny model for certain sensitive (or precedent-setting) arms export decisions should be developed on a trial basis for transfers to countries under, or recently under, embargo. We recommend that the Government examine this proposal in detail as part of its review of export controls. (Paragraph 269)

55. We recommend that the Government consider whether the development of e-mail to allow it to be used as a means to transfer entire software packages or detailed technical manuals between groups comes within export control and, if it does not, whether it should be brought within control. Given the pace of technological change and globalisation of industry we recommend that the Government carry out a further review of the legislation in five years. In the meantime we recommend that the Government set up an ongoing internal review which responds to technological and global developments and examines best practice and innovative ideas that enhance the effectiveness of export controls in other countries. (Paragraph 272)

56. We note that the Government's predictions about the effect of the legislation overestimated the number of licences likely to be sought by exporters. We conclude this was in part a product of industry's apprehensive approach to the legislation and the greater than anticipated use of open licences. (Paragraph 274)

57. We conclude that the implementation of the Export Control Act 2002 has not undermined the competitiveness of the UK's defence industries. (Paragraph 277)

58. Taking the defence manufacturing sector as a whole we reach two conclusions about the implementation of the export control legislation. First, the cooperation and involvement of industry in drawing up guidance assisted the smooth implementation of the export control secondary legislation. Second, while we acknowledge the constructive approach taken by EGAD, we had concerns about the tone and inaccuracy of some of industry's representations about the implementation of the legislation. (Paragraph 282)

59. Whilst we accept that it is reasonable to assess the benefit in terms of counter-proliferation of any extension of export controls, we conclude that a detailed objective test may not be practicable and its absence should not preclude changes to the system of export controls consistent with a precautionary approach. (Paragraph 283)

60. We conclude that transitional arrangements lasting six months were adequate for the full introduction of the new export controls. (Paragraph 285)

61. We recommend that the Government work with industry to produce an Open General Export Licence as soon as possible to address the concerns of the chemical, biological, radiological and nuclear sector about the need to obtain export licences before submitting technical information to UK Armed Forces and blue light services prior to contract signature. (Paragraph 290)

62. We recommend that the ECO review and modify its website to make it easier to use. (Paragraph 295)

63. We conclude that the Export Control Organisation has a key role to play in preventing inadvertent transfer of goods and technologies which can be used in weapons of mass destruction. We recommend that the ECO publish and regularly update Guidance on the Operation of the WMD End-Use Control, including lists of suspected front companies. (Paragraph 297)

64. We recommend, as we did last year, that the outreach programme to industry be expanded significantly. (Paragraph 300)

65. To ensure that the export control system maintains its integrity we conclude that the holders of OIELs with terms of five years or longer must be subject to regular compliance checks and we recommend that in its reply the Government explain the extent to which the holders of such licences are subject to compliance visits and checks. (Paragraph 302)

66. On the basis of the evidence put before our inquiry we conclude that there is no overwhelming case in favour of setting up an export enforcement agency. (Paragraph 304)

67. We recommend that the Government improve the arrangements for monitoring and controlling large volumes of weapons that enter the UK for destruction or re-export. In addition, we recommend that the Government provide a full account of the 200,000 assault rifles that were imported into the UK from the former Yugoslavia between 2003 and 2005, explaining how many were made unusable and how many were re-exported. (Paragraph 310)

68. We recommend that the Government do not cut defence attaché posts in countries where the export of goods and technology from the UK requires careful consideration to ensure that they meet the EU Code of Conduct on Arms Exports and the National Export Licensing Criteria, and in countries where the UK and other members of the international community are assisting in the destruction of surplus conventional weapons and WMD materials, or where there are concerns about the exporting of such surplus weapons and materials. (Paragraph 312)

69. We recommend that in responding to this Report the Government set out the progress that has been made in carrying out the recommendations arising from the 2004 review of the implementation of EU Council Regulation 1334/2000 on the control of dual-use items in an enlarged EU. We further recommend that the Government consider whether the EU review's conclusions have implications for its own 2007 Review of Export Control Legislation. (Paragraph 314)

70. In our view the Government needs to formulate a policy to respond to any proposals emerging from the European Commission to remove the barriers to the free movement of military goods and technology that currently exist within the EU. The Government's policy needs to address the effect that any changes would have on export controls and to ensure that UK and EU export controls are not weakened. We recommend that the Government set out its policy in responding to our Report. (Paragraph 320)

71. We share EGAD's concerns about the European Commission's proposals for changes to the dual-use regulations and recommend that the Government in its response to this Report explain its policy to the changes proposed by the Commission to the regulations. (Paragraph 323)

72. We recommend that the Government provide firm and explicit answers to questions about its decisions to grant, or withhold, export licences for goods or technology which could be used for internal repression in countries where human rights are abused. (Paragraph 330)

73. We conclude that it is entirely reasonable for a government to have a policy of refusing to license exports to a particular country for a stated reason or a foreign policy objective. (Paragraph 333)

74. We conclude that on the basis of the statistics there is evidence that the licensing policy to Israel may have been tightened up. We conclude that the Government's "case by case" response in explaining decisions to grant or refuse licences is unclear. While the "case by case" approach gives the Government flexibility this appears to allow latitude to adjust policy without the need for public explanation, which is neither transparent nor accountable. (Paragraph 339)

75. We recommend again this year that the Government explain its policy on licensing exports to Israel, Jordan or other countries in the Middle East and that it explain whether it has adjusted its policy since 1997 as events in the Occupied Territories and Middle East have unfolded. We further recommend that Government explain how it assesses whether there is a "clear risk" that a proposed export to Israel might be used for internal repression (for the purposes of Criterion 2). (Paragraph 340)

76. We recommend that in responding to this Report that the Government explain what was the purpose of the Foreign and Commonwealth Office's recent visit to China to discuss export controls and what was the outcome. (Paragraph 346)

77. We reaffirm the recommendation we made in our last Report that the Government work within the EU to maintain the arms embargo on the People's Republic of China. (Paragraph 348)

78. We recommend that the Government press for the inclusion of provisions in the arms trade treaty to regulate the trade in small arms and light weapons. We recommend that the Government provide a report on progress on the treaty in responding to this Report. (Paragraph 356)

79. We recommend that the Government press for the inclusion of provisions in the arms trade treaty to promote good governance and combat bribery and corruption in arms transfers. (Paragraph 358)

80. We conclude that, if a comprehensive treaty is secured, its full benefit will only be realised if countries across the world put into operation export control systems capable of implementing the provisions of the treaty as well as with non-proliferation requirements under UN Security Council Resolution 1540 of 2004 and other treaties and that countries with fully developed systems will have to assist those without. In the UK this will include providing licensing, technical and enforcement staff to participate in outreach missions. (Paragraph 360)

81. While we consider that the Government ought to give top priority to the international arms trade treaty, there is a risk that it may distract support for the non-proliferation regimes. We recommend that the Government bring forward proposals to extend the non-proliferation regimes. (Paragraph 362)

82. We congratulate the Government on its support for a ban on "dumb" cluster bombs and on its commitment to withdraw the UK's stocks of "dumb" cluster munitions with immediate effect. (Paragraph 368)

83. We recommend that the Government also withdraws "smart" cluster bombs, provided that an operational alternative is available for military use to counter massing troops in formation on the battlefield. (Paragraph 368)

84. We recommend that the Government publish future Annual Reports on Strategic Export Controls by the end of April each year. (Paragraph 370)

85. We recommend that future Annual Reports on Strategic Export Controls set out in a consistent and systematic manner the resources made available by the Government to implement and enforce strategic export controls with details of enforcement actions. (Paragraph 372)

86. We recommend that section 1 (Policy Issues Relating to Strategic Export Controls) of future Annual Reports be widened to include a detailed report on UK export control policy as a whole along the lines of that provided in the Swedish Annual Report. We welcome the Government's offer of a "Restricted" report on outreach and recommend that the Government provide such a report at the same time that it publishes its Annual Reports on Strategic Export Controls. (Paragraph 376)

87. We recommend that the "country by destination" section of future Annual Reports provide, for each country, a statement on the general arms transfer control approach or policy, along with any policy changes that have occurred over the year. We also recommend that the Government bring forward proposals to allow the data in the Quarterly Reports to be easily extracted in order to be summarised and analysed. (Paragraph 379)

88. We recommend that the Government make the following changes to its Quarterly Reports.

- Divide up information on financial values and descriptions between Military List items and "Other".
- Combine the information on financial values, number of licences issued and descriptions to give a better indication of the volume of each type of goods licensed for export.
- Provide more systematic information on the type of end-user.
- Provide information on the final destination of goods covered by "incorporation licences".
- Provide separate information on each license denial with a description of the goods covered the reasons for the denial. (Paragraph 382)

89. We recommend that the Government produce data on the value of exports broken down by Military List category and data on the value of dual-use exports, which is published in future Annual Reports. In addition, as the EU Code of Conduct on Arms Exports applies to dual-use goods we recommend that the UK press the EU to produce an EU reporting standard for data on conventional dual-use exports and for the data on dual-use goods to be included in the EU's own Annual Reports. (Paragraph 383)

90. We recommend that the Government consider amending customs codes either to include a sub-category of controlled items in each relevant category or to add a digit that indicated that a good was listed. (Paragraph 385)

91. We recommend that the Government bring forward a proposal for a fully searchable and regularly-updated database of all licensing decisions. If the Government propose that the database replace the Quarterly Reports it must demonstrate that there will be no loss of functionality or data. In addition, the Government will need to make a proposal for supplying the classified information that it provides to us each quarter. (Paragraph 386)

92. We conclude that the Government's explanation about the breaches of export control in respect of UK-manufactured imaging equipment found in South Lebanon was satisfactory. (Paragraph 387)

93. The DTI's (now the Department for Business, Enterprise and Regulatory Reform's) 2007 Review of Export Control Legislation is an opportunity to stand back and look at the changes in strategic export controls since the 1990s. As a result of the Export Control Act 2002, and the secondary legislation made under it, the UK now has generally efficient and reliable export controls. The volume and quality of information that the Government provides about strategic export controls has improved considerably in the past ten years and we hope will continue to improve. (Paragraph 390)

94. We conclude that the DTI's 2007 Review is a constructive process that addresses many of the issues which we and other interested parties have raised over several

years. Much careful thought and work has gone into the Consultation Document and it shows that the Government has been listening. The options for changes it sets out in important areas such as extra-territoriality are welcome and we conclude provide the basis for change. The Review has two shortcomings. First, it ignores the fact that strategic export controls rely on Government-wide cooperation and communication. The Consultation Document does not mention HMRC, which enforces strategic export controls. Second, it ignores the EU dimension. The States of the EU face exactly the same problems as the UK in administering an export control regime, a significant part of which is derived from EU legislation. (Paragraph 391)

95. We look forward to reviewing the Government's conclusions arising from the 2007 Review in our next Report. (Paragraph 392)

96. The past year has seen the start of the UN process to secure an International Arms Trade Treaty. The groundswell of support for the treaty has been greater than could have been anticipated and we are pleased to report significant progress. We conclude that the Government has continued to show skill in promoting the treaty and, significantly, to press for a comprehensive treaty including both military and dual-use goods and technology. The next year will be crucial for the treaty when the governmental experts start on the details. We hope that in our next report we shall be able to report further significant progress. (Paragraph 393)

1 Introduction

Introduction

1. Since 1999 the Defence, Foreign Affairs, International Development and Trade and Industry Committees have worked together to examine the Government's strategic export control system and policies. This arrangement, which has become known as the "Quadripartite Committee", enables the House of Commons to conduct ongoing scrutiny of a complex and controversial area of government policy.

Review of export controls

2. The existing regime of UK export controls is based on the Export Control Act 2002 which the Government called "the most comprehensive review of strategic export controls for over 60 years".[1] It accepted that the new controls introduced under the Act would "be a significant challenge both for industry and Government, and it is therefore entirely appropriate to keep their operation under review".[2] Post-legislative scrutiny, in line with Cabinet Office guidance, was announced with a review of the regulations introduced under the 2002 Act after they had been in force for three years, i.e. in May 2007.[3] In our Report in 2006 we indicated that we planned to take up the Government's offer to make a contribution to its review of export control legislation.[4]

3. In responding to our Report last year the Government confirmed that in 2007 it would be conducting a review of the legislation. The Government published a consultation document, 2007 Review of Export Control Legislation,[5] on 18 June 2007 and invited responses by 30 September 2007. The review is being carried out by the Export Control Organisation (ECO), in consultation with other interested departments and parties.[6] The Government explained that the review would be carried out according to Better Regulation principles as set out by the Cabinet Office[7] and "will provide a useful opportunity to take stock of existing controls".[8]

1 Departments of Defence, Foreign and Commonwealth Affairs, International Development, and Trade and Industry, *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*, Cm 5988, October 2003, p 1

2 Cm 5988, p 1

3 HC Deb, 16 March 2006, col 521WH; HC Deb, 4 May 2006, col 1751W

4 Defence, Foreign Affairs, International Development and Trade and Industry Committees, First Joint Report of Session 2005–06, *Strategic Export Controls: Annual Report for 2004, Quarterly Reports for 2005, Licensing Policy and Parliamentary Scrutiny*, HC 873, para 17 and Q192

5 Department of Trade and Industry, *2007 Review of Export Control Legislation: A Consultation Document*, June 2007 (hereafter "2007 Consultation Document")

6 HC Deb, 4 May 2006, col 1751W

7 Departments of Defence, Foreign and Commonwealth Affairs, International Development and Trade and Industry, *Strategic Export Controls: HMG's Annual Report for 2004, Quarterly Reports for 2005, Licensing Policy and Parliamentary Scrutiny Response of the Secretaries of State for Defence, Foreign and Commonwealth Affairs, International Development and Trade and Industry*, Cm 6954, October 2006, p 3

8 Cm 6954, p 1

The Government's 2007 Consultation Document

4. The Government's 2007 Consultation Document aims to look to the future, and it identifies potential options for further change, some of which it has already identified in discussions with stakeholders. The Government's ultimate aim "is to find an effective and proportionate way to guard against the risk of undesirable exports and related activities", and it is looking to those responding to the consultation document "to provide the evidence and ideas that will enable us to do so".[9] The Consultation will run for three months, until 30 September 2007, and at the end of the period, the Government will analyse all responses received and aim to publish the initial results of that analysis, together with any proposals for changes, by 31 December 2007.[10]

The Committees' review of the legislation

5. Because we knew that the Government's review of export controls was scheduled for 2007 we decided to start work on our own review in the autumn of 2006 with the objective that our Report should assist the Government's review. We reviewed the 2005 Annual Report on Strategic Export Controls[11] and the Quarterly Reports[12] for 2006 together with the operation of the Export Control Act 2002 and the secondary legislation made under the Act. The review has provided the main focus for our work this year. In reviewing the legislation we have gone back to the Scott Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions,[13] the conclusions of which helped frame the considerations behind, and debates on, the legislation. We have also focused on the development and operation of the system of strategic export controls put in place by the Export Control Act 2002, which have been in full operation since April 2004. We have outlined our approach at chapter 3 and our conclusions and recommendations which are our response to the Government's review of export controls are principally at chapters 4 to 8.

6. **We conclude that the Export Control Act 2002 has provided a sound legislative basis for controlling and regulating the UK's strategic exports but with gaps and shortcomings. The challenge of increased globalisation of the defence industry, the fast pace of technological development, changing proliferation patterns and procurement methods for weapons of mass destruction (WMD) programmes and the threat from terrorists suggest to us that the 2002 Act may not surpass the record of its predecessor, the Import, Export and Customs Powers (Defence) Act 1939, to remain on the statute**

9 2007 Consultation Document, p 2

10 2007 Consultation Document, p 3

11 Foreign and Commonwealth Office, United Kingdom Strategic Export Controls Annual Report 2005, Cm 6882, July 2006

12 Four reports for January-March 2006, April-June 2006, July-September 2006 and October-December 2006 were published by the Foreign and Commonwealth Office on the Internet at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1119522594750

13 *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, 1995–96, HC 115 (hereafter "the Scott Report")

book for over 60 years without extensive amendment. We expect the current legislation will need to be reviewed, and possibly amended, regularly.

7. As well as the process of taking oral and written evidence on policy and the operation of the legislation, we have continued to explore issues raised by particular licences; we have, for example, assessed whether there has been any inconsistency in the issuing and refusal of licences to a particular country and whether other licence approvals or refusals for which the rationale is not obvious have been determined in accordance with the EU Code of Conduct on Arms Exports and the National Export Licensing Criteria.[14] This process is detailed and, necessarily, confidential. We have drawn on the information received to make points on policy issues, and will keep certain cases under review.

14 HC Deb, 26 October 2000, cols 199-203W and http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1014918697565

2 The work of the Committees

Relations between the Committees and the Government

8. In our Report last year we were glad to note a change in the Government's approach to the questions we raised and in the speed of its replies.[15] In previous years the Government had warned the Committees "to be aware that [their] necessary duties add significantly to the running costs of the Government's export controls"[16] and we, for our part, had concerns about the speed of the Government's replies.[17] In reply to our Report last year the Government indicated that it was committed to answering all requests for information in a "timely manner".[18] In the debate on 22 February 2007 on our last Report the then Parliamentary Under-Secretary of State for Trade and Industry, Jim Fitzpatrick MP, acknowledged that the "scrutiny applied by the Committee is a very important aid to the export licensing process and to the Government's wider deliberations on the scope and administration of export controls" and he looked forward "to the Committee playing a full role as the Government's review of export controls is taken forward".[19] We concur with the Minister's comments and we are pleased that the change in relations last year has continued.

9. While the Government's responses to our questions have not always been received within the six week timetable we requested,[20] we recognise that the need to clear responses with four departments may on occasion mean there is delay. A six week timetable allows us to play a full role in scrutinising export controls. Slippage beyond this deadline reduces the transparency of scrutiny and our ability to review decisions within a reasonable period from the decision to grant (or withhold) an export licence. **We recommend that the Government agree to reply fully—other than in exceptional circumstances—within six weeks to our letters on decisions to grant or withhold export licences.**

Evidence and witnesses

Oral evidence

10. In the course of this inquiry, we held five evidence sessions with: (i) the UK Working Group on Arms;[21] (ii) the Export Group on Aerospace and Defence (EGAD);[22] (iii) the

15 HC (2005-06) 873, para 9

16 Departments of Defence, Foreign and Commonwealth Affairs, International Development and Trade and Industry, *Strategic Export Controls: HMG's Annual Report for 2003, Licensing Policy and Parliamentary Scrutiny Response of the Secretaries of State for Defence, Foreign and Commonwealth Affairs, International Development and Trade and Industry*, Cm 6638, July 2005, p 2

17 Defence, Foreign Affairs, International Development and Trade and Industry Committees, *First Joint Report of Session 2004–05, HMG's Annual Report for 2003, Licensing Policy and Parliamentary Scrutiny*, HC 145, paras 13-15

18 Cm 6954, p 1

19 HC Deb, 22 February 2007, col 180WH

20 HC (2005–06) 873, para 12

21 The Working Group is part of an international coalition of non-governmental organisations which includes Amnesty UK, BASIC, Oxfam GB and Saferworld.

Parliamentary Under-Secretary of State for International Development, Mr Gareth Thomas MP, and officials; (iv) officials from HM Revenue and Customs (HMRC) and the Revenue and Customs Prosecutions Office; and (v) the then Secretary of State for Foreign and Commonwealth Affairs, Rt Hon Margaret Beckett MP, and officials.

11. The evidence session with the Department for International Development (DFID) was the first time that either we or our predecessor Committees had taken evidence directly from that department. DFID has primary responsibility for consideration of applications for export licences against Criterion 8 of the Consolidated EU and National Arms Export Licensing Criteria, which requires exports to be compatible with the technical and economic capacity of the recipient country. The question of sustainability played a large part in the discussions at a time when both the primary and secondary legislation was before Parliament. The issue was a matter that we needed to examine in detail as part of our review of the legislation and therefore we found the session useful.

12. In order not to prejudge the outcome of the review, which was led by the former Department of Trade and Industry (DTI), now the Department for Business, Enterprise and Regulatory Reform, we did not take oral evidence from the Department this year. When, following its review of export controls, the Government has announced its conclusions we shall invite the Department to give evidence on the outcome.

Written evidence

13. We invited written evidence not only from those who have usually supplied evidence to our and our predecessor Committees' recent inquiries but also from a wider field which ranged from academics to those who organise arms fairs. We were grateful to receive their written evidence. We sent the DTI a series of written questions about the operation of the export control system and received detailed replies as well as several memoranda. In addition, we commissioned memoranda from our advisers, Dr Sibylle Bauer and Miss Joanna Kidd. We attach to this Report all the evidence we received—other than material with a security classification—and invite the Government to consider it before reaching its conclusions on the review of export controls. We have also made available on the Internet for the first time the written evidence we had received by March 2007, to assist those with an interest in our inquiry. We are grateful to all those who gave oral and written evidence and to our adviser, Dr Bauer, who helped us evaluate that evidence.

Visits

14. We carried out two visits in 2007. In March we visited the Export Control Organisation at the DTI where we met officials and the Minister of State for Science and Innovation, Malcolm Wicks MP. In April we visited the Foreign and Commonwealth Office (FCO) and met officials with responsibility for policy on strategic export controls

---

22 EGAD operates under the auspicious of the Defence Manufacturers' Association (DMA), the Society of British Aerospace Companies (SBAC), the Society of Maritime Industries (SMI), the British Naval Equipment Association (BNEA), the Association of Police and Public Security Suppliers (APPSS) and intellect (the trade association for the UK hi-tech industry).

and for considering applications for export licences. We wish to put on record our thanks to the Minister and the officials in both departments who showed us how applications for export licences are considered and answered our questions. We plan to visit HM Revenue and Customs later in the year.

15. In 2007 the FCO provided us with briefing on the UK contribution to the UN deliberations on the proposed arms trade treaty. We were grateful for the briefing and found it informative and useful.

3 Review of export control legislation

Background to the legislation

16. The origin of the Export Control Act 2002 was the Report of the Scott Inquiry published in February 1996, which criticised the export control regime at that time for its lack of accountability and transparency. The report recommended that "the present legislative structure, under which Government has unfettered power to impose whatever export controls it wishes and to use those controls for any purposes it thinks fit, should […] be replaced as soon as practicable".[23] Following a White Paper on Strategic Export Controls[24] in 1998 the Government published the draft Export Control and Non-Proliferation Bill in March 2001[25]. A draft bill was introduced in the Commons in June 2001 and completed all its stages receiving Royal Assent in July 2002. The Export Control Act 2002 (as the draft Bill became) was primarily an enabling power and so attention also focussed on the orders to be made under the Act, the first of which were produced in draft in 2001. The legislation came into full operation on 1 April 2004.

17. In carrying out our review of the operation of export control legislation we have not restricted ourselves to the issues raised in the Government's consultation document. Although the Government supplied the terms of reference to us in January 2007, the consultation document itself was not published until 18 June with a deadline for responses, 30 September, eight weeks after the start of the summer recess. It would therefore have been impractical for us to have taken evidence within the Government's timetable. We therefore had to anticipate the likely issues and to seek evidence accordingly. Of more importance, however, we consider that if there is an issue that needs to be addressed—irrespective of whether or not it has been raised in the Government's consultation document—the Government's review is the opportunity to attend to it. In carrying out our review of the legislation we have therefore addressed and sought views on a wider range of issues than those sent out in the consultation document. We have drawn on the following:

a) our predecessor Committees' pre-legislative scrutiny of the primary and secondary legislation;

b) the Government's stated aims for the legislation and policy;

c) issues arising from the Scott Report; and

d) Law Commission's 2006 consultation paper on post-legislative scrutiny.

23 Scott Report, HC (1995–96) 115, Vol IV, Chapter 2, para K2.1

24 *Strategic Export Controls White Paper*, July 1998, Cm 3989

25 *Consultation on Draft Legislation: The Export Control and Non-Proliferation Bill*, Cm 5091, March 2001

Pre-legislative scrutiny

18. Our predecessor Committees reviewed both the proposals in the draft Export Control and Non-Proliferation Bill[26] and subsequently the proposed orders to be made under the Export Control Act 2002.[27] In scrutinising the legislation our predecessor Committees identified changes that they considered were required as well as a number of tests that could be used to evaluate the effectiveness of the legislation. We have drawn on the work of our predecessor Committees in reviewing the export control legislation.

Aims of the legislation

19. In the consultation paper published with the draft Export Control and Non-Proliferation Bill in 2001 the Government stated that the aims of the primary legislation were to:

a) set out the purposes of export control in legislation;

b) provide for parliamentary scrutiny of secondary legislation made under the Bill;

c) require the Government to publish annual reports; and

d) create new powers to impose controls on the transfer of military and dual-use technology by intangible means, on the provision of related technical services, and on trafficking and brokering of military and dual-use equipment.[28]

20. These are significant, but relatively narrow, aims. In our view there can be little doubt that they have been achieved with the coming into operation of the legislation in April 2004, though, as we discuss later in this Report, we have concerns that the legislation does not fully extend controls to transfers of all intangible transfers of technology, technical assistance and brokering and enforcement.[29] The key issue is the extent to which the legislation—both primary and secondary—has assisted in achieving the aims of the Government's strategic export control policy which were to:

a) maintain an effective system of export controls to ensure that UK involvement in arms exports did not contribute to regional instability, internal repression or external aggression whilst supporting a strong defence industry and defence exports;

b) play a leading role in helping to strengthen international regulation of the arms trade; and

---

26 *The Defence, Foreign Affairs, International Development and Trade and Industry Committees, Report for Session 2000-01, Draft Export Control and Non-Proliferation Bill*, HC 445

27 *The Defence, Foreign and Commonwealth Affairs, International Development and Trade and Industry Committees, First Joint Report of the Session 2002-03, The Government's proposals for secondary legislation under the Export Control Act*, HC 620

28 Cm 5091, p 1 (hereafter "2001 Consultation Document")

29 See below, paras 166 ff, 252 ff, 49 ff, 123 ff respectively.

c) prevent the proliferation of weapons of mass destruction.[30]

21. Our predecessor Committees concluded that the main test of effectiveness of the Government's proposals would be how well they were able in practice to discourage trade in military goods and technology where it was undesirable without also discouraging trade that the Government wished to promote.[31] We consider this issue further from paragraph 46.

Issues from the Scott Inquiry

22. The Government stated that the legislation would not only strengthen and modernise the domestic export control regime but also implement key recommendations of the Scott Report by providing for greater government accountability and transparency in the export control regime.[32]

23. We took evidence on two issues that were identified in the Scott report:

a) whether export controls on goods or technology are being used as an instrument of foreign policy; and

b) the state of communication between departments with responsibilities for considering applications for export licences.

Post-legislative scrutiny

24. We have also drawn on the Law Commission's 2006 consultation paper, "Post-Legislative Scrutiny",[33] to carry out our assessment of the legislation. The purpose of post-legislative scrutiny is to evaluate the effects of legislation, to stand back and take a careful view of the legislation in order to evaluate whether it has achieved what the Government said it would do, to analyse the effects of the legislation and to recommend changes, if required. The process should also identify success. Taking our lead from the Law Commission's paper we sought evidence to answer the following questions:

a) whether the Government's stated aims and purposes for the legislation have been achieved;

b) whether the new provisions introduced by the legislation—such as controls on the intangible transfer of technology and on brokering and certain extra-territorial transactions—are operating satisfactorily;

---

30 Department of Trade and Industry, *Final Regulatory Impact Assessment: Export Control Orders, 2003*, para 2 at http://www.dti.gov.uk/files/file7886.pdf (hereafter the "RIA")

31 HC (2002-03) 620, para 23 Illegitimate is defined as breaching the law, disregarding norms such as the EU Code on Arms Exports or UN Security Resolution 1540/2004 or assisting the proliferation of weapons of mass destruction.

32 RIA, para 2

33 Law Commission, *Post-legislative Scrutiny*, Consultation Paper no. 178 - http://www.lawcom.gov.uk/docs/cp178.pdf and Law Commission, *Post-legislative Scrutiny*, Cm 6945, October 2006

c) whether the effects of the legislation identified in the regulatory impact assessment (RIA) were accurately and adequately predicted by the Government—in particular:

- whether the costs and benefits in the original RIA were correct;
- the effectiveness of the proposed enforcement regime; and
- the extent to which the "solution" did actually solve the problem;[34]

d) what have been the economic consequences of the legislation, particularly what effect has there been on defence manufacturers;

e) whether the legislation complements defence and anti-terrorist policies and has the flexibility to adapt to possible changes—for example, the changes arising from a review of the EU Code of Conduct on Arms Exports or a requirement to licence brokers and the European standards for regulating brokering (EU Common Position on Brokering of June 2003); and

f) whether the legislation has had any unintended consequences.

Research

25. In our Report last year we recommended that the Government commission research to establish:

a) the volume and categories of the "goods falling within definitions on the Military List and in the dual-use regulations but which are being exported in breach of export controls without licences";[35] and

b) the extent to which dual-use goods "not subject to control are exported from the UK and are then incorporated into equipment which had it been exported from the UK would have been subject to export control".[36]

26. We regret that the Government declined to follow our recommendations[37] and, as far as we are aware, has not commissioned any independent research to test the effectiveness of the legislation in these and other key areas. Instead, the Government has drawn on an internal assessment of the controls undertaken by the Export Control Organisation (ECO) to evaluate the impact and effectiveness of the controls, which it described as "a useful starting point for the Review"[38] and "a contribution to a broader debate".[39] The Government explained that the evaluation comprised two elements:

34 RIA, para 13.1

35 HC (2005-06) 873, para 76

36 HC (2005-06) 873, para 100

37 Cm 6954, pp 14-15

38 2007 Consultation Document, pp 2-3

39 2007 Consultation Document, para 1.2

- Business impact; the extent to which the new controls have placed additional burdens upon business. For this element, we looked at the number of applications received on average per annum in comparison to the estimates in the final Regulatory Impact Assessment (RIA) […] We also looked at application processing times for Open Individual Export Licences, Standard Individual Export Licences, Open Individual Trade Control Licences and Standard Individual Trade Control Licences following the introduction of the new controls, to gauge whether exporters have received a slower service than previously.

- Effectiveness; the extent to which the controls achieved their intended purpose. To measure this, we gathered information from those in the ECO who process licence applications or conduct compliance visits, and exporter feedback from seminars and workshops. Although this evidence is not statistically based, we nevertheless feel that it is an important contribution, which can be supplemented from other sources as the review progresses. It is also legitimate to view any refusals made under the new controls as an indication of effectiveness: these represent transactions which we had no means of stopping before the introduction of the new controls.[40]

27. The Government stressed that the ECO assessment did not prejudge the results of the public consultation.[41] In the 2007 Consultation Document the Government posed a number of "questions for readers" to gauge the extent to which the conclusions on business impact that the ECO had drawn from its own evidence were supported—or not—by exporters and other interested parties.

28. In our view the ECO's assessment is useful but as the Government itself concedes is only a starting point which, in our view, fails to provide the breadth and depth of analysis to supply the assurance that the system is working effectively. The assessment has two flaws: it allows the ECO to report on its own effectiveness and therefore lacks an element of independence; and it concentrates on those who comply with the controls, albeit with some shortcomings. Supplementing the ECO assessment with responses to the Consultation Document goes some way to addressing these shortcomings but is not a substitute for a systematic analysis of the effectiveness of export controls since 2004. The responses may, as the Government appears to want, encourage a debate but this is a debate that we have observed and reported on for several years. We are concerned that without better and harder evidence the debate will not reach a conclusion.

29. The Government states that the internal assessment drew on evidence held by the ECO only and was not a Government-wide assessment.[42] We question this approach. How can the Government measure the effectiveness of the legislation without examining, for example, the extent to which it has prevented "undesirable transfers" (a term used in the EU Code of Conduct on Arms Exports[43] and also by Malcolm Wicks MP, Minister of State

40 2007 Consultation Document, para 1.3

41 2007 Consultation Document, para 1.2

42 2007 Consultation Document, para 1.2

43 More precisely Criterion 7 of the EU Code refers to "The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions" (Cm 6882, p 72).

for Science and Innovation, in his introduction to the 2007 Consultation Document)? One obvious way to do this is to enter into an inter-agency consultation and check with enforcement agencies and intelligence. There is no indication in the 2007 Consultation Document that this has been done. There is only one reference to the main enforcement agency, HM Revenue and Customs (HMRC), but that is a listing in an annex of abbreviations and glossary of commonly used terms.[44] We cannot believe that the Government intends that agencies such as HMRC and the intelligence services to make their contributions by completing the questionnaire in the Consultation Document. In the absence of a Government-wide assessment we question whether the Government is justified in making the assertion in the Consultation Document that "no serious non-compliance with [the new controls] has come to light".[45] **We recommend that the Government carry out a government-wide assessment of the effectiveness of the export control legislation since 2004 and that the assessment encompass all the agencies with responsibility for the monitoring and enforcement of export controls.**

30. We have examined the limited material that is available. It appears to us to throw up more questions that need to be answered. For example, when he answered a Parliamentary Question in 2006 the then Financial Secretary at the Treasury, Mr John Healey MP, indicated that 17% of the goods seized in 2004-05 would not have been licensed for export and the remaining 83% would have been granted an export licence had the exporter applied for one.[46] Commenting on the figures the Export Group for Aerospace and Defence (EGAD) said that if 17% of attempted shipments which were seized would not have received an export licence, "that is a very high proportion".[47] EGAD was not aware of any analysis of the figure.[48] We asked HMRC about the cases where licences would have been granted and it explained that the percentages were estimates and "might be slightly overstated". HMRC continued:

> If we discover export control breaches, such is the general complexity that we will not necessarily know at the time as to whether such goods would be rated licence-required. Sometimes we might find in some cases that the decision which emerges from the DTI ratings people does not follow what we expected. If we were to pull back from these cases you might be criticising us for paying less attention to enforcing this area.[49]

31. We are disappointed and puzzled that the Government has not carried out research. Whilst we acknowledge that research may not be straightforward, we consider that the Government is under a duty to measure and analyse the effectiveness of its policy in this important area. If, as EGAD points out, it were to be the case that 17% of the goods leaving the country were doing so in breach of export controls and would not have been given a

44 2007 Consultation Document, annex 1, p 93

45 2007 Consultation Document, para 1.4.iii

46 HC Deb,13 September 2006, cols 2335-6W

47 Q 64 (Mr Saltzmann)

48 Q 66

49 Q 148

licence if one had been sought, this would cast a serious doubt on the effectiveness of the system. **We recommend that the Government in responding to this report produce detailed evidence to demonstrate the effectiveness of export controls.**

32. In the face of the Government's reluctance to commission research we asked Miss Joanna Kidd and Dr Sibylle Bauer, two of our advisers, to examine aspects of the UK's systems of export control and to compare it with aspects of the systems in other countries. This work is not exhaustive but we consider that as well as providing preliminary conclusions, it highlights issues that require further and more detailed consideration. We have published the results of their research, which each carried out with a colleague, as memoranda.[50]

50 Ev 130;Ev 137

4 The legislative framework

The Export Control Act 2002: overall assessment

33. There was a measure of agreement in the evidence that we received that the Export Control Act 2002 provided an adequate mechanism for the control and regulation of strategic export controls.

- The UK Working Group on Arms took the view that "the Export Control Act 2002 and the subsequent secondary legislation of 2004 is a major improvement on what we had before which [dated] back to 1939 [and] essentially said that export control is the responsibility of the government, full stop. At least we now have in law a section of relevant consequences so everybody is clear about why we have export controls and the need to stop undesirable activity."[51]

- The Campaign Against the Arms Trade, while expressing reservations about the manner in which the Act was used, considered that the "Act gave the Government the powers necessary to ensure that UK arms exports do not contribute to regional instability, internal repression or external aggression".[52]

- EGAD took broadly the same view: "Following the introduction of the [2002 Act] the UK now has, undoubtedly, one of the best and most comprehensive export control systems in the World […] Many of [the] criticisms […] stem from disagreements over some of the individual licensing decisions which have been made by HMG since the adoption of the new regulations, but […] some contentious decisions, one way or the other, will always arise, no matter what the regulations are."[53]

Parliamentary scrutiny of secondary legislation and guidance

34. When the Export Control Bill was before Parliament there was pressure that the exercise of the main order-making power to impose export controls should be subject to the affirmative rather than the negative resolution procedure. Although there are powers in the Act, the exercise of which require the affirmative procedure, none of these have been used. All orders have been made under the negative resolution procedure and it appears that only one of these was the subject of a debate to annul—the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. 2003/2764)—in the Lords in 2003.[54] **We found no evidence to reach a conclusion that the balance between the requirements for the affirmative and the negative resolution procedures in the Export Control Act 2002 need to be re-examined or altered.**

51 Q 2

52 Ev 120, para 3

53 Ev 57

54 HL Deb, 16 December 2003, cols 1080-91

35. Our predecessor Committees recommended "that Orders under the Act should first be exposed in draft and in confidence to the Quadripartite Committee and, if then made and laid, the Government should undertake to use their best endeavours to find time for a debate if the Committee so recommended".[55] Our predecessor Committees carried out an inquiry into the secondary legislation in 2003.[56] **We recommend that any secondary legislation to implement conclusions arising from the Government's review of export controls be shown in draft to our Committees.**

Guidance

36. During the Commons Committee Stage of the Export Control Bill the then Minister of State at the Department of Trade and Industry, Nigel Griffiths MP, stated:

> The guidance referred to […] in clause 8 [now section 9] […] is guidance about announced policy, and about the way in which existing or future obligations concerning licensing decisions should best be carried out in furtherance of agreed policy. The consolidated [EU] criteria in themselves count as guidance […] If there were to be changes to the criteria, the Government would announce them, and it would be for Parliament or parliamentary Committees to consider any changes in the usual way. Of course the Quadripartite Committee would have a role in scrutinising any changes with Ministers. Any other guidance issued under clause 8 could also be subject to parliamentary consideration in that way.[57]

37. The Government confirmed to us that where new guidance about the exercise of licensing powers became necessary—which included any changes to the Consolidated EU and National Arms Export Licensing Criteria—this would be announced by the Government. It would then be open for individual Members to ask Ministers questions about those changes following their announcement, and the Quadripartite Committee to do likewise, either as a specific response to the announcement, or as part of the Annual Report scrutiny process and linked evidence sessions.[58]

38. These arrangements were seen by the UK Working Group on Arms as giving the Secretary of State excessive discretion to change the guidance and it said that Parliament's role in this process was unduly limited, i.e. merely being informed of the guidance, potentially retrospectively. The Government had assured critics that it would exercise this power with care, and that significant changes to the guidance would not be introduced without due consideration being paid to the concerns of Parliament. But the Working Group pointed out:

> [o]n 8 July 2002, the Government announced that new guidance had been given on the subject of considering applications for export licences for the supply of military

55 HC (2000-01) 445, para 31

56 HC (2002-03) 620

57 Stg Co Deb, Standing Committee B, *Export Control Bill*, 19 July 2001

58 Ev 100, para 4

> equipment for incorporation into final products for possible onward export. In the same announcement, it was revealed that export licences had already been issued under this licence, specifically for the export of Heads-Up-Display Units for use in the cockpits of F-16 aircraft to the US, for onward export to Israel. This would appear to have confirmed the fears of those opposed to the way section 9 of the Export Control Act was formulated. The [Working Group] recommends that the Government revisits this part of the Act so as to limit the power of the Secretary of State to make changes to guidance without independent oversight.[59]

39. Our predecessor Committees expressed concern about the announcement made on 8 July 2002, in particular we were "not wholly convinced that, in making his statement" the Foreign Secretary "fully met his own standard of not applying any unannounced criteria to licensing decisions".[60] Where there are substantial changes to guidance on strategic export controls it is unacceptable that they should be made without consulting those with an interest in the changes. Nor is it acceptable to issue guidance retrospectively after applications for export licences have been determined in accordance with the emerging guidance. **We recommend that the Government give an undertaking to consult interested parties—the defence manufacturers, the non-governmental organisations and our Committees—before deciding to make significant changes to the guidance on strategic export controls.**

Clarity of the secondary legislation

40. We asked respondents to indicate whether the Orders made under the Export Control Act 2002 have been clear, well-drafted and intelligible. EGAD indicated that they had been clear, "except in regard to those areas where the Government has sought to give itself the broadest possible control powers, where it has found some confusion". EGAD said that there were some areas of uncertainty within the trade controls legislation, which needed to be clarified if industry was to have the certainty that it needed to operate legally and to prevent illicit activities from being undertaken with impunity from a realistic threat of successful prosecution. EGAD cited two instances of ambiguity.

a) The Export Control Organisation (ECO) had stated that, whilst the transfer of software and technology was not controlled as such under the trade controls, the transfer of technology could be caught, where this was related to "restricted goods"[61] or "embargoed destinations", as the provision of technology could be construed as "an act calculated to promote" a trade deal.

59 Ev 44, paras 7-8

60 Defence, Foreign Affairs, International Development and Trade and Industry Committees, *First Joint Report of Session 2001–02, Strategic Export Controls: Annual Report for 2000, Licensing Policy and Prior Parliamentary Scrutiny*, HC 718, para 147

61 Currently long range missiles and torture equipment.

b) A clear outline of what constituted trade control licensable "general advertising and promotion" was needed.[62]

41. Miss Kidd and her colleague, Dr Christopher Hobbs, also identified two areas where there was a lack of clarity.[63]

a) They questioned how to make a practical distinction between *basic* and *applied* scientific research. They pointed out that *basic* scientific research was covered under the end-use section of the act whereas *applied* research came under both dual-use and end-use. It did not appear to be clear as to how a distinction was made between the two, which raised the question whether researchers in the *basic* sciences should be made aware of the dual-use list.[64] In order to avoid such queries, they recommended that UK export controls included some additional clarification as to what constituted a *basic* science project and what constituted an *applied* science project.

b) Further clarification was needed to the definition of the "public domain", particularly in respect of the grouping of a number of papers/sources which individually would not come under the control list because they were available in the public domain.[65]

42. The Government confirmed that EGAD's analysis was correct and that the trafficking and brokering of technology was not subject to export controls. Where technology was, however, not the subject of the export itself, but was used by a UK concern as a medium, to promote the trafficking and brokering of restricted goods or of controlled goods to embargoed destinations, that act of promotion was controlled, whether it was done by the provision of technology or by any other means. The Government provided a theoretical example.[66] The Government was not aware that UK companies were encountering significant difficulties in this area, but offered to examine any evidence that was put forward during the forthcoming public consultation.[67] It also undertook to consider whether current guidance adequately explained this distinction and take steps to clarify it further if necessary.[68]

---

62 Ev 57

63 Ev 130

64 Miss Kidd and Dr Hobbs gave an example: it was not clear how collaborative work on theoretical nuclear and particle physics by a UK citizen with a group outside the European Union (EU) would be judged.

65 Miss Kidd and Dr Hobbs gave an example: a list of technical manuals and scientific papers that gave all the necessary information to build an explosive lens system could be grouped together and the emailed to a colleague outside the EU.

66 The example was the case when an exhibitor attending a trade fair in the hope of cultivating customers for Restricted Goods (say Unmanned Air Vehicles) might feel that it was necessary to display technology relating to those goods in a more professional manner. The exhibitor might therefore ask a software house to produce an interactive display package. In doing so, the exhibitor would pass, to the software house, technology in hard copy form and receive back, technology in the form of an interactive display package. The Government explained that in this instance, technology had been used as a medium to promote, on behalf of the exhibitor, the potential sale of Restricted Goods and so the provision of it to that exhibitor would be subject to export control. Although the Government conceded that this was an area that was more difficult to explain than others, it contended that it was clear when the controls applied.

67 The 2007 Consultation Document raises the point about the control on advertising material at para 1.2.6.

68 Ev 104, para 24

43. We are grateful to those who raised points for clarification and to the Government for its response to EGAD's points. **On the basis of the evidence supplied to us we conclude that the secondary legislation is intelligible to those to whom it applies. We recommend, however, that the Government clarify in guidance the distinction between applied and basic research scientific projects and that it defines the "public domain" in greater detail.**

Challenges in the courts

44. The orders made under the Export Control Act 2002 have not been challenged in court and there have been no successful challenges to licensing decisions made since those Orders came into force. Currently, however, one licensing decision is subject to an application for Judicial Review, but the Government said that at this stage it was not appropriate to provide further details.[69] **The absence of successful challenges in the courts is not conclusive proof that the legislation is working satisfactorily but we conclude that it provides an indication that the legislation is accepted by exporters and interested parties. Once the case that is currently before the courts is concluded, we recommend that the Government supply us with a note describing the case and the lessons, if any, that it has for the operation of the legislation.**

Notice of changes to the secondary legislation

45. We also asked respondents to indicate whether those to whom the Orders applied received sufficient notice of any changes and adequate explanation of the requirements in the Orders. EGAD replied that the Government, in general, and ECO in particular, had been "very constructive and proactive in their dealings with industry and very willing to discuss changes with relevant companies before they take place". EGAD believed that the ECO, and other government departments were "far more approachable, constructive and user-friendly than many of their foreign counterparts".[70] We welcome EGAD's comments that the Government has given sufficient notice and adequate explanation of changes in the Orders. **We recommend that the Government continue to provide notice and adequate explanation of any changes proposed to the secondary legislation.**

Effectiveness of the legislation

46. In carrying out their pre-legislative scrutiny of the secondary legislation, as we have noted, our predecessor Committees concluded "that the main test of 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

69 Ev 100, para 3

70 Ev 57

instance on having reliable methods of distinguishing between 'legitimate' and 'illegitimate' trade".[71]

47. The UK defence industry was not clear how effective the regulations had been in curtailing the sorts of proliferation trade which the Government regarded as being undesirable. On the question of distinguishing between "legitimate" and "illegitimate" trade, EGAD commented that exports "which are undertaken within the regulatory framework, legally, and with the necessary licences (and other documentation) are legitimate, whilst those which are outside of the regulatory framework are illegitimate". EGAD commented that if this view was accepted it followed that it was entirely for the Government to determine what was a "legitimate" and what an "illegitimate" export.[72]

48. We have considered the question of the effectiveness of the legislation very carefully but have not been able to reach any firm conclusions:

- there is a lack of research to test the effectiveness of the legislation. See also paragraphs 26 to 31;
- the part of government best placed to advise whether "illegitimate" or undesirable trade in military goods and technology has been discouraged is the intelligence services from whom we have not taken evidence; and
- the limited evidence we have received indicating that some parts of the system of control are not as effective as they should have been was fragmentary and sometimes anecdotal. The most prominent example is the control of dual-use goods which we examine at paragraph 191.

As we do not have information to reach a firm conclusion on the effectiveness of the system as a whole we have instead examined components of the strategic export control system, starting with the controls on brokering and trafficking and extra-territoriality.

Brokering and trafficking and extra-territoriality

49. When she opened the debate on the second reading of the Export Control Bill in the Commons on 9 July 2001 the then Secretary of State for Trade and Industry, Rt Hon Patricia Hewitt MP, said the Bill was about the reduction of poverty, the promotion of sustainable development and the reduction of conflict. She cited a number of tragic cases and declared that "illicit gun running and unregulated arms brokering contribute to the suffering and death of children, adult civilians and whole communities around the world".[73]

71 HC (2002-03) 620, para 23 Illegitimate is defined as breaching the law, disregarding norms such as the EU Code on Arms Exports or UN Security Resolution 1540/2004 or assisting the proliferation of weapons of mass destruction.

72 Ev 57

73 HC Deb, 9 July 2001, col 542

50. When the Export Control Bill was before the House of Commons the then Minister of State at the Department of Trade and Industry, Nigel Griffiths MP, said:

> The tracking down of UK nationals who may be involved in illegal activities and who are either based in Britain or trading abroad and returning to Britain is one of the core aims of the Bill. […I]t is pointless having a regime such as that of the US, which includes everything that people are calling for such as extradition of nationals wherever they are […] if the enforcement regime is weak.[74]

51. During pre-legislative scrutiny of the draft Bill our predecessor Committees concluded:

> We note that other countries have a system which claims some extra-territorial jurisdiction. Whilst recognising the practical difficulties in policing activities outside the United Kingdom, we see compelling arguments in favour of extending controls on brokering and trafficking to activities outside the country and recommend that controls be introduced on the activities of UK citizens and companies wherever they take place.[75]

52. The Government replied:

> 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.[76]

53. The Trade in Goods (Control) Order 2003 made under the 2002 Act requires those trading in Restricted Goods (torture equipment or long-range missiles (over 300 km) and their component parts) to have a licence when the activity is carried out in the UK or anywhere in the world by British citizens. With the Trade in Controlled Goods (Embargoed Destinations) Order 2004 controls were introduced on trading and other acts calculated to promote the supply or delivery of Military List items to destinations subject to an internationally agreed arms embargo. The Controlled Goods Order mirrors the controls on Restricted Goods as its restrictions also apply to those carrying out the activity in the UK or anywhere in the world by British citizens.[77]

54. The goal of export control is to prevent negative effects from the transfer of strategic goods and technology. Those negative effects could be, for example, to national or international security or to human rights. During the Cold War responsibilities were

74 Stg Co Deb, Standing Committee B, *Export Control Bill*, 16 October 2001

75 HC (2000-01) 445, para 96

76 Cm 5988, p 3

77 2007 Consultation Document, para 1.1

clearly delineated when the State could regulate strategic export controls made from its territory. Since the end of the Cold War it has become much more difficult to establish a causal link between transfer and a negative consequence. What exactly falls within a government's—and industry's—area of responsibility has become less clear cut. It depends on whether government is held to have responsibility for the territory on which actions take place, the impact of actions and transactions, the nationality of the staff, the origin of components, the location of production sites or the ownership of a company. In our view States—and companies—need to ensure and accept responsibility for controls along the whole supply chain, which requires looking beyond the traditional territorial scope and focus on the actual end-use, controls over technology transfers, licensed production and role of subsidiaries. When it carried out pre-legislative scrutiny of the secondary legislation our predecessor Committees concluded that the "Government's current proposals for a limited extension of extra-territorial jurisdiction are an inadequate halfway house solution".[78]

55. There are two issues we examined: (i) whether the provisions enacted in the legislation are effective and enforceable; and (ii) whether the provisions should be extended. The Government explained that it would measure the effectiveness of the extra-territorial controls by looking at three key factors:

a) the extent to which the controls achieved their desired effect;

b) their impact upon businesses operating them; and

c) the extent to which difficulties were encountered in administering or enforcing them.[79]

In the 2007 Consultation Document the Government said that there was "a choice to be made between blanket extra-territorial controls, and extra-territorial controls which are focused on the specific categories of equipment, activities, or destinations which concern us".[80]

Effectiveness of the extra-territorial controls

56. The UK Working Group pointed out that in 2005 there had been applications for brokering activities for 71 trade control licences,[81] and five had been refused. In contrast,

78 HC (2002-03) 620, p 3

79 Ev 104, para 1

80 2007 Consultation Document, para 2.1.4

81 The Trade in Controlled Goods (Control) Order 2003 makes it an offence without a licence to:

- arrange the transfer of controlled goods [essentially goods on the Military List plus others related to non-military explosives or devices] from one third country to another third country, or acquire or dispose, or agree to acquire or dispose, of any controlled goods, where that person knows or has reason to believe that such an acquisition or disposal will or may result in the removal of those goods from one third country to another third country;
- arrange or negotiate, or agree to arrange or negotiate, a contract for the acquisition or disposal of any controlled goods, where that person knows or has reason to believe that such a contract will or may result in the removal of those goods from one third country to another third country in return for a fee, commission or other consideration;
- do any act; or agree to do any act calculated to promote the arrangement or negotiation of a contract for the acquisition or disposal of controlled goods, where that person knows or has reason to believe that such a contract

before 2004 none of these activities would have been controlled.[82] Thus brokering and trafficking which was previously uncontrolled has been brought within the system of strategic export control. It is to be assumed that those who had their applications for licences refused and who are law-abiding have desisted from brokering and trafficking. It appears to us that the legislation has therefore prevented brokering and trafficking in contravention of the Consolidated Criteria. For those who are prepared to flout the 2002 Act—as we note at paragraph 70—enforcement may be remote. For them the legislation is therefore largely declaratory, although prosecution is always possible if evidence of breach of the law becomes available. We raise no objection to such legislation which sends a clear signal to those living in the UK and to British citizens abroad that brokering and trafficking is an activity that must be regulated. In the 2007 Consultation Document the Government cited the case of "at least one documented instance in which a UK person overseas decided to cease trading activity when confronted by the need to apply for a trade control licence".[83]

57. EGAD argued that trade controls that encompassed an extra-territorial dimension acted as a potential discriminator against the employment of UK nationals by firms overseas, and

> for the only UK person employed overseas whom we know of who has actually applied for trade control licences, we understand that his employers (a perfectly legitimate and responsible Government-owned company overseas) quickly reached the conclusion, soon after the introduction of the new UK regulations, that his continued future employment was no longer desirable.[84]

58. The Government said that three UK nationals working overseas had applied for trade control licences. In one case the ECO had determined that no licence was necessary. Licences were issued to the two other applicants. In total, one Open Individual Trade Control Licence and three Standard Individual Trade Control Licences had been issued.[85] The low number of applications suggested to the Government that:

- the activity may not be happening to any significant degree;
- UK exporters may have decided to arrange their business so that all items are exported from the UK for administrative reasons, thus no "trading" takes place; or
- UK persons overseas may be unaware that they are affected by these controls, or if they are aware, judge that there is no realistic prospect of the UK Government taking enforcement action against them and therefore decide to disregard them.[86]

---

will or may result in the removal of those goods from one third country to another third country. (2007 Consultation Document, para 1.1.9)

82 Q2 A similar point was made by the Government in the 2007 Consultation Document, para 1.2.5.

83 2007 Consultation Document, para 1.2.8

84 Ev 57

85 Ev 104, para 2 In the 2007 Consultation Document at para 1.2.8 the Government added: "Only three UK persons overseas have applied for individual licences, leading to the issue of 3 SITCLs and 1 OITCL to UK persons operating in Jordan or UAE".

86 2007 Consultation Document, para 1.2.9

59. In our view the Government's suggestions are credible, though the third is worrying if correct. In addition, as EGAD suggests, it may be the case that British citizens overseas are reluctant to apply for trade control licences if it puts their employment at risk. The Government needs to assemble evidence and to reach a view on the reasons there have only been four persons overseas who have applied for trade control licences. **We recommend that at the end of the review process the Government set out in its conclusions to the Review the reasons for the small number of applications for trade control licences from British citizens overseas.**

60. We received no evidence that the controls on brokering and trafficking imposed onerous burdens on those working in, and operating from, the UK or, other than in the one instance from EGAD, on British citizens overseas. British citizens working overseas to whom the extra-territorial provisions in the legislation apply must be encouraged to apply for the appropriate licences as a matter of course and, to safeguard their employment, the process must be streamlined. **Where a British citizen working overseas for a reputable and responsible organisation applies for a trade control licence we recommend that there be a presumption that a licence will be granted. We conclude that to do otherwise may penalise the responsible British citizen and may undermine the UK's extra-territorial controls on brokering and trafficking.**

Extending the extra-territorial controls

61. During the Bill's passage much debate focussed on the criteria which had to be met before extra-territoriality could be applied. In 1996 the Home Office published the report of the Interdepartmental Steering Committee reviewing the policy on the assumption of extra-territorial criminal jurisdiction, "Review of Policy on Extra-territorial Jurisdiction".[87] The report set out six guidelines to be applied, when a need was established, to decisions whether or not legislation should have extra-territorial effect:

a) the offence is serious;

b) by virtue of the nature of the offence, the witnesses and evidence necessary for the prosecution are likely to be available in UK territory;

c) there is international consensus that certain conduct is reprehensible and concerted action is needed involving the taking of extra-territorial jurisdiction;

d) the vulnerability of the victim makes it particularly important to be able to tackle instances of the offence;

e) it appears to be in the interests of the standing and reputation of the UK in the international community; and

f) there is a danger that offences would otherwise not be justiciable.

87 Home Office, *Review of policy on extra-territorial jurisdiction*, 23 July 1996

62. During debate on the Export Control Bill, the then Parliamentary Under-Secretary of State for Science and Innovation, Lord Sainsbury of Turville, explained how the guidelines were applied:

> [T]he Home Office guidelines state that extension of jurisdiction overseas may be considered when certain factors are met. It also makes it clear that meeting those factors is not in itself sufficient to justify extra-territorial jurisdiction but that practical enforcement issues would also be relevant. It has been the policy of successive British Governments to resist strong attempts by other states to impose extra-territorial controls on our territory. We maintain the view that it would not be right to take extra-territorial jurisdiction over activities such as trade in military equipment, including arms, the majority of which will constitute perfectly legitimate transactions.[88]

63. Although not cited in the 2007 Consultation Document, the Government confirmed that the six guidelines would inform the 2007 review of export controls, but that, in addition, when considering any proposals to extend extra-territorial export controls, the Government would "have regard to other factors such as the likely effectiveness of assuming extra-territorial jurisdiction in addressing the perceived problem and any practical enforcement issues, including resource implications. Thus, the fact that an offence satisfies one or more of the six guidelines would not necessarily mean that the government will extend extra-territorial control in the relevant area."[89] The Government added in the 2007 Consultation Document that an issue to consider before changing the provisions on extra-territoriality was that "extra-territorial controls are by nature very difficult to enforce".[90] The Government said that "the difficulty of enforcing extra-territorial powers is not one of the criteria taken into consideration when considering an export licence application".[91]

64. The Government explained that it had always adopted a cautious approach towards the imposition of extra-territorial controls.[92] That was why extra-territorial controls had been introduced in a strictly defined range of circumstances, usually when the activity to which they related could never be regarded as in any way acceptable to the Government—for example, the supply of weapons to embargoed destinations, the supply of torture goods, or provision of assistance to Weapons of Mass Destruction (WMD) programmes. In these limited circumstances, the Government judged that the difficulties inherent in enforcing such controls were outweighed by the need to create a legal framework that enabled it to refuse to sanction UK involvement and possibly to deter British citizens who might be considering becoming involved. Whilst numbers were small, experience had shown the Government that the UK had been able to prevent some undesirable activities taking place as a result of the imposition of these controls. Whether this was sufficient to justify the

88 HL Deb, 18 April 2002, col 1146

89 Ev 100, para 7

90 2007 Consultation Document, para 2.1.16

91 Ev 100, para 8

92 The controls in place applied to the trafficking and brokering of certain goods—see above, para 53.

retention of these extra-territorial controls, and whether convincing evidence could be produced to support arguments for extra-territorial controls to be extended into broader areas, would be key issues for the Government's review.[93]

65. In the 2007 Consultation Document the Government identified three possible changes:

- A new "Middle Category": The "Restricted Goods" controls would be reserved for items for which the Government would never normally grant a licence. A new category, "Partially Restricted Goods" would be created for more sensitive goods but where there was legitimate trade. Under this category, the core activity of trading in these goods would still be controlled if carried out by a UK person anywhere in the world, as would other acts calculated to support that trading, including transportation, financing/financial services, and insurance or re-insurance; but the more peripheral acts, such as the promotion or advertising of these goods at trade fairs or in periodicals would not be controlled.

- Reduction of the "Restricted Goods": The Government pointed out it was right that the most rigorous controls should apply to equipment the supply of which was inherently undesirable. But whilst this was true of torture equipment and supplies to embargoed destinations, the case was less strong for long range missiles. Long range missiles were a legitimate defence weapon for the UK and many other nations and so there were many occasions when licences would be granted. There was no evidence that they had been the subject of trading activities. An added complication was that unmanned air vehicles (UAVs) were in effect classified as long range missiles, because their range is variable and so use beyond 300 km was often feasible. These would often carry no warhead at all and yet were still subject to the most rigorous level of control.

- Extension of controls on some categories of equipment: The Government said that certain types of military equipment were widely viewed as being of greater concern than others: in particular, small arms, light weapons (SALW) and man-portable air defence systems (MANPADS) and cluster bomb munitions.[94]

66. In its evidence the UK Working Group called on the Government to "honour its manifesto pledge and start from the premise that all arms brokering activities of UK passport-holders should be controlled, wherever they are located". It was, however, prepared to accept exemptions for classifying certain types of equipment which although sensitive had legitimate uses—such as unmanned aerial vehicles—as separate from other goods which could never be classed as legitimate—such as torture equipment—and where no licence would be required for activities such as general advertising or promotion. The Working Group argued that this would, for example, avoid the need for defence publications to obtain licences to carry advertisements for unmanned aerial vehicles and that small arms and light weapons would logically fall into this category.[95]

93 Ev 104, para 3

94 2007 Consultation Document, para 2.1

95 Ev 44, paras 12-13

67. In contrast, EGAD found considerable problems with extra-territoriality, both in principle and in practice. EGAD identified the following problems.

- In practice extra-territorial controls were neither effective nor enforceable.
- It was wrong in principle to seek to control the exports of other sovereign nation states.
- Extra-territorial legislation could criminalise activities to which the Government did not object and which, in some cases, it even supported.
- It could not be right to impose on an individual the law of two different jurisdictions at the same time for the same act in the same place.[96]

68. In EGAD's view extra-territoriality worked in an area in which there was universal condemnation—such as paedophilia, bribery and corruption and drug smuggling—and where the laws and enforcement capabilities of other nations might not be effective in pursuing and curtailing these inherently immoral and undesirable activities. EGAD contended that this was not the case in the vast majority of areas of the "arms trade", in most instances of which the proposed deals might not only be approved and sanctioned by the local governments, but even also enjoy their enthusiastic support.[97]

69. EGAD considered that it would be invaluable if the ECO could, as part of the review, provide a report on how effective and successful the extra-territorial provisions of the regulations had been in operation, to demonstrate how successfully they had been working. This could include the publication of details of numbers of UK nationals who had applied for trade control licences because of their planned activities overseas and the numbers of licences involved. Also, it would be useful if HM Revenue and Customs (HMRC) could report, informally, on what efforts it had made since March 2004 to investigate and pursue any suspected infringements of the extra-territorial aspects of the 2002 Act, as, if it had "made no efforts to do so because of lack of resources or the perception that it is all too difficult, then there is absolutely no point in seeking to expand the scope of extra-territoriality under the review".[98]

70. The Government told us that the "extra-territorial powers provided under the Export Control Act 2002 have not been used to initiate any prosecutions".[99] The Government also explained that "other countries would provide information to HMRC, only by consent and there would be a general expectation from the recipient country that HMRC's requests should relate to a type of activity that would also constitute an offence in their own country. If the activity was carried out legally in accordance with the laws of the country concerned, HMRC could not expect to be given the required assistance."[100]

96 Ev 57

97 *Ibid*.

98 *Ibid*.

99 Ev 100, para 8

100 Ev 104, para 4

71. EGAD also found "baffling" the

> inclusion of long-range missiles and UAVs in the "restricted goods" category under the trade controls [and considered it] is having an impact on projects in these areas, which will, almost invariably, involve international, globalised supply chains. Certainly MBDA UK Ltd, which is the UK arm of a multinational (UK/France/Italy) company involved […] in this area has experienced some particular practical difficulties at the working level.[101]

72. Mrs Susan Griffiths, Export Control Manager, MBDA UK Ltd, explained that in respect of long range missiles:

> our company who make Storm Shadow/Scalp EG, [is] a joint venture programme in which the UK Government and the French Government are actively involved. The controls on that are very extreme. We have to have approval from either government before we can sell[. W]e are now in a situation where we are trying to work as a pan-European company and if we had somebody who had the expertise who was a UK employee but we had a potential contract to have our French counterparts sell that system we would need a licence before we could allow that UK person to actually participate in that activity.[102]

73. On the current items covered by the extra-territorial controls EGAD said:

> Typically if you look at a UAV system or a long range missile system these are not the sorts of things that are being irresponsibly brokered around the world and used in third world countries to cause significant numbers of deaths.[103]

74. The Government was not aware of any conflicts between UK and other countries' legislation but said that it was interested in evidence from industry and others on these issues and would consider whether the UK extra-territorial controls that were currently in force have placed British citizens overseas in unacceptable positions. The Government said it would seek specific evidence on these points.[104] While noting in the Consultation Document that there was a "potential for a clash of jurisdictions",[105] it appears that the Government is not seeking information in the questionnaire directed at those responding to the Document about British citizens who have been placed in unacceptable positions. **We recommend that the Government enquire whether the extra-territorial provisions in the legislation have placed British citizens overseas in unacceptable positions.**

75. We note that there are currently 25 separate pieces of legislation on the statute book under which criminal offences can be prosecuted in the UK when they are committed overseas. These range from bribery and corruption committed outside the UK to bigamy;

101 Ev 57

102 Q 50 (Mrs Griffiths)

103 Q 46

104 Ev 104, para 5

105 2007 Consultation Document, para 2.1.16

the full list is set out in the Annex to this Report. It is clear to us that there are now a substantial body of precedents for extra-territorial provisions in UK law. We cannot see why it should be acceptable to have extra-territorial provisions to tackle bribery and corruption and bigamy but unacceptable to the Government to extend the current extra-territorial provisions to reduce the supply of arms in order to prevent massive loss of life.

76. We and our predecessor Committees have consistently and persistently recommended that the extra-territorial controls be extended.[106] As we feared the provisions have been an inadequate halfway house which have satisfied neither industry nor the non-governmental organisations. In our view the Government's approach was misconceived. By attempting to define trade in terms of the items that could be reasonably identified in advance as those which would not generally be granted a licence in the UK the Government has produced a regime that is too tightly and inconsistently drawn. One obvious example is the inconsistency in the treatment of missiles—with those with a range greater than 300 kilometres included within the extra-territorial control but those with a range below 300 kilometres excluded—which is baffling and confusing. As the Government acknowledged in the Consultation Document, there is no evidence that long range missiles have been the subject of trading activities.[107] Moreover, the Government pointed out there was "an added complication" in that Unmanned Air Vehicles (UAVs) were classified as long range missiles, because their range was variable and so use beyond 300km was often feasible.[108] Nor are we persuaded that the creation of a new category, "Partially Restricted Goods" based on a more widely-drawn list of goods will address the problems we have identified. It is still a limited extension of extra-territorial jurisdiction which, rather than being an inadequate halfway house solution, would be an inadequate two-thirds-way house solution, which is likely to throw up a new set of anomalies. Instead, we consider that the Government should adopt a fresh approach. **We conclude that the Government should bring forward proposals to extend the extra-territorial provisions of the export control legislation to encompass trade in all items on the Military List. In our view the experience of the past three years has shown that the current arrangements have failed and that the extension of the extra-territorial provisions is overdue. We therefore recommend that the Government require all residents in the UK and British citizens overseas to obtain trade control licences, or be covered by a general licence, before engaging in any trade in the goods on the Military List. In order not to undermine the employment prospects of British citizens working for reputable organisations, we further recommend that the Government issue general licences covering British**

106 Defence, Foreign Affairs Committee, International Development and Trade and Industry Committees, Third, Second, Third, Fourth Reports of 1999-2000, *Annual Reports for 1997 and 1998 on Strategic Export Controls: Report and Proceedings of the Committee, Appendices to the Report and Further Appendices to the Minutes of Evidence*, HC 225, para 46; Defence, Foreign Affairs Committee, International Development and Trade and Industry Committees, Eleventh, Seventh, Seventh, Eleventh Reports of 1999-2000, *Strategic Export Controls: Further Report and Parliamentary Prior Scrutiny*: *Report, Proceedings and Minutes of Evidence and Appendices* HC 467, para 64; HC (2000-01) 445, para 96; Defence, Foreign Affairs, International Development and Trade and Industry Committees, First Joint Report of Session 2003–04, *Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, HC 390, paras 221 and 224; HC (2004-05) 145, para 156; HC (2005-06) 873, para 195

107 2007 Consultation Document, para 2.1.6

108 *Ibid.*

citizens working overseas and engaged in categories of trade between specified countries or in certain activities such as advertising.

Registration of brokers

77. In our Report in 2006 we concluded that there was a case for greater regulation of brokers operating in the UK requiring all arms brokers to be registered, for registration to be dependent upon a broker meeting defined standards and requirements and that, where a person who was not registered carried out any brokering activity, he or she should be guilty of a criminal offence. We recommended that the Government bring forward a proposal to require the registration of arms brokers.[109] The Government rejected the recommendation but undertook to include it in its 2007 review.[110] The issue is addressed at paragraph 2.5 of the 2007 Consultation Document.

78. We invited further evidence on the registration of brokers. The UK Working Group saw registration as a valuable additional tool in the battle against irresponsible arms brokers. It pointed out that this position seemed to be reflected in the EU Common Position, which encouraged Member States to have a system of registration in addition to case-by-case licensing of individual transactions.[111] It also made the point that registration would ensure that brokers had a good knowledge of the law, which could be one of the criteria for being admitted to the register, and would assist in the dissemination of information regarding changes to control lists, open licences, embargoed destinations.[112] In its oral evidence the UK Working Group added:

> if you introduce the licensing regime so that you require a licence, for those people who do not get a licence what you have to do is prove the connection with the deal—you have to prove a single connection with that deal—and that they have stepped outside the law. You do not have to trace that deal right from the source to the final destination to find out whether someone has been in breach of the law. For transfers to embargo destinations, at the moment you have to prove that link right from the source to the embargo destination before you can get a prosecution of an individual, whereas if you extended the concept of extra-territoriality, even if you could only prove that a deal made to a state bordering an embargoed destination, if there is no licence you still have grounds for prosecution.[113]

79. EGAD took a different view. It said that "the issue of registration would not actually make things any easier because at the moment you would have to try to prove that a person has been involved in facilitating a deal. In future, if you had a registration system, you

109 HC (2005–06) 873, para 136

110 Cm 6954, p 19

111 Ev 44, para 14

112 Ev 44, para 15

113 Q 11

would have to prove that they were not registered and they were trying to facilitate the deal. You still have to prove the involvement in the deal."[114]

80. In responding to our Report last year the Government's view chimed with EGAD's. It considered that registration of brokers would not make prosecution easier as brokering in contravention of the 2002 Act as well as failure to register would have to be proved. In addition, it argued that a register could be used by brokers to suggest that they had official approval, risking embarrassment for the Government should a registered broker subsequently commit an offence.[115] We found this additional argument wholly unconvincing. Official registers are used for many purposes and, for example, the persons listed on the Violent and Sex Offender Register could under no circumstances be construed as carrying any degree of approbation. While we do not suggest that a register of arms brokers would be analogous to the Violent and Sex Offender Register, the point is that a register of brokers will not carry an automation presumption of official approval.

81. In the Consultation Document the Government advised that a pre-licensing registration system could be achieved via secondary legislation.[116] While accepting that there were not likely to be "insuperable problems" it said that a "number of issues then arise to question the value of creating a pre-licensing system". First, the register would not give the Government additional powers, nor would it prevent UK involvement in undesirable activities. Second, it would add another layer of complexity/bureaucracy to existing licensing controls and as such, could lead to delays in the licensing process for those not already registered. Third, traders may be unlikely to apply to register on a speculative basis (i.e. simply because they might, at some future date, need to indulge in trading activity), but are more likely to apply to register shortly before their first trade transaction. This might not allow sufficient time for the registration checks, thus delaying the business.[117]

82. We accept that the EU Council Common Position on the control of arms brokering, adopted on 23 June 2003, does not call for the registration of arms brokers. Article 4 suggests that Member States "may" establish a register of arms brokers, and that "registration or authorisation to act as a broker would […] not replace the requirement to obtain the necessary licence or written authorisation for each transaction". **We conclude that the EU Common Position on the control of arms brokering sets the best practice and we recommend that the Government follow best practice to establish a register of arms brokers. We conclude that a register will help to ensure that brokers meet defined standards, requirements and checks as well as deterring those—for example, with a relevant criminal conviction—for applying for registration. We also recommend that any brokering or trafficking in arms by a person in the UK or a British citizen abroad who is not registered be made a criminal offence.**

114 Q 53

115 Cm 6954, p 19

116 2007 Consultation Document, para 2.5.4

117 2007 Consultation Document, para 2.5.7

83. In a supplementary memorandum the Government said primary legislation may be required to ensure publication of a register. It pointed out that section 7(f) of the 2002 Act empowered the Government to make provision in an order under the Act "about the persons to whom [information held in connection with anything done under or by virtue of the order] may be disclosed" but "this section of the Act is not conclusive as to the extent to which such information can be published". [118] We note, however, that the Government has not raised this point in the Consultation Document.[119] **We recommend that the Government obtain and publish in its reply to our Report definitive legal advice setting out whether primary legislation is required to publish a register of brokers and, if the conclusion is reached that primary legislation is required, that the Government bring forward an amendment to the Export Control Act 2002 to permit publication.**

"Catch-all" provisions (weapons of mass destruction)

84. Under UK law before 2004 a licence was required if an "exporter knows, or is informed by UK Government, or has grounds for suspecting, that exports of technology or electronic transfers of technology from the UK to a destination outside of the EC would, or might be used in connection with WMD [weapons of mass destruction]".[120] This rule was broadened in 2003 to include the transfer of WMD end-use technology by any means, including "face-to-face communication, personal demonstration, or by handing over material recorded on documents or disks".[121] These new restrictions also applied to anyone in the UK who proposed to transfer technology by any means to another entity within the UK, if the provider knew or had been informed by the Government that it might be intended for use outside the EU in connection with WMD. The Government explained, however, that "none of the new controls are based on suspicion of a WMD end-use. The person or entity concerned must be aware or have grounds for suspecting or have been informed."[122]

85. Although the Government advises that all reasonable enquiries are made should there be any suspicions,[123] under the "catch-all" provision there is no requirement on a potential exporter to make attempts to check that a proposed recipient of technology did not intend to use information in a WMD programme. Miss Kidd and Dr Hobbs suggested that this "caveat" was intended to reassure potential exporters that they did not have to investigate all casual business acquaintances, as they would not be liable for prosecution on the basis of a face-to-face conversation with a foreign entity who, unbeknownst to them, was involved with WMD and sought to elicit technical details from them.[124] However, where potential

118 Ev 117

119 Para 2.5.8 of the 2007 Consultation Document appears to accept that the register could be published.

120 Ev 130; Department of Trade and Industry, *Supplementary Guidance Note on Additional Controls Relating to the Prevention of Proliferation of Weapons of Mass Destruction (WMD)*, October 2004, p 2 See also 2007 Consultation Document, para 2.8.

121 Ev 130; Department of Trade and Industry, *Supplementary Guidance Note on Additional Controls Relating to the Prevention of Proliferation of Weapons of Mass Destruction (WMD)*, October 2004, p 3

122 *Ibid.*

123 2007 Consultation Document, para 1.3.0

124 Ev 130

exporters behaved recklessly they might breach the law. Paragraph 2.2.(a) of the Uranium Enrichment Technology (Prohibition on Disclosure) Regulations 2004 (S.I. No, 1818/2004) expands on the definition of "reckless": "the disclosure creates an obvious risk […] but at the time he makes the disclosure he has failed to give any thought to the possibility that the disclosure would create such a risk".

86. Miss Kidd and Dr Hobbs acknowledged that there "is only a limited amount of time that a busy UK exporter of dual-use goods can devote to evaluating a potential customer's intentions" and pointed out that "proliferators are aware of this, and often bury their desired items in a long list of innocuous products, or only make a request after a secure business relationship has been secured with the exporter". Miss Kidd and Dr Hobbs suggested possible technical solutions, such as (non-removable) transponders attached to dual-use goods which would reveal their final destination, "could be explored in an attempt to make this task easier for the exporter".[125]

87. We asked HMRC about its powers under the catch-all provisions to seize goods. HMRC explained that it did not have powers to seize non-controlled goods in cases where the exporter was not aware of nor suspected WMD end-use. Where HMRC identified non-controlled goods that it suspected might be destined for WMD end-use, it had the power to detain them under the 2002 Act whilst DTI[126] decided whether or not to invoke the end-use catch-all control. If DTI decided that goods required a licence on end-use grounds, they informed the exporter and HMRC. HMRC then detained the goods until the exporter either obtained an export licence, or withdrew the goods from export. The only cases where HMRC could seize the goods would be where there was evidence that the exporter already had grounds to suspect that the goods were for a WMD use, or, having been informed by the DTI that the goods could not be exported without a licence, the exporter subsequently attempted to do so.[127] HMRC considered that the law was strong enough.[128]

88. Changing the regulations to impose a duty on exporters to enquire into the intended use of their goods and to withhold exports where they have a suspicion that goods could be used for WMD purposes is a step that cannot be taken lightly or without clear evidence of the systematic failure of the export control system. Such a change would impose a considerable burden on industry. While we have expressed reservations, and continue to express reservations, about the adequacy of the controls on dual-use goods (in chapter 6 below), we conclude that the imposition of a duty on exporters to enquire into the intended use of their goods and to withhold exports where they have a suspicion that goods could be used for WMD purposes is not yet justified. There are, however, a number of steps that the Government could take to improve the operation of the current system.

125 Ev 130

126 Now the Department for Business, Enterprise and Regulatory Reform

127 Ev 156

128 Q 172

- First, the Government could regularly remind exporters of the provisions of WMD end-use and encourage exporters voluntarily to report any suspicions that they may have about WMD end-use.

- Second, the Government itself has to gather intelligence from its own sources and exchange information with its EU partners and other services, as well as carrying out market surveillance in the same way as the Zollkriminalamt, the German Customs Criminological Office. It can use its powers under the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. No. 2764/2003) to inform exporters where a WMD end-use is suspected and to bring the prospective exports within export control.

- Third, HMRC must be able to seize goods where there is good intelligence that they are likely to be used for a WMD end-use, irrespective of the knowledge and intentions of the exporter.

89. **We conclude that the imposition of a duty on exporters to enquire into the intended use of their goods and to withhold exports where they have a suspicion that goods could be used for WMD purposes is not yet justified. There are, however, a number of steps that the Government could take to improve the operation of the current system. First, we conclude and recommend that the Government regularly remind exporters of the provisions of WMD end-use and encourage exporters voluntarily to report any suspicions that they may have about WMD end-use. Second, for the system to work the Government has to gather intelligence from its own sources and exchange information with its EU partners and other services, as well as carrying out market surveillance in the same way as the Zollkriminalamt, the German Customs Criminological Office. In addition, it must use its powers under the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. No. 2764/2003) to inform exporters where a WMD end-use is suspected and to bring the prospective exports within export control. We recommend that the Government in responding to our Report confirms that this is the approach it has adopted. Third, we are concerned that HMRC cannot seize goods destined for a WMD end-use without evidence that the exporter was aware of the intended use. We recommend that in its reply the Government explain whether this requirement has been an impediment preventing enforcement action against proliferators of WMD or whether other legislation provides HMRC with adequate alternative powers to seize goods. If the absence of a provision is an impediment to effective enforcement, we recommend that the regulations be changed to allow HMRC to seize goods where there is good intelligence that they are likely to be used for a WMD end-use, irrespective of the knowledge and intentions of the exporter.**

Transfer of software (weapons of mass destruction)

90. The WMD end-use control allows the government to impose an export licensing requirement on software which are not normally controlled.[129] From their research Miss Kidd and Dr Hobbs have concluded that the area of software transfer was where UK Export Controls were "most contentious and possibly at their least adequate" and that the "controls were frequently flouted because of their impracticability".[130] They suggested that this area should be reviewed as a matter of urgency. They explained:

> A number of the senior academics […] expressed concern over the potential implications of the Act for collaborations in software development projects with non-EU groups. In order to develop a piece of source code in an international collaboration it can be necessary to transfer frequently (usually via email) fragments of code from one group to another. This type of exchange was [for example] essential to the development of the Serpent encryption algorithm […] Under the Act it would appear to be necessary to apply for separate export license to sanction each separate email exchange (with non-EU colleagues). If this is indeed the case, the effectiveness of any collaboration with non-EU groups would be seriously inhibited.
>
> It is possible that the public domain exemption may help to circumvent this course of action, as in many cases the final source code produced in an academic collaboration is made freely downloadable on a university website (i.e. placed in the public domain). Although at the time of the email exchanges the code fragments would not have been available for public consumption. It is unclear to academics as to whether the public domain exemption could apply retrospectively in this case.[131]

91. **We recommend that the Government in responding to this Report clarify whether each e-mail exchange within a group containing participants from within and outside the EU working on the collaborative development of IT source code requires a licence under the legislation and, if it does, whether an open or general licence or exemption could be provided.**

129 2007 Consultation Document, para 2.6.1

130 Ev 130

131 *Ibid.*

5 Sustainable development

Legislative treatment of sustainable development

92. Criterion 8 of the Consolidated EU and National Arms Export Licensing Criteria requires exports to be compatible with the technical and economic capacity of the recipient country. Section 9 of the Export Control Act 2002 requires the Secretary of State to give guidance on the general principles to be followed when exercising licensing powers, which must include guidance on sustainable development. In its representations the UK Working Group pointed out that Criterion 8 was omitted from the table of "Relevant consequences" contained in the Schedule to the Export Control Act, thereby giving the sense it was "of secondary importance". Second, the inclusion of the bracketed phrase "if any" in the reference to sustainable development in section 9 of the Act, whereby the "guidance required … must include guidance about the consideration (if any) to be given, when exercising such powers, to … issues relating to sustainable development" was, in the view of the Working Group, unwelcome because it allowed the Secretary of State "excessive discretion to remove sustainable development from the licence decision-making process, and consigns the issue to second-class status, thus further undermining the importance of this issue". The UK Working Group contended that sustainable development should be included in the table of Relevant Consequences contained in the Schedule to the Act in order that this Criterion would have "equivalence with other consequences, and is treated in a way that is commensurate with the damaging affects of transfers that undermine development".[132]

93. The treatment of sustainable development was debated when the legislation was before Parliament. In arguing against amendments that would have added Criterion 8 to the Schedule of Relevant Consequences and removed "if any" from section 9 the Government said that making these changes "would oblige the Government to have regard to sustainable development […] in all cases" and that it needed "to be able to take common-sense decisions and to reach a judgment when taking export licensing decisions that particular considerations are simply not relevant in certain cases and situations".[133]

Role of Department for International Development

94. The Department for International Development (DFID) leads on the assessment of applications for export licences against Criterion 8. In carrying out the assessment it has to measure the compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.[134]

132 Ev 44, paras 10-11

133 HL Deb, 18 April 2002, col 1101

134 Cm 6882, p 72

Impact of irresponsible and illegal arms transfers on developing countries

95. Although DFID acknowledged that calculating the impact of irresponsible and illegal arms transfers on developing countries was "extremely difficult" and that the available information was "not comprehensive", it believed that the data available could be used to make an estimate of the impact of the global arms trade on development and was working to improve its understanding in this area.[135] In 2004, it had commissioned research from Bradford University on the impact of armed violence on poverty,[136] which looked in part at the impact of the international arms trade. The research showed that responsible transfers of conventional weapons could create space for development by helping governments to provide security for their populations. DFID also reminded us that developed and developing countries alike had the right to provide for their own legitimate defence and security needs and that this principle was enshrined in the UN Charter. Few developing countries, however, had their own indigenous arms industries, so they were often dependent on arms imports. On the other hand, DFID pointed out that irresponsible transfers, and the costs of maintaining and using these weapons, could divert resources from development spending on areas such as education or health.[137]

96. DFID explained how the weapons that were misused could also have a significant impact on development. Weapons could play a significant part in tipping conflict into violence or in facilitating the abuse of human rights with the damage caused compounded by the negative impact on development.[138] This was the reason DFID also commented on licence applications against the criteria covering human rights and conflict. DFID added that it was also leading work in the OECD's Development Assistance Committee to develop guidance for donor countries on the reduction of armed violence and arms availability in developing countries.[139]

The number of refusals given on grounds of incompatibility with Criterion 8

97. We were surprised to learn that since 2002 only one application to export arms had been refused by the UK Government on the grounds that it was incompatible with the technical and economic capacity of the recipient country.[140] We asked for reasons and whether this statistic was significant.

98. The UK Working Group considered that one of the reasons so few applications were refused on grounds of incompatibility with Criterion 8 was "those applying the criteria are not applying the sustainable development rigorously enough".[141] The Working Group

135 Ev 71, para 33

136 See http://www.brad.ac.uk/acad/cics/projects/arms/AVPI/

137 Ev 71, paras 34 and 36

138 *Shattered Lives: the Case for Tough International Arms Control*, Oxfam International and Amnesty International, 2003

139 Ev 71, para 35

140 Ev 71, para 27 The application was turned down in 2003.

141 Q 8

pointed out that "since 2003 there have been 52 refusals [in the EU] based on sustainable development Criterion"[142] compared to one refusal made by the UK Government.

99. DFID acknowledged that more licences were refused under other criteria than under Criterion 8. For example, in 2006, there had been 80 refusals with the vast majority based on Criteria 2 (human rights), 3 (internal tensions), 4 (regional peace and security) and 7 (risk of diversion). DFID did not accept that it was the case that the Government took some criteria more seriously than others. It maintained that clearer procedures for inter-departmental consultation on all the criteria, and guidelines for the application of Criterion 8 in particular, had helped ensure that all criteria were taken into account in the final decision on whether to grant a licence. DFID argued:

> The fact that more licences are refused under other criteria is not a reflection of how seriously Criterion 8 is taken, but more of the nature of the UK's arms export industry and the global market. Exports to developing countries make up a relatively small proportion of the global trade in military equipment, and of the UK's military exports[…] In addition, many potential licence applications can be deterred at the pre-approval stage if they are likely to be rejected under the criteria.[143]

Comparison with France

100. In contrast to the one refusal on grounds of incompatibility with Criterion 8 in the UK, the Working Group pointed out that the French Government had been responsible for 42 refusals on this ground.[144]

101. Although the UK Government would not comment on the detailed processes followed by individual EU Member States, it said that "some interpret Criterion 8 differently" but that its "interpretation, and that of the vast majority of our EU partners, focuses on the impact on the recipient country's economy, rather than on the UK's national security". The UK Government had sought to minimise these differences by leading the identification of best practice on Criterion 8 as part of the EU's Users' Guide to assist with implementation of the Code of Conduct. It pointed out that the UK was one of only two EU Member States routinely to involve its development department or agency in licensing decisions.[145] The Parliamentary Under-Secretary for International Development, Mr Gareth Thomas MP, also pointed out that most other European countries' performances were similar to the UK in terms of the number of licences refused.[146]

---

142 *Ibid.*

143 Ev 71, paras 15-16

144 Q 9

145 Ev 71, para 31 It should be noted, however, that the Annual Report on the Netherlands arms export policy 2005—available at http://www.sipri.org/contents/armstrad/atlinks_gov.html—states at p 4: "In the case of applications for exports to developing countries appearing on Part 1 the OECD DAC list, the Minister of Foreign Affairs will first consult with the Minister for Development Co-operation, and will then advise the Minister of Economic Affairs on the basis of that consultation". In addition, some years ago the German Federal Ministry for Economic Cooperation and Development was included in the Federal Security Council, the top decision-making body for arms exports.

146 Q 84

102. EGAD commented that under the French export licensing system military exports were prohibited unless a governmental authorisation was granted (Art. 13 of the legislative decree of 18 April 1939), and the French export control system was implemented in several stages:

- prior authorisation to negotiate;
- authorisation to conclude a sales operation; and
- authorisation to export equipment.

103. EGAD commented:

> Therefore, a French export licence refusal, against any of the criteria, can take place right up front, when French firms apply for permission to promote their products to a potential overseas customer. Under the UK's system, export licences are only needed for actual exports of goods and technology. However, in the UK we have, in place of the French system's formal prior authorization, the informal 680 system, as well as other informal consultative mechanisms which exist, for companies to use to assess whether it is worth pursuing export business opportunities or applying for export licences. A 680 refusal against one of the criteria (including Criterion 8), or informal advice from British Government officials to an exporter that a potential business opportunity is not worth pursuing, including on grounds of sustainable development, will not show up in the official published figures. Therefore, criticism of the British Government's own implementation of Criterion 8 is based on only part of the picture being visible.[147]

104. DFID explained that the Defence Export Services Organisation (DESO) in the Ministry of Defence (MoD) referred all F680 applications for proposed exports to international development association (IDA) countries to DFID for a Criterion 8 assessment. DFID used the same analysis as that used for licence applications—see paragraph 108 and following. DFID explained that where Criterion 8 was a possible or probable cause for concern, the MoD would warn exporters of this. DFID suggested that this might deter exporters from submitting applications for licences that would fall foul of the criteria.[148]

Conclusions on the weight given by the legislation to sustainable development

105. We consider that an amendment to the primary legislation to require greater weight to be given to the question of sustainable development would be justified where it was clear that the present arrangements were failing and moreover that the failures were the product of a defect in the legislation. First, the statistics are not, in our view, conclusive that the UK Government is out of step with other European States. Apart from France, there have been

147 Ev 69

148 Ev 71, paras 13-14

ten refusals since 2002 across the EU on grounds of incompatibility with Criterion 8. The French Government with 42 refusals, rather than the British, appears atypical. Because of the restrictions on the information shared by Member States the UK Government was not able to explain to us the reasons for the large number of French refusals.

106. One point, however, which concerns us is the risk of wide disparity in the interpretation of Criterion 8 by Member States, particularly if the pattern were to continue after the publication of the Users' Guide. We consider that the UK Government should request COARM, the EU Council of Ministers' working group on conventional arms, to consider the matter. **We recommend that the Government request COARM to examine whether Member States are following a consistent interpretation of Criterion 8.**

107. We recognise that the Best Practice Guidance for the Interpretation of Criterion 8 refers to a number of "broad, overarching issues".[149] It follows that judgments have to be made by governments in addressing these issues and that given the scope permitted by Criterion 8 there is going to be disagreement. Moreover, given the latitude of Criterion 8 there is no certainty that changing the legislation to require greater weight to be given to sustainable development, which means greater weight to Criterion 8, would result in the refusal of significantly more licences. It follows that not every application for an export licence raises questions about sustainable development. We therefore concentrated on the filtering process and addressed two questions: whether the filtering and concomitant evaluation processes identified those cases where questions of sustainable development arose and whether the decisions that emerged were comprehensible. **We conclude that there is no strong case for amending the primary legislation to require greater weight to be given to sustainable development.**

The filtering process for applications

108. An application for a licence is passed to DFID by the Department of Trade and Industry (DTI), now the Department for Business, Enterprise and Regulatory Reform, for an assessment against Criterion 8 when the destination is on a list of countries where sustainable development is most likely to be an important factor, and where the value of the licence is above a certain threshold for that country. This threshold is determined on a country-by-country basis. The list comprises those countries that are eligible for concessional loans from the World Bank's International Development Association (IDA), taken to represent the world's poorest countries.[150] In addition, DFID has the right to comment on any export licence application against any of the other criteria. Because of the inter-relationship between human rights, conflict and development, DFID takes particular interest in Criteria 2 (human rights), 3 (internal tension or conflict), and 4 (regional peace and security). DFID maintains a list of countries for which the country threshold is set very

149 Cm 6882, p 83

150 See Ev 71, appendix 1.

low or at zero, ensuring that most or all licence applications for these countries come to DFID for analysis. DFID keeps this list under regular review.[151]

109. We asked DFID why it used the IDA list and it replied:

> The list of countries eligible for IDA loans is the most authoritative, comprehensive, and up-to-date list of the world's poorest countries. Eligibility is based on low income (low GNI per capita), so IDA countries have the least available resources and the greatest need to use those scarce resources in a productive way. The list is produced by the World Bank, and is updated annually. It now includes 82 countries.
>
> By contrast, the UN's list of Least Development Countries (LDCs) covers 50 countries and is only updated every three years. […] It is therefore of less relevance to exporters like the UK.[152]

110. We had specific concerns that the list was not comprehensive—for example, it did not include Morocco, a developing country with significant expenditure on its armed forces and in disputed occupation of the Western Sahara. The Government replied:

> In 2005, Morocco's GNI per capita ($1,059) was slightly higher than that of Guyana ($1,000). As the cut-off point for eligibility for IDA loans is $1,025, Morocco is not on the IDA list. In the specific case of Morocco we feel that factors causing concern are subject to scrutiny under other criteria: Morocco's relatively high level of military spending and its occupation of Western Sahara would be taken into account under criteria 3 (internal tensions) and 4 (regional peace and stability).[153]

111. The Minister explained that, while the IDA list was the "most appropriate of those that are available",[154] it was not exhaustive and the Government looked at all licence applications for Iraq, Sudan and Nepal where they went beyond the value threshold using the methodology, and that "we have recently taken a decision to extend still further to Afghanistan, Burma, Burundi, Chad, Cote D'Ivoire, DRC,[155] Ethiopia, Eritrea, Sri Lanka, Somalia and Zimbabwe for which we look at all the licence applications in those circumstances".[156]

112. Since 2002, DTI has referred 858 Standard Individual Export Licences (SIELs) and 767 Open Individual Export Licences (OIELs) to DFID. This constitutes a relatively small proportion of all the export licence applications received by the DTI as the licensing authority. For example, in 2006, 1.5% of SIELs and 27% of OIELs were referred to DFID.[157] We asked why the proportion of applications, particularly for SIELs, was low. The

151 Ev 71, para 12

152 Ev 77, para b See also Q 98.

153 Ev 77, para b See also Q 99.

154 Q 99

155 Democratic Republic of Congo

156 Qq 99, 116

157 Ev 71, paras 10-11

Parliamentary-Under the Secretary of State for International Development told us "that only a relatively small percentage of UK exports are destined for developing countries"[158] and that the number referred was determined by the methodology.[159]

113. In 2006, 6.9% of the value of military list export licences issued by the UK Government was destined for IDA-eligible countries. By value in 2006 this amounted to exports of £113 million.[160] We consider this amount to be significant and that there would be grounds for concern if either the percentage or amount grew substantially.

114. **We accept that the list of countries eligible for IDA loans provides a foundation on which to build the first stage of the filtering arrangements for consideration of applications for export licences against Criterion 8. The Government itself has recognised that the IDA list needs to be supplemented with the addition of 14 countries. We conclude that the Government's approach gives the correct degree of flexibility to the system. We recommend that the Government also consider adding countries such as Morocco to the list.**

Methodology used by DFID

115. We invited DFID to explain the methodology it used when it received an application from DTI. DFID told us that the assessment of licence applications under Criterion 8 took into account four main areas: economic capacity; levels of military expenditure; technical capacity and the potential diversion of resources; and the legitimate security and defence needs of the recipient country.[161] The initial assessment examined whether the value of the proposed export exceeded the value threshold for the recipient country which was based on the value of the export as a proportion of health and education spending in that country, as well as the other indicators in the methodology.[162] DFID explained that making the assessment for a SIEL was "relatively straightforward" but that making an assessment against Criterion 8 was more complex for an OIEL, as OIELs did not specify a value. DFID said that it would therefore usually ask DTI to obtain an estimate of the cost from the exporter. The estimated cost provided the basis for a Criterion 8 assessment.[163]

116. When the analysis revealed that a proposed export exceeded the value threshold for a recipient country or it triggered any of the indicators, the licence application was passed to the DFID country desk or office for a more detailed examination using the agreed guidance. Country specialists then looked at (a) the extent to which the value of the export licence application exceeded the country threshold; (b) the number of indicators that had been exceeded, and the extent to which they have been exceeded. Country specialists made

158 Q 101

159 *Ibid.*

160 Ev 71, para 29

161 Ev 71, para 17

162 Qq 103-05

163 Ev 71, para 20

a judgement, based on their knowledge of the recipient country, on whether and how the proposed export would impact on the indicators for Criterion 8.[164]

117. Other government departments might also offer opinions on Criterion 8. In particular, the Ministry of Defence would consider the proposed export in the light of legitimate defence needs, taking into account any security sector reform programmes or strategic defence reviews. Consideration of this aspect was usually conducted against Criterion 4 (regional peace and security) but could also feed into Criterion 8.[165] As with all export licensing applications DTI, as the licensing authority, assessed whether, in the light of advice from DFID and other departments, issuing or refusing a licence was consistent with the Consolidated Criteria as a whole.[166]

Publication of the methodology

118. We requested a copy of the methodology DFID used for applying Criterion 8; a copy was supplied to us in confidence and is therefore not being published, although we have treated it as evidence. We nevertheless questioned why the methodology could not be made public. The Minister replied that there was a risk as to how the document would be used,[167] in particular by "unscrupulous arms dealers".[168] He asserted that most arms exporters had a good idea of what would constitute a serious threat under the Criterion 8 to the long-term economic prospects of that country.[169]

119. The Minister produced no evidence to support his assertions that publication of the methodology would assist the unscrupulous or that, by implication, respectable dealers understood the rules. With only one application rejected on the grounds of incompatibility with Criterion 8 since 2003 we fail to see how the unscrupulous are deterred. On the contrary the failure to publish could give the impression, erroneous in our view, that the Government may be hiding weaknesses in the system or preventing criticism when it issued licences for applications that appear above the triggers. **From the information we obtained during the inquiry we conclude that the system for assessing applications against Criterion 8 appears sound and that it is underpinned by a robust methodology. We recommend that the Government publish the methodology in the Annual Report on Strategic Export Controls along with a list of the countries on the IDA list, as supplemented.**

Bribery and corruption

120. The Parliamentary-Under Secretary of State for International Development said that his Department would be reviewing its use and implementation of the methodology to see whether further improvements could be made "to the implementation of that

164 Ev 71, para 21

165 Ev 71, para 22

166 Ev 71, para 23

167 Q 90

168 Q 91

169 Q 89

methodology".[170] This review is distinct and separate from the review of export controls which the Department for Business, Enterprise and Regulatory Reform is leading. One matter on which we received evidence was the need to guard against bribery and corruption—see paragraph 357. The Minister did not consider "it would be true to say we have gone quiet on corruption in the arms industry, but we are engaged in some thinking and some work there. Obviously we are happy to keep the Committee informed about the progress of that work."[171] We are grateful for the Minister's offer to keep us informed.

121. It is also pertinent to draw attention to the recent conclusion and recommendation of the Foreign Affairs Committee, one of our participating Committees:

> We conclude that the Government's decision to halt the inquiry into the al Yamamah arms deal may have caused severe damage to the reputation of the United Kingdom in the fight against corruption. We recommend that in its response to this Report the Government set out what steps it has taken since that decision to maintain momentum on international anti-corruption measures, and how it has responded to the OECD's criticisms of the decision.[172]

122. In its response the Government did not agree that the decision to halt the Serious Fraud Office inquiry might have caused severe damage to the reputation of the UK's fight against corruption. The Government detailed the wide-ranging activities it had undertaken since July 2006, when its anti-corruption action plan had been agreed. These activities included "strengthening the UK's capacity to investigate allegations of foreign bribery" and working with the private sector on both specific anti-corruption initiatives, such as the Extractive Industries Transparency Initiative, and on efforts to raise UK business awareness around the world of the damage corruption can cause".[173] In our view an overhaul of the Criterion 8 methodology that included a test to establish whether the contract behind an application for an export licence was free from bribery and corruption would fit well with the Government's anti-corruption action plan and would show that the Government was maintaining momentum on international anti-corruption measures. **We recommend that DFID consider including an assessment in the Criterion 8 methodology applied by Government to test whether the contract behind an application for an export licence is free from bribery and corruption.**

170 Q 88

171 Q 113

172 Foreign Affairs Committee, Third Report of Session 2006–07, *Human Rights Annual Report 2006*, HC 269, para 42

173 Foreign and Commonwealth Office, *Annual Report on Human Rights 2006: Response of the Secretary of State for Foreign and Commonwealth Affairs*, Cm 7127, June 2007, para 31

6 Enforcement of the legislation

Introduction

123. In their review of the secondary legislation our predecessor Committees concluded "that a […] 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".[174] In responding the Government said:

> 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.[175]

124. We have expressed our concerns in chapter 3 about the absence from the 2007 Consultation Document of a systematic analysis of the effectiveness of export controls since 2004. In our view crucial to such an analysis is an evaluation of the enforcement of the 2002 Act by all arms of government, not just the Export Control Organisation (ECO). The question of the enforcement of the legislation has been central to our deliberations and those of our predecessor Committees.[176] We invited views on how effectively the legislation was being enforced against those who have no regard for the letter of the law and what were the challenges to bringing forward successful prosecutions.

Section 68(2) the Customs and Excise Management Act 1979

125. Section 68(2) the Customs and Excise Management Act 1979 provides that a person knowingly concerned in the exportation of goods, with intent to evade any prohibition or restriction in force shall be guilty of an offence and may be arrested. The penalty provisions for this offence in section 68(3) provide:

- on summary conviction in Magistrates' Court a penalty of £5,000 or of three times the value of the goods, whichever is greater, or imprisonment for a term not exceeding six months or to both; or
- on conviction on indictment in Crown Court an unlimited fine, imprisonment for a maximum term of ten years or to both.

126. HM Revenue and Customs (HMRC) explained that it assessed all intelligence and reported breaches to determine what, if any, action was appropriate. HMRC explained that

174 HC (2002-03) 620, para 24

175 Cm 5988, p 2

176 For example, HC (2005–06) 873, para 75 ff

it investigated all activity suggesting a deliberate breach "involving a sensitive destination or particularly sensitive goods"[177] and would refer the matter to Revenue and Customs Prosecutions Office, to consider whether there was sufficient evidence to mount a prosecution. HMRC's evidence leaves a question over those cases where there is intent but the goods or the destination is not sensitive. We consider that the effectiveness of the export control system can only be maintained if all breaches of export controls that are discovered are thoroughly investigated and penalties imposed. We are concerned that the difficulties in launching prosecutions under section 68(2) of the 1979 Act, particularly in respect of sensitive goods going to sensitive destinations, turn the provision into a dead letter. In our view intent to breach export controls is a serious matter and it is unacceptable for the authorities to consider prosecution only where there are aggravating factors such as the sensitivity of the goods or their destination. **We recommend that, in any case where intent to evade export controls is suspected, the case should be investigated and where there is evidence of intent, irrespective of the sensitivity of the goods exported or of their destination, prosecution should always be initiated under section 68(2) of the Customs and Excise Management Act 1979.**

127. Where a case involving sensitive goods or a sensitive destination is reported to the Revenue and Customs Prosecutions Office, HMRC told us that outcome could be:

a) that the reported behaviour did not constitute an offence;

b) that *prima facie* an offence might have been committed but there was insufficient evidence to support a prosecution;

c) that there was sufficient evidence to support a prosecution but that prosecution was not in the public interest; or

d) that there was sufficient evidence to support a prosecution and that prosecution was in the public interest.[178]

128. In its memorandum the Revenue and Customs Prosecutions Office set out the reviews it made before proceeding with a prosecution. The reviewing lawyer must, for example, be satisfied that there was enough evidence for there to be a "realistic prospect of a conviction" against each defendant on each charge.[179] The Prosecutions Office explained, however, that satisfying the sufficiency of evidence test could be particularly challenging in prosecuting offences in this area because:

- it was difficult to prove the destination intended for the goods in question; there might be intelligence to show that the goods were going to a country of weapons of mass destruction (WMD) concern, although the apparent destination might be innocuous;

177 Ev 78, para 7

178 *Ibid.*

179 Ev 80, para 8

- vital evidence was often located abroad; whilst it might be possible for some or all of the evidence to be obtained by Letters of Request or bilateral Mutual Administrative Assistance arrangements, the degree of cooperation and the length of time that it took to deal with the request could vary from country to country; in addition, there might be issues as to the provenance of a particular exhibit, and its subsequent evidential admissibility in a UK trial;

- evidence about the specification, functionality and proposed use of the goods could be ambiguous, which made inference of guilty knowledge difficult to draw; and

- exports were sometimes accompanied by End User Certificates that were supplied by foreign governments, which were suspected to be false; in these circumstances it was difficult to prove beyond reasonable doubt that they were false instruments for the purposes of a prosecution.

- when potential defendants were located outside the European Union, it could be particularly difficult to get them extradited to the UK.[180]

129. In its evidence the Revenue and Customs Prosecutions Office concluded that while in theory the legislation should not be any more difficult to apply than any comparable legislation, the challenge lay in finding sufficient evidence for a successful prosecution.[181]

130. HMRC said that "where offences are committed entirely overseas, the enforcement difficulties can be compounded" but that "where the alleged activity is internationally condemned, such as breaching UN embargoes, greater cooperation can generally be expected from foreign Governments and enforcement bodies".[182] We found no evidence, however, that breaches of embargoes were more successfully prosecuted than other breaches of export control.

131. It appears to us almost paradoxical that those cases which involve goods that are not sensitive or are not bound for sensitive destinations may not be referred for prosecution while those that do are referred but they are the cases where the prospects of securing evidence to launch a prosecution are slight. **We conclude that, because of the need to secure evidence or witnesses from abroad or to reveal evidence provided by the intelligence services in court, prosecutions under section 68(2) of the Customs and Excise Management Act 1979 against those posing most threat to the UK's strategic export controls are problematic.**

132. EGAD expressed concern that the seeming inability of the Government to enforce the existing laws might be used as a justification for pressures to tighten further the regulations. It argued that in many cases, what was needed was the political will to implement effectively the legislative tools that the Government already had at its disposal. EGAD was "unaware of a single legal action which has been taken by the Government

180 Ev 80, para 11

181 Ev 80, para 18

182 Ev 78, para 6

against any of the real, non-compliant 'bad guys'", despite some cases having come publicly to light, and was "unaware of any cases which have been even investigated which have been of an extra-territorial dimension, since the adoption of the [Export Control Act 2002] some two and a half years' ago".[183]

133. In a memorandum in December 2006 the Government said that there had been three successful prosecutions since the beginning of 2006.

- On 23 March 2006 Vestguard UK Ltd was convicted under section 68(1) of the Customs and Excise Management Act 1979 for exporting Body Armour to the value of £128,000 to Kuwait, Iraq and Saudi Arabia. The company was fined £10,000 and ordered to pay £500 costs.

- On 6 September 2006 Peace Keeper International Ltd had pleaded guilty to 3 offences under section 68(1) of the 1979 Act of exporting body armour and helmets to the value of £23,000 to Kuwait and Iraq during 2004. The company was fined a total of £10,000 and ordered to pay £1,600 costs.

- On 7 September 2006 Winchester Procurement Ltd pleaded guilty to 10 offences under section 68(1) of the 1979 Act of exporting military helmets and flak jackets to the value of £48,260 to Kuwait for use in Iraq during the latter half of 2004. The company was fined a total of £8,000 and ordered to pay £500 costs.

We note that none of these successful prosecutions was under section 68(2) of the 1979 Act. All were under section 68(1) which we consider further at paragraph 148 and following. In addition to these successful prosecutions the Government pointed out that:

- In December 2006 a compound penalty[184] of £15,000, in lieu of prosecution, had been paid by a company which had exported carbon materials to various destinations. The company had made a voluntary disclosure to HMRC, following a DTI compliance visit, but HMRC enquiries had revealed additional unlicensed exports that had not been accounted for in the disclosure. In addition, restoration fees of £6,945 were imposed in 13 separate cases where HMRC had seized goods. HMRC suggested that the figure was likely to be higher as cases were dealt with locally and not all records were complete.[185]

134. HMRC added in its oral evidence that in 2006-07 although it had two cases concluded by a conviction in a court it also settled "two cases by compound penalty as a result of a criminal investigation".[186] HMRC told us that "the number of prosecutions will not be high and should not be used as an indicator as to whether the controls are successful".[187]

183 Ev 57

184 Compound penalty is defined at para 135.

185 Ev 83, para 9

186 Q 150

187 Ev 78, para 5

Compounding penalties

135. The Revenue and Customs departments have powers under section 152 of the 1979 Act to compound offences, that is to accept a monetary amount in lieu of pursuing criminal proceedings. Compound penalties can only be issued where there is evidence to a criminal standard that an offence has been committed.[188] In its evidence to us HMRC explained that in the two cases it had concluded that compounding rather than prosecution was justified because of lower degrees of seriousness and exceptional mitigating factors.[189]

136. HMRC also assured us the compounding was compliant with the Human Rights Act. On legal advice HMRC applied compounding in a way that was compliant on the following principles:

- equality of treatment; the opportunity to compound was offered to a company and there was no duress; it was available to everyone in a similar position;
- it was truly voluntary; there was no improper pressure by way of threat of prosecution; and
- there was sufficient evidence to prosecute; there had to be confirmation from Revenue and Customs Prosecutions Office that there was sufficient evidence to justify prosecution and that if it was to report the case for prosecution the public interest criteria would justify a prosecution.[190]

137. HMRC explained that it could not publish the names of those who paid compounding fines:

> HM Customs and Excise of old did […] publish names in certain cases that were laid down by Peter Lilley when he was the Paymaster in 1989. Events have overtaken us. The Commissioners for Revenue and Customs Act prevents us from doing so. We have clear legal advice that we cannot publish the names. What we still do—and in these two cases—we are publicising details without the names, so we are publicising in general terms that there has been a case concluded involving these factors and this sort of behaviour but we are still looking to publish information on that basis. One of the two has yet to be publicised.[191]

188 HC (2005-06) 873, para 118

189 Qq 156-57 Both cases that were settled by compounded penalty involved limited companies and in one case the employee who had committed the wrongful acts had left the company. The person who would have ended up being arraigned as a representative of the company in the magistrates' court would have been the person who was actually working with HMRC to put things right within the company's export control systems. With that and the fact that the company was prepared to work with HMRC, HMRC felt that added up to a case where it would offer a compound penalty. The second case had different factors. The company brought the breach to HMRC's attention voluntarily before either receiving an audit from HMRC or the DTI Compliance Unit. The factors were fairly straightforward and HMRC wanted to encourage other companies to report matters.

190 Q 158

191 Q 160

138. We were grateful to HMRC for the explanation of the operation of the compounding process and for additional information about the above cases. We make no criticism of HMRC but we are concerned that the process could be construed, or misconstrued, as a lenient option available at the discretion of HMRC. **To ensure that the process of levying compounding fines is as transparent as possible we recommend that HMRC continue to provide full disclosure of the details of all cases, but without names. In addition, we recommend that, when a suitable opportunity arises, the Government bring forward legislation to require HMRC to publish the names of those paying compounding penalties.**

Co-ordination and comparison with other jurisdictions

139. In our Report last year we recommended that HMRC examine how other EU countries' experience in prosecuting export control breaches could be exchanged and built upon more systematically. We are pleased to note that the representatives from the Revenue and Customs Prosecutions Office were able to attend a meeting of prosecutors and investigators hosted by Eurojust.[192] The Prosecutions Office provided us with a note explaining the lessons that it had drawn from the meeting, which included

a) the complex investigative background to […] cases can easily cause similar difficulties to the sort of disclosure questions that we face in the UK;

b) procedures for dealing with such issues vary considerably from country to country. Inability to disclose sensitive matters can sometimes lead to trials collapsing;

c) the ability to implement a very strict licensing regime and impose civil penalties often results in early disposal of breaches; and

d) that ability to have a forum to meet prosecutors and investigators involved in similar work and to share experiences is a valuable experience and well worth developing further. [193]

140. The level of successful prosecutions, although improving in 2006-07,[194] remains at a relatively low level. We considered whether this level of prosecutions was common across the EU. EGAD believed that the UK's export control legislation and enforcement were at least comparable with those of other EU Member States, and were probably amongst the most effective in the World.[195] We asked Dr Bauer and Ms Wetter to compare the approach of the UK Government to that of other European States. They reported the following.

192 Q 168 Eurojust is a European Union body established in 2002 "to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime"— http://eurojust.europa.eu/.

193 Ev 147, para 3

194 One prosecution in 2005-06 (see Cm 6882, p 9) as opposed to two in 2006-07 (see para 133)

195 Ev 57

- A survey of the penalties in place that are linked to export control offences in EU Member States shows that they vary both in type and scale. The range of maximum penalties varies from 12 months of imprisonment (Ireland) to 15 years of imprisonment (Germany).

- A study on administrative enforcement practices in the EU conducted on behalf of the European Commission shows that nine of the 11 Member States surveyed can impose administrative sanctions for export control violations.

- Almost half of the Member States have applied their criminal sanctions against exporters violating export control law. One third of Member States regard only intentional violations as criminal offences, whereas the remaining two thirds consider violations as criminal offences in any event.[196]

141. From this survey and from the Revenue and Customs Prosecutions Office's note on the Eurojust meeting it appears that the method of operation of the authorities in the UK and the problems they face are broadly similar to those of the Member States of the EU. On the sanctions available, it is clear that most States can apply a range of administrative and criminal penalties. Administrative sanctions can include monetary sanctions and the loss of export licences, of the right to privileges (for example, simplified procedures) and of property rights through confiscation and destruction of the confiscated product. Criminal penalties can include fines, imprisonment and suspended sentences. Fines have been classified as either administrative or criminal sanctions, depending on factors such as the authority that decides and the laws on which they are based.[197]

142. We are, however, concerned that neither these contacts with Eurojust nor other contacts with export control licensing and enforcement authorities in the EU appear to have informed the 2007 Consultation Document. In our view it is useful to draw on the experience of EU States when considering issues such as the regulation of ancillary services or the treatment of subsidiary companies, which we address in this Report. Moreover, as the Consultation Document acknowledges some areas such as military end-use control are areas of EU competence.[198] In our view the absence of an international perspective in the Consultation Document is a flaw in the Government's review of the export control legislation.

143. **From the evidence we received about the enforcement of export controls in other Member States of the EU we concluded the following. First, the level and pattern of prosecutions in the UK is not significantly out of line with that in other EU States, but further examination is required for a comprehensive analysis of procedures, approaches and court rulings across the EU. Second, given the similarity of work and problems faced we are disappointed that the 2007 Consultation Document fails to draw in evidence from other EU Member States. Third, we recommend that the Revenue and**

196 Ev 137, section 2.2

197 Ev 137, section 4

198 2007 Consultation Document, para 2.4.3

Customs departments continue to develop arrangements to share information and experiences with enforcement authorities across the EU.

Resources for prosecutions

144. The UK Working Group had "serious concerns that not enough resources are being allocated to the implementation of the existing regime" and that on "a number of occasions where there has been evidence of breaches of controls, the response of Government has been inadequate".[199] HMRC explained in its memorandum that in "allocating resources to overseas investigations that can be costly, we have to take account of the likelihood of cooperation to obtain evidence and the seriousness of the offence that we can allege".[200] **We conclude that in those cases where evidence is required from overseas HMRC is correct to concentrate on those cases involving sensitive goods and destinations where there is a likelihood of cooperation to obtain evidence.** The Government has, however, to recognise that effective enforcement requires resources. **We recommend that the Government increase resources for investigations and prosecutions under section 68(2) of the 1979 Act, particularly, to ensure the coordination and exchange of information with EU and other governments.** This recommendation also fits into the commitment under the EU's Strategy against the Proliferation of WMD, which states that "The EU is committed to strengthening export control policies and practices within its borders and beyond, in co-ordination with partners".[201]

145. Before examining other methods of enforcement and penalties we have one general concern about section 68(2): whether the existence of a range of alternatives to prosecution inhibits the initiation of prosecutions. In our view the existence of other methods of enforcement and penalties should not inhibit the use of section 68(2). **We recommend that as a matter of course HMRC consider all breaches of export control for prosecution under section 68(2) of the Customs and Excise Management Act 1979 and that where the evidential and other tests carried out by the Revenue and Customs Prosecutions Office are met prosecution should be initiated.** The availability of a range of alternative penalties to those imposed by prosecution under section 68(2) of the 1979 Act does, however, take the pressure off the need to modify prosecution procedure by, for example, reducing the evidential tests. We received no evidence that these tests and reviews should be changed. In addition, changes to the reviews or to the tests that the Revenue and Customs Prosecutions Office has to make before launching a prosecution run the risk of the reappearance of the systematic failings which led to the Scott Inquiry—for example, the failure to disclose information to the defence. **We conclude that no change should be made in the operation of the reviews and tests carried out by the Revenue and Customs Prosecutions Office before a prosecution can be launched.**

199 Ev 44, para 49

200 Ev 78, para 6

201 *Presidency conclusions Thessaloniki European Council*, 19 and 20 June 2003, Annex II, para 5

Alternatives to prosecution under section 68(2) of the Customs and Excise Management Act 1979

146. Enforcement of export controls is not synonymous with prosecution under section 68(2) the 1979 Act. As the survey of enforcement of export control in Member States of the EU noted there are several methods of enforcement other than prosecution. The alternatives range from strengthening and extending the licensing controls to disruption and seizure of goods.

Extension of administrative arrangements

147. In its evidence EGAD questioned whether there was any point in burdening a compliant industry with the current bureaucracy if no-one checked who complied and who did not.[202] EGAD said that HMRC staff had to be resourced and trained adequately on export controls and that it was "no good seeking to rectify this merely by seeking to add yet further unnecessary bureaucratic burden on a compliant Industry, when almost no additional efforts will be taken to identify and pursue those who are not complying with the new, even tighter regulations, than have been with the previous ones".[203] We share EGAD's analysis**. We conclude that it would be detrimental to industry if the Government were to increase the administrative burdens on exporters without convincing evidence that the existing measures were being fully enforced against those who with intent flout export controls.**

Prosecution under section 68(1) of the Customs and Excise Management Act 1979

148. The Revenue and Customs Prosecutions Office pointed out that prosecution via section 68(2) of the 1979 Act was not the only option available. Section 68(1) of the 1979 Act provided that an offence was committed if any goods were exported contrary to any prohibition or restriction in force. The Revenue and Customs Prosecutions Office explained this was a strict liability offence, which meant that it was punishable on summary conviction to a maximum penalty of three times the value of the goods or £1,000, whichever was the greater amount. In addition, the goods in question were liable to forfeiture and this offence applied whenever a breach had been committed regardless of the knowledge or intent of the exporter.[204] Recently, recognising the need to improve deterrence, HMRC had identified strict liability cases with aggravating features and reported them to the Revenue and Customs Prosecutions Office.[205] The Prosecutions Office added that:

202 Ev 57

203 *Ibid.*

204 Ev 80, para 5

205 Ev 78, para 8

> the increase in the numbers of strict liability offences that have been prosecuted in the past 12 months has been widely reported in the trade, which suggest that any prosecution of more serious offences would attract similar or greater notice.[206]

149. We consider that prosecution under section 68(1) of the 1979 Act should be examined in all cases where there has been a breach of export control. **We recommend that in any case of breach of export control where prosecution under section 68(2) of the Customs and Excise Management Act 1979 is not possible, the Revenue and Customs Prosecutions Office as a matter of course consider, and take steps to maximise successful prosecution under section 68(1) of the 1979 Act and that the outcome of successful prosecutions be publicised by HM Revenue and Customs.**

Use of warning letters

150. In its memorandum of December 2006 the Government provided a list of the warning letters that had been issued in 2005 and 2006.[207] HMRC explained that the purpose of the letter "is really about preventing and deterring and perhaps steering that company and its employees towards improved compliance".[208] HMRC added that all "warning letters will be referred to our local inland audit staff in one or other of our operational directorates. They will pursue any potential breaches or any issues arising from that warning letter in their follow-up audit of that company's books and records."[209] HMRC also indicated that it could "consider carrying out some further publicity, either local or national, which would focus on the type of offences that are being carried out and that generate the warning letter and therefore provide some further publicity of the types of things that exporters are doing that are clearly potentially in breach of the Export Control Act. Exporters need to take that on board and learn lessons from it".[210]

151. We support the use of warning letters and wish to ensure that they are used to the best effect to strengthen the export control system, and we welcome the use of warning letters and HMRC's commitment to examining greater publicity. **We conclude that a warning letter should not be an alternative to a prosecution that meets the Revenue and Customs Prosecutions Office's tests for a viable prosecution and we recommend that, in those cases where a letter is issued, HMRC follow it up to ensure that all deficiencies have been rectified. We also recommend that HMRC examine the opportunities for greater publicity about warning letters subject to ensuring that the reputation and legitimate commercial interests of exporting companies are not unjustifiably damaged, and report its conclusions in the Government's response to this Report.**

206 Ev 80, para 16

207 Ev 83, para 9

208 Q 163

209 Q 165 (Mr Fuchter)

210 Q 165 (Mr Westhead)

Disruption of exports of concern

152. We note that in the 2007 Consultation Document the Government said that "some effective actions have been taken to prevent or deter undesirable activities overseas".[211] No information is provided. HMRC told us that one of its contributions to preventing and deterring the illegal trade in strategic goods was disruption. HMRC explained that by, for example, visiting potential exporters in collaboration with the relevant agencies they could prevent any exports of concern. HMRC also detected non-listed goods going to end users of concern under the WMD end-use catch-all control but pointed out that these could not normally be seized unless—as already noted at paragraph 87—there was evidence that the exporter had grounds to suspect a WMD end-use. But HMRC's intervention would often result in withdrawal of the goods from export or to the goods being brought within the licensing system.[212] We assume that if the Government becomes aware, for example through intelligence, that uncontrolled goods intended for export could be used for WMD, HMRC or the ECO would inform the exporter of its concerns and at that point the "catch-all" provisions would come into operation and the goods could then be seized.

153. HMRC stated that "much valuable disruption activity has been done by HMRC investigators working with our overseas counterparts, with intelligence and security agencies, with other Government Departments and with industry".[213] HMRC stated that it had disrupted procurement attempts by preventing the supply on 34 occasions between 1 April 2005 and 31 March 2006 and 15 such attempts between 1 April 2006 and 30 September 2006.[214] HMRC's approach chimed with the view of Dr Bauer and Ms Wetter who were of the view in their memorandum that:

> Arguably, the most dangerous proliferator is part of a larger network which works towards developing WMD for a state or a non-state actor. This type of proliferator tends to be indifferent to the deterrent factor of a harsh punishment (general prevention) since he or she is driven by a determination to succeed with the mission. Such a proliferator would need to be removed from the criminal arena to interrupt the proliferation risk (special prevention).[215]

154. EGAD requested that not only more enforcement effort take place (and be publicised), but also for this to be focused in trying to tackle the non-compliant "bad guys", rather than "taking the easy option of seeking to pick on inadvertent administrative minutiae errors from the compliance efforts of the legitimate and law-abiding, in order to meet targets".[216]

---

211 2007 Consultation Document, para 1.4.iv

212 Ev 78, para 1

213 Ev 78, para 8

214 Ev 83, para 10

215 Ev 137, section 1

216 Ev 57

155. Having monitored strategic exports for nearly two years we have no doubt that HMRC should have the powers and resources to be able to disrupt exports smuggled in breach of export control and to make preventative confiscation of goods which may be exported for a WMD end-use. We were reassured that in its evidence to us HMRC was alert to the risk that the use of this crucial power could be open to criticism and was "looking into ways of providing more information with suitable safeguards".[217] **We received no evidence that the power to disrupt had been abused and we accept that it is a legitimate and crucial weapon in HM Revenue and Customs' armoury. The exercise of the power by HMRC is not, however, usually subjected to review by the courts and it therefore needs careful supervision by ministers and Parliament. We recommend that HMRC as part of the review of export controls bring forward proposals to provide more information about the use of the power to disrupt exports of concern and to provide suitable safeguards, and provide information about how this is handled in partner countries**.

Seizures

156. Table 1 below sets out the number of seizures in each of the past six financial years. Seizure occurs when HMRC detain goods subject to export control which appear to be intended for export without a valid export licence.[218]

Table 1

Financial year	HMRC seizures
2000-01	120
2001-02	80
2002-03	67
2003-04	63
2004-05	37
2005-06	34

157. The table shows that there has been a steady downward trend in the number of seizures by HMRC. We note that seizures in 2005-06 stood at less than a third of the level that they were in 2000-01. **We recommend that the Government in replying to this Report provide an explanation for the reduction in the number of seizures since 2000-01.**

217 Ev 78

218 Cm 6882, pp 8-9

The role of the intelligence services

158. When we invited HMRC to suggest indicators to show whether or not it enforced export controls effectively, Mr Fuchter, Head of Prohibitions and Restrictions Group, HMRC, identified, first, "preventing exports to a WMD programme […] either in response to […] tasking from the Restricted Enforcement Unit […] based on sensitive intelligence" and also "preventing similar trafficking in conventional arms". He said that "it is about prevention combined with other departments to ensure that the Government's export controls outcomes are achieved [to ensure] exporters are aware and incentivised to remain compliant [and] those considering or behaving in a non-compliant way are deterred from doing […] Finally, if proliferators and middlemen enter the field, that they are detected quickly and either dissuaded, taken out or denied the goods."[219]

159. The reply from HMRC highlighted for us the critical role of the Restricted Enforcement Unit. We assume that behind the Unit stands the intelligence services which provides material to inform decisions about applications, to inform HMRC's targeting and to alert HMRC to consignments of concern.[220] The part the intelligence services—the Security Service (MI5) and Secret Intelligence Service (MI6)—play in the system of export control is a matter on which neither we nor our predecessor Committees have commented in detail. Nor have we taken evidence directly from the intelligence services. From our own scrutiny over the past two years and from our visits to the Department of Trade and Industry (DTI) and Foreign and Commonwealth Office (FCO) it appears to us that intelligence should play a crucial role in the operation of export controls and that communication and sharing of intelligence within Whitehall is satisfactory. Indirect evidence we received from EGAD chimed with our view. While not commenting on the role of the intelligence services, EGAD believed that liaison and communication between the various Government departments was effective.[221]

160. It appears to us that the efficient enforcement of the export controls is dependent upon intelligence which could be said to provide the lubrication which allows the system to operate. We expect HMRC to be working with the intelligence services and to be using enforcement tools that include the monitoring of telecommunications, undercover operations and computer surveillance, all of which Dr Bauer and Ms Wetter identify as necessary in their memorandum.[222] There are risks in that this part of the system is neither transparent nor subject to the same degree of scrutiny as, say, the Export Control Organisation. The risks could be compounded by the availability of alternatives to prosecution such as disruption which, as we have noted, is not usually subjected to review by the courts.

219 Q 135

220 Ev 78, para 1

221 Ev 57

222 Ev 137, section 1

Level of penalties

161. We sought information of the costs of prosecution and level of fines from the Revenue and Customs Prosecutions Office. Table 2 below[223] shows the cases prosecuted over the last two years, the goods and their value (where available) and the approximate cost of the prosecution to the Revenue and Customs Prosecutions Office. The figures do not include HMRC's investigation costs. It appears that the level of fine is well below the value of the goods seized and in two cases barely covers the costs of prosecution. In one case, Vestguard, the fine of £10,500 was 8% of the value of the goods intercepted. Such a fine could be classed as an overhead rather than a deterrent. We cannot see that fines at these levels act as a deterrent.

Table 2

Year	Case	Goods & value	Fine + costs	Approximate cost of prosecution
05/06	Praetorian Associates	Body armour	£2, 500	£2, 600
	Vestguard	Body armour £128, 000	£10, 500	£3, 300
06/07	PKI	Body armour & helmets £23, 000	£11, 600	£11, 500

162. We sought views on whether the increase in the maximum penalty for intentional breaches of export control from seven to ten years had acted as a deterrent. The Revenue and Customs Prosecutions Office, which has responsibility for prosecuting cases, told us:

> The impact that the increase of the sentencing powers from 7 years to 10 years imprisonment has had on the commission of these offences is difficult to measure because of the challenges of prosecuting these offences and their relative rarity. It is difficult if not impossible to measure how the increase in sentence has acted as a deterrent.[224]

163. EGAD in its evidence said that, whilst the raising of the maximum penalties for non-compliance had a "beneficial effect in assisting export control compliance staff within companies to get the attention of their colleagues on export control matters", the subsequent dearth of any headline prosecutions underscored with heavy penalties on transgressors had allowed this threat of potential prosecution to reduce as an "effective awareness raising tool". EGAD added that those cases which had arisen and been publicised, even though the penalties had been quite small in comparison to those which

223 Ev 147, para 1

224 Ev 80, para 15

could be available, or which are regularly imposed in the USA, "had helped to grab the attention of colleagues within companies", and EGAD urged that more publicity be given to HMRC's activities against illegal exporters, even if this is merely disruptive in nature and not resulting in a court prosecution.[225]

164. In our Report last year we recommended that the Sentencing Guidelines Council conduct a review of the guidelines on sentences for breaches of export control as a priority.[226] In response, the Council explained that it already had a very full work programme for 2006-07 and, after careful consideration, decided that sentencing for breaches of export control could not be accommodated within this, particularly in view of the relatively small number of cases involved. The Council agreed, however, to consider the issue again when it determined its work programme for 2007-08.[227]

165. We are grateful for the consideration that the Sentencing Guidelines Council gave to our recommendation and we appreciate its pressures of work. Nothing in the evidence we have taken this year diminishes the force of the recommendation we made in last year's Report. If, as we have discussed, prosecutions under section 68(2) of the 1979 Act are very rare, we conclude that the effectiveness of the statute as a deterrent will be further weakened if those convicted receive non-custodial sentences or suspended or short imprisonment.[228] We consider that the fact that there are only a small number of prosecutions underscores the need for a review by the Council as there is a risk that the courts may form an erroneous view that a breach of export control is an exceptional and unimportant contravention of the law. **We reiterate our recommendation made last year that the Sentencing Guidelines Council conduct a review of the guidelines on sentences for breaches of export control and we press the Council as a matter of urgency to include the review in its programme for 2007-08.**

Intangible transfers of technology

166. The 2002 Act provided a new power to control the transfer of all controlled technology by electronic means and to control the transfer of information which could be used for weapons of mass destruction. When they examined the primary legislation our predecessor Committees concluded:

> The proposed controls on the passage of technology relevant to weapons of mass destruction are profoundly significant. The Government's proposals are, we believe, ground-breaking in some respects. They deserve support for bringing them forward. It is an area of policy crying out for more effective international agreement. There would also be benefit in close analysis of the experience of other countries and of the measures they are taking, faced with similar challenges. Given the complexity and

225 Ev 57

226 HC (2005-06) 873, para 126

227 Ev 114

228 See table Cm 6954, p9 for list of penalties imposed, the maximum of which was 18 months imprisonment suspended for two years with a ban from being company director for ten years and an asset forfeiture order for £69,980.

> sensitivity of the issues, it is also particularly important that there be wide and detailed consultation in drawing up the secondary legislation. Non-proliferation is arguably the most important single issue in strategic export control.[229]

167. When subsequently they examined the proposed secondary legislation our predecessor Committees recommended 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".[230] They pointed out that different sorts of activity may require different sorts of control.

Effects on academic research

168. When the legislation was being framed academics were concerned that it could infringe academic freedoms and inhibit scientific research—for example, that the Government would require prior scrutiny of research papers and vet research students.[231] Our predecessor Committees recommended "incorporation in the Bill of the safeguards for *bona fide* academic activity set out in the commentary on the draft Bill and in evidence from the Secretary of State".[232] Section of 8 of the 2002 Act contains explicit protection of a number of freedoms.

169. In the run-up to the introduction of the new controls in 2004, the Export Control Organisation (ECO) consulted representative bodies for the academic community and following these consultations placed extensive guidance on its website. Universities UK, a body representing the interests of UK universities, is a standing member of the Export Control Advisory Committee (ECAC), a grouping co-ordinated by ECO bringing together trade associations or other bodies and which provide a forum for discussing export control issues or raising matters of concern. Representatives of academia have attended ECAC meetings on a number of occasions. ECO has also undertaken a number of compliance visits to higher education establishments and has given presentations about the new controls to academic audiences. As part of the preparations for the 2007 review of export controls, ECO has been in touch with a selection of academics and has arranged to meet them.[233] In the 2007 Consultation Document the Government said that it would continue to work closely with the academic community on awareness within this sector.[234]

170. Whilst in principle, all export controls applied to academia in the same way as they applied to any other body, the Government explained to us that, in practice, the main area of concern had been the potential transfer of technology that might be of use in WMD programmes. Controls were applied where the academic or researcher had been informed

229 HC (2000-01) 445, para 77

230 HC (2002-03) 620, para 29

231 HL Deb, 4 March 2002, col 38; HC Deb, 24 June 2002, col 673; HL Deb, 16 December 2003, cols 1080-91

232 HC (2000-01) 445, para 74

233 Ev 104, para 23

234 2007 Consultation Document, para 1.3.5

by the Government that such a transfer was intended for a relevant WMD-related use, or was aware that it was so intended, and might be used outside the EU. As such, the controls were triggered more by the recipient of the technology and the intended use, rather than by the intrinsic nature of that technology, vetting of individual research papers or publications was not part of the Government's strategy for enforcing controls in this area. Instead the Government followed a two pronged strategy:

> The first line of defence against unwelcome transfers of technology is to prevent students of concern attending courses where such technology might be imparted. Historically, this has been achieved by way of the Voluntary Vetting Scheme, but this is soon to be replaced by a more comprehensive, compulsory scheme known as ATAS (Academic Technology Approval Scheme). Under this pre-Visa scheme, which will be run by the Foreign and Commonwealth Office, all non-EU students intending to undertake PhD and Masters research in specific areas (broadly Maths, Engineering, Physics, Chemistry, Biology and Computing) will need to apply for an ATAS certificate. The application will be rigorously risk assessed and a clearance certificate either granted or refused. Until the student possesses the certificate they will not be able to apply for a student visa or extension. The Government then sees export controls as a second line of defence, with the awareness effort as its key tool. A good deal of awareness raising with academics has already taken place […] but the Government is by no means complacent and will consider whether its efforts can be expanded or improved in the light of our forthcoming discussions with the academic community.[235]

171. HMRC told us that it had not concluded any investigations against academics, although it had intercepted academics at outward controls at London Airport on the basis of intelligence. HMRC advised us that it was investigating "a case not involving an academic but involving intangible transfers of technology".[236]

172. We invited the views both of academics' representative bodies and a number of academics who had written on export controls. Whilst we are grateful to those who have replied, we found it difficult to elicit views from academics whose work and students may have been affected by the operation of the 2002 Act. One who responded was Professor Ross Anderson who said that he had been unable to work out whether a number of common examples of routine scientific collaboration breached the regulations or not. He claimed that thousands of UK academics were "conducting bona fide research with colleagues overseas that could be held, should the Government ever care to go after them, to be criminal". In his view:

> The Export Control Act is thus, as currently administered, one of the most objectionable pieces of legislation on the UK statute book. It criminalises thousands of people by stealth, laying them open to jail should they ever annoy the Government. The DTI has not had the courage to advertise this fact at all widely.

235 Ev 104, para 23

236 Q 154

> Thus the affected parties have not […] received sufficient notice of any changes and adequate explanation of the requirements in the orders, and the system of export controls is far from being accountable and transparent.[237]

173. In their memorandum Miss Kidd and Dr Hobbs echoed some of these concerns:

> It would appear that little scientific research has been affected by the UK's export controls for two reasons: firstly, few scientists are aware of 2002 Export Control Act and its implications on research and, secondly, those that are aware do not alter their research programmes to take the Act into account. This is not a satisfactory state of affairs. It is recommended that, as a matter of some urgency, the relevant Research Councils be made aware of the 2002 Act and its implications for academic research and that they are asked to disseminate this information to universities.[238]

174. The Royal Society also told us that academics did not have "a culture of dealing with export controls" and "this is something that will need to be built up over time".[239] The Royal Society stressed, however, that

> it is too soon to determine whether the Export Control Act is significantly affecting academic freedoms or scientific research. We would like to suggest that the Department of Trade and Industry should monitor this issue. We will continue to maintain our watching brief over all legislation or regulation that might unduly hinder scientific progress. If we discover any such issues we will bring them to the attention of your Committee, the Department of Trade and Industry or other Government Departments as appropriate.[240]

175. While we have some sympathy with the view of the Royal Society that more time is needed, the timetable for the review of the legislation does not make this possible. The concerns expressed by academics when the legislation was before Parliament were serious and, if found to be justified, may require changes to the legislation. The absence of an identifiable reaction from academics does not of itself, in our view, justify a conclusion that the legislation is working satisfactorily. The submissions of Professor Anderson, Miss Kidd and Dr Hobbs contradict this view. On the other hand, the Government has adopted a relatively "light touch" to enforcement by concentrating on WMD and, we assume, suspicious activities or individuals identified by intelligence. It is also now putting in place what appears to be a comprehensive system for vetting non-EU postgraduate students where the responsibility for denial of admission rests clearly with the Government, not academic institutions. There are risks with this approach—for example, that academia remains ignorant of the requirements of 2002 Act and may fail to report suspicious activities. **We recommend that the Government examine the effect of the Export Control Act 2002 on academic institutions and on postgraduate research and consider**

237 Ev 121

238 Ev 130

239 Ev 118

240 *Ibid.*

whether the legislation is working as intended. We also recommend that the Government formulate and adopt a publicity strategy to inform academic institutions, research councils and similar bodies of their responsibilities under the Export Control Act 2002.

Open general licences

176. The Government has indicated its intention to use open licensing to ensure that individual licence applications are kept to a minimum.[241] The existing Open General Export Licence (OGEL) for military technology has been extended to electronic transfers of technology. Our predecessor Committees saw no possible objection to this.[242] In addition, the Government introduced an Open General Trade Control Licence (OGTCL), covering trade to and from a number of countries selected on the basis that they had "robust and long developed export control systems" and that they followed the same core principles as the UK and the EU.[243]

177. During our predecessor Committees' examination of the secondary legislation the Working Group on Arms expressed concerns about the Open General Transhipment Licences (OGTLs), which allow the export of specified controlled items by any exporter without the need to apply for an individual licence, provided the shipment and destinations were eligible and certain conditions were met. The Working Group was concerned that OGTLs would provide a loophole allowing exports to countries such as Israel to which the Government would not licence exports directly from the UK.[244] Our predecessor Committees took the view in 2003 that it would be superfluous, bureaucratic and potentially anti-competitive where trade was already subject to robust and principled regulation abroad, to subject British citizens and companies to the requirements of a second regulatory system. The basis on which the Government proposed to introduce OGTLs seemed to be sound to our predecessor Committees.

178. In carrying out our current inquiry we considered whether there was any evidence that the open general licences had provided loopholes, allowed goods to be exported in contravention of the EU Code of Conduct on Arms Exports or had compromised UK interests and priorities in the long term. EGAD stated that it was unaware of any cases which had come to light where goods had fallen into irresponsible hands. Given the conditions attached to OGELs, EGAD assume that, if this were the case, then the OGEL would have most probably been illegally misused in a way which was in breach of its coverage and terms and conditions, and, thus, that the exporter concerned could be prosecuted for an illegal and unlicensed export.[245]

241 2001 Consultation Document, para 3.7-3.8, p 16, and para 4.33, p 34

242 HC (2002-03) 620, para 76

243 *Ibid.*

244 HC (2002-03) 620, para 77

245 Ev 57

179. The UK Working Group argued that "the current licensing requirements regarding transit and transhipment of controlled goods are extremely confusing".[246] The Working Group contended that the standard approach of industry (apart from where the goods concerned were of a particularly sensitive nature) was to assume that "possible regulatory obligations relating to a transit or transhipment can be ignored", as in most circumstances:

a) a licence most probably would not be required;

b) if a licence were required, it would most probably be the Open General Transhipment Licence, for the use of which registration was not required and no records needed to be kept, so it was in effect irrelevant; and

c) in the event that the Government decided that other authorisation should have been sought, the confusion surrounding the rules would make it virtually impossible to have any realistic expectation of a successful prosecution.[247]

180. The Working Group explained:

> The Export Control Act suggests that most transit and transhipment via the UK is permitted as long as certain conditions are met, yet it fails to specify what these conditions are. The Open General Transhipment Licence (OGTL) currently available for use seems to contradict this. For most items on the military list, the OGTL lists a variety of destinations in an annexed Schedule for which individual approval is required. This implies that for sensitive destinations listed on the Schedule, a licence is required in advance to bring these goods through the UK. Since the UK is a major transportation hub and there is confusion amongst all relevant parties (including exporters themselves), amendments to the legislation and/or clear guidance on the rules and procedures for transit should be prioritised.[248]

181. In the 2007 Consultation Document the Government explained that the legislation, in the form of an exception for transit and transhipment, allowed goods on the Military and dual-use lists to pass through the UK en route to another destination via a pre-determined route without the need for a UK licence, provided that the exporter had complied with the laws of the originating country. The exception did not apply to a range of sensitive goods (landmines, torture and paramilitary equipment, and any goods destined for use in a WMD programme) and certain sensitive destinations (including all currently embargoed destinations). In practice this meant that transit/transhipment licences were required for any listed goods en route to Iran or North Korea; and for any goods on the Military list en route to any other embargoed destination. The legislation also placed an upper limit of 30 days on the time that the goods could stay in the UK, and stipulated that they must remain on board a vessel or aircraft, or be on a through bill of lading or through air waybill for the duration of that period. The Government made clear that the transit/transhipment legislation was therefore designed to facilitate legitimate trade by allowing goods to pass

246 Ev 44, para 32

247 Ev 44, para 33

248 Ev 44, para 34

through the UK when they are not the subject of controls or have been appropriately approved in the originating country, whilst enabling the UK to intervene, and potentially halt, the onward movement in the case of goods or destinations of concern.[249]

182. HMRC told us that one of the steps it had put in place was a profiling exercise using its automated freight control systems "to get behind what is going on in terms of the use of OGELs and we need to understand the outcomes from that exercise". The exercise had been running for a year and HMRC had almost 500 checks as a result. HMRC said that outcome had "not discovered any discrepancies and, in fact, the emerging picture […] is that goods tend to be going where an OGEL is quoted because the goods are going, as you would expect, to a non-sensitive destination or the goods are less sensitive". HMRC said that, although there was a large amount of compliance, it was not satisfied as to the evidence either way in terms of degree of compliance.[250]

183. We found no evidence that the open general licences were being abused or that they provided a conduit for the export or transhipment of goods into the wrong hands. We welcome the profiling exercise that HMRC has been conducting on the operating of OGELs. **We recommend that HMRC produce and publish a report on the outcome of the exercise it is conducting on the operation of Open General Export Licences and that HMRC conduct a similar exercise on the operation of the Open General Transhipment Licences in time for the results to be taken into account by the Government before it reaches conclusions on its Review of Exports Controls. In our view it is of crucial importance that not only sensitive goods such as landmines, torture and paramilitary equipment and goods destined for use in a WMD programme or goods destined for embargoed destinations are denied transit and transhipment through the UK but also goods destined for terrorists.**

Compliance visits

184. The Government believes that the principal weapons in the fight to improve compliance are working with industry to improve awareness and a robust compliance auditing regime. It said that a "good deal of effort has already gone into this, and this is continuing, but the Export Control Organisation is open minded about suggestions to improve awareness activity or focus it specifically on identified problem areas".[251]

249 2007 Consultation Document, paras 2.7.1-2.7.3

250 Q 149

251 Ev 104, para 10

185. The Government supplied the following information about compliance visits:

Table 3

Year	Number of Compliance Visits	Percentage of companies found to be fully compliant
2005	533	69%
2005(to end Sept)[252]	421	69%
2006 (to end Sept)	378	63%

186. In a memorandum in December 2006 the Government said that over the last 12 months ECO's Compliance Unit had been specifically targeting OGEL users, the largest increase in its client base, as sub-contractors to larger companies were being asked to export in their own right for the first time. The statistics therefore included an unusually high proportion of first time visits. The Government's said that many of the instances of non-compliance had been technical breaches of licence condition—for example, missing or incorrect undertakings or other supporting paperwork or licences incorrectly referenced on invoices. The Government said that its experience was that where such breaches occurred a revisit within three to six months had usually found the company had improved its processes dramatically and was compliant.[253] The Government added:

> We have also, more recently taken a more robust approach to compliance in conjunction with making more help available to exporters. For example we have run seminars specifically on Compliance and published "Compliance Visits Explained" on our website http://www.dti.gov.uk/europeandtrade/strategic-export-control/help-advice/page33802.html. The latter acts as a companion to the Compliance Manual.
>
> HMRC have also tightened up on minor breaches. Examples of fines levied can be found on the ECO website http://www.dti.gov.uk/europeandtrade/strategic-export-control/licensing-rating/guidance/page33980.html shows the latest, two companies were fined £10,000 and £8,000 respectively plus costs for exporting body armour and helmets without the appropriate licenses. We are also starting to look, with HMRS, [*sic*] at additional measures to those already available around the issue of enforcement.[254]

187. During compliance visits in 2006, 202 companies breached the conditions of the open licences they were using.[255] This broke down as follows:

252 Additional figures for "2005 to end September" to enable comparison with the 2006 figures

253 Ev 83, para 22

254 *Ibid.*

255 Ev 97, para 6

Table 4

Unlicensed Shipments made	35
Incorrect or missing undertakings	26
Problems with electronic transfers or trade controls	14
Company unsure of where their goods fall on the control list, so cannot confirm that they can use an OGEL	6
Problems with using OGELs (misunderstanding the licence, not having the correct supporting documents, not reading the licence)	64
Problems using OIELs (not understanding or reading the licence)	13
General lack of knowledge of UK Export controls leading to errors	44

188. After each compliance visit a letter was sent to the company. If any breaches were found, these were set out in the letter with the remedial actions the company needed to take to be compliant. The Government said that at least 26 breaches had been referred to HMRC, and many of these were still being investigated at the time the Government's memorandum was compiled. It assured us that work was continuing in ECO on improving the quality of the information it produced about breaches and the action taken against companies.[256]

189. We asked how many companies persistently in breach of open licences had been "deregistered" and prevented from using OGELs. The Government replied that companies were not "de-registered" from OGELs because exports covered by OGELs were by definition very low risk—that is, exports for which it would never refuse a licence. However, as part of an initiative to tighten compliance generally, the ECO was looking with HMRC at a range of additional enforcement options, on which it would report to the Committees in due course.[257]

190. In our view entitlement to use an open general licence is a privilege and possible sanctions against those who breach export control should include the loss of such privileges.[258] **We recommend that those who fail to comply with open licences should be denied the privilege of open general licences for at least a year. We also conclude that for the public to have confidence in the system of open licences there needs to be a thorough system of regular compliance checking of those who use open general licences. We welcome the ECO's and HMRC's consideration of additional enforcement options and conclude that, when the Government has reached its conclusions, we should look at this matter again in our next report. At this stage we do not wish to pre-empt the ECO's and HMRC's consideration of additional enforcement options but we**

256 Ev 97, para 6

257 Ev 97, para 7

258 Ev 137, section 2.2

recommend that the Government also review whether resources dedicated to compliance visits and to outreach to industry are sufficient and ensure that the ECO and HMRC produce a joint strategy which, for example, could include joint compliance visits.

Dual-use

191. Transfer controls on dual-use items—that is, goods and technologies that have both civil and military applications, or may be used in connection with WMD programmes—are of crucial importance to prevent goods and technologies falling into the wrong hands. The EU Strategy against the Proliferation of Weapons of Mass Destruction, adopted in December 2003, highlights the importance of export controls.[259] UN Security Council Resolution 1540 of 2004 for the first time creates an international requirement to put effective export controls in place.[260]

192. We sought evidence of instances where exporters inadvertently but persistently breached export controls. EGAD responded that it knew that there were "large numbers of companies and individuals currently operating outside of the regulatory framework", both deliberately and inadvertently, and it argued that the Government had to put more effort into awareness raising and enforcement. EGAD believed "that one promising method of doing this will be through making greater use of regional industrial links and bodies, such as UKTI,[261] Chambers of Commerce and Business Links". EGAD was constrained by an obligation to keep matters in confidence and was not able to quote "chapter and verse of companies' infractions, to demonstrate the scale of the problem" as it would "only serve to dissuade others from approaching us and seeking the advice that they need to be brought back onto the path of export control righteousness, which we must be seeking to encourage and should have our highest priority".[262] EGAD was able, however, to offer some evidence as an indication of the scale of the problem in its view.

> During the 2002/2003 and the 2004 Export Control Roadshows which we jointly undertook with the ECO, we were constantly coming across companies who had come along to learn about the new Export Control Act and what they needed to do to comply, who clearly were coming to realize at these events that they were actually operating in breach of the existing regulations. To take one instance, at the largest such event that we held, in Southampton in January 2004 (attended by over 110 industrialists), we can comfortably estimate that, from comments made at the event, at least 10-15% of the audience had become aware of aspects of the existing regulations that they were, inadvertently, infringing – and this was from an audience who were aware that they were caught by export controls. […]

259 *Strategy Against Proliferation of Weapons of Mass Destruction*, Council of the European Union, 15708/03, December 2003 - http://www.consilium.europa.eu/uedocs/cmsUpload/st15708.en03.pdf

260 *Non-proliferation of weapons of mass destruction*, United Nations Security Council, 1540 (2004) See also Ev 137, section 1.

261 UK Trade and Investment

262 Ev 57

> When companies' shipments have been [intercepted by HMRC as a result of random selection or intelligence], and they approach us […] for help and advice, all-too-often […] the discussions between us will include the use of the phrase that: "But we have been doing this for XX years, and never had any problems before". […]
>
> [T]he Government's own published figures, clearly indicate that something is array. For instance, taking the 2003 Annual Report and excluding EU (then) and CGEA (Community General Export Authorisation) countries for both military and dual-use (the latter of which would not be shown anyway for EU and CGEA nations), SIELs number:
>
> Military List: 2,884
>
> Dual-use Goods: 1,490
>
> Even given the fact that everything "specially designed or modified for military use" is controlled and not everything which is "dual-use" falls within control parameters, it still takes some swallowing that there are double the number of military SIELs to those for dual-use goods. […]
>
> Also, we understand from figures from the ECO that in the period from the start of 2004 through to 31st August 2004, whilst they had anticipated that some 20-40 companies would register for the new OGEL: Technology for Military Goods, in fact some 371 companies had registered to use it – we are not convinced that all of these companies can possibly be firms who were only and solely exporting technology intangibly, and, therefore, only coming within the remit of the regulations when the controls were extended to intangible transfer of technology. Logic dictates that they were exporting technology tangibly prior to this, and only became aware of the licensability of this activity when they were looking into the new regulations.
>
> […U]p until December 2005, 8A002f of the dual-use goods regulations caught: 'Electronic imaging systems, specially designed or modified for underwater use, capable of storing digitally more than 50 exposed images' (i.e. underwater digital cameras). In late-2005, realising that these goods had now become increasingly popular consumer items, it was decided within the Wassenaar Arrangement to de-control them. However, sight of the Annual and Quarterly Reports covering the period before December 2005 would seem to reveal that, despite ever increasing sales of underwater digital cameras here in the UK, there was a total paucity of export licences being applied for by people wishing to take them out of the country (and the EU) with them, for instance on holiday. Was really no-one ever taking these cameras with them on their holidays…or were they taking them and just unaware that they were licensable?[263]

193. We have set out EGAD's representations at some length for two reasons. First, in our view they show that there is evidence that dual-use goods are being exported, probably

263 Ev 57

inadvertently, in breach of export controls. Second, they illustrate a conundrum at the heart of export controls on dual-use: should the authorities expend resources checking for goods and taking action against exporters of goods that would almost certainly be granted a licence if one were sought. In our view the answer has to be that action should be taken otherwise the integrity of the export control system is undermined. **We recommend that as part of its review of export controls the Government bring forward proposals for penalties such as fixed fines to be imposed in cases where the authorities discover dual-use goods exported in breach of export controls but which would normally be given an export licence had the exporter applied for one.**

Appeals

194. When our predecessor Committees carried out pre-legislative scrutiny they welcomed "the proposal to put the appeal procedure on some statutory footing" but considered that it would have to include some genuinely independent element and that there "would be advantage in putting this on the face of the Bill".[264] In the event it was not put on the face of the Act. In recent years the Committee has, however, received no complaints about the appeals process, and currently about a quarter to a third of appeals against refusals of licences are successful.

Table 5

Appeals Information[265]

	Rejected	Partial Rejected	Successful	Percentage Successful	Withdrawn	Not Processed /NLR[266]	Total
1998	14		1	7%			15
1999	18		6	25%		1	25
2000	15		2	12%		16	33
2001	17		6	26%	6	10	39
2002	37		14	27%	17		68
2003	77		37	32%	16		130
2004	60	-	22	27%	8		90

264 HC (2000-01) 445, para 65

265 Information taken from UK Annual Reports on Strategic Export ControlsFigures include appeals against refusals to issue SIELs and revocations of SIELs.

266 No Licence Required

2005	29	1	16	36%	1		47[267]

195. EGAD stated that as far as it was aware, the appeals arrangements were working satisfactorily, and it had not had any complaints registered by companies about the appeals procedures, even if companies complained "on occasion about the decision when the original refusal is upheld on appeal".[268] **We conclude that the appeals procedures are working satisfactorily.**

Exports to British forces operating overseas

196. In reviewing the secondary legislation our predecessor Committees were concerned 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 operations".[269]

197. EGAD said in a memorandum that the creation of two Open General Export Licences in 2004—the OGEL: Military and Dual-Use Goods: Exports to UK Forces Deployed in Embargoed Destinations and the OGEL: Military and Dual Use Goods: Exports to UK Forces Deployed in Non-Embargoed Destinations—had greatly eased potential problems with the provision of support to British armed forces.[270] **We conclude that the secondary legislation has not impeded the provision of support to British armed forces.**

Internet

198. In our Report last year we concluded that the Government's response to the challenge of the Internet as an arms emporium was too passive and failed to take account of the role it now played in promoting and facilitating commerce and exports across the world.[271] In response the Government acknowledged the importance of the Internet and it proposed to consider the matter further.[272] Subsequently the Government started a pilot programme of Internet monitoring, to gauge the extent to which the Internet was used to promote or facilitate the export or transfer of goods that were subject to UK export controls. The Government indicated that it would report the outcome of the exercise to the Committees later this year.[273]

199. We unreservedly welcome the Internet monitoring exercise and we intend to consider this matter further when the Government reports the outcome of the exercise to us.

---

267 Includes 2 refusals to issue a SITCL

268 Ev 57

269 HC (2002-03) 620, para 110

270 Ev 57

271 HC (2005-06) 873, para 82

272 Cm 6954, p 14

273 HC Deb, 22 February 2007, col 184WH

Arms fairs

200. In the 2007 Consultation Document that Government stated:

> "The ECO has systematically sent out mail-shots to industry, both in the UK and overseas, advising them of the impact of the controls before trade fairs, to warn companies that they may need licences e.g. to advertise goods and to give them enough time to apply for them. The ECO, in conjunction with event organisers and other government departments, has also worked to ensure that stands where unlicensed activity is taking place have been withdrawn from exhibitions. However, trade fairs remain an area that, will, by nature, continue to generate administrative challenges.[274]"

201. We invited evidence on the impact of the Export Control Act 2002 on the organisers of arms fairs in the UK. In addition, in our Report last year we received evidence of a number of potential breaches of the Export Control Act 2002 at the Defence Systems and Equipment International (DSEi) arms fair in London in September 2005 and we recommended that, as well as providing guidance and attending arms fairs, the Government actively sought out breaches of export controls at arms fairs.[275] In its response the Government said that it continued to work with organisers of arms fairs to ensure they understood the brokering rules. It would also continue to seek out actively breaches of export controls and that it had made checks and followed up enquiries on several stalls at the Farnborough Air Show.[276]

202. Reed Exhibitions Ltd, which organised DSEi 05, explained to us in written evidence this year that the only significant impact of the legislation on them, "as an organiser of defence exhibitions, has been the time and effort required to understand the new legislation, to interpret, translate and then communicate it to exhibitors and visitors, and to handle the associated enquiries, particularly from overseas companies".[277] More specifically in respect of DSEi 05 Reed said it made the following efforts to communicate the new legislation to all exhibiting companies and visitors:

- An explanation of how the legislation might affect individuals and companies was written into a pdf file with links to the relevant sections on the DTI website. This had been translated into several languages and sent to all exhibiting companies. The same information had been shown on the DSEi website.

- Each company exhibiting at DSEi 05 had been required to sign a statement of compliance with UK law and UK's international undertakings, EU/UN law and EU/UN international undertakings. An additional paragraph had been added to the 2007 exhibitor contract that referred specifically to the UK Export Control Act 2002.

274 2007 Consultation Document, para 1.2.7

275 HC (2005–06) 873, para 86

276 Cm 6954, p 15

277 Ev 116

- An explanation of the new legislation and the impact on exhibiting companies had been included in the exhibitor brochure and a flyer included in every access badge wallet sent to all visitors and exhibitors.

203. Reed added that during DSEi 05 two potential breaches of the law had been brought to its attention and that the appropriate authorities had been informed and the two offending exhibitors' stands closed down.[278]

204. We received no evidence from either companies organising arms fairs or their representative bodies that the Export Control Act 2002 imposed excessive burdens on arms fairs.

205. EGAD in its written evidence commented that it was not clear how many of the organisers of fairs organised in the UK, "have been as *au fait* with the new regulations as the organizers of the DSEi and Farnborough International Airshow exhibitions have been".[279] This was a prescient observation. We received a memorandum from Mr Mark Thomas who attended IFSEC 2007, an annual exhibition for the security industry, in Birmingham on 24 May 2007. He observed a Chinese company, Echo Industrial Co. Ltd, had electro-shock items on public display. Mr Thomas explained that the person in charge of the stall, Mr Xia, "offered to show me the stun weapons and discharged them in the fair. Electro shock weapons make a distinct and loud noise. Anyone walking past would easily have seen the blue electrical flashes". Mr Xia offered to sell supplies of the weapons to Mr Thomas. Mr Thomas reported the matter to fair organisers, CMP Information Ltd, who took prompt action. HMRC was not present at the exhibition.[280] Subsequently, according to press reports, Mr Xia was arrested, pleaded guilty to possessing three stun guns and a friction lock baton and was given a six-month jail sentence suspended for 12 months after the judge "accepted he did not realise he was acting illegally".[281]

206. Mr Thomas was concerned that the Crown Prosecution Service (CPS) had not brought charges of brokering or attempting to sell prohibited weapons. He reported that the police had said that the CPS had "decided not to bring charges, as they regarded Mr Xia as just a stool for the big boys". Mr Thomas said that Mr Xia had been deported, after serving a month on remand and having pleaded guilty. Mr Thomas questioned why the CPS had not brought a case when the evidence was obviously there. He commented that "once again the chance to enforce the legislation has been missed".[282]

207. We are grateful to Mr Thomas for his evidence. He brought the breaches of the 2002 Act to the attention of the authorities and organisers of DSEi 05 last year. We are concerned that he has with ease been able to observe yet another breach of the Act at the exhibition in Birmingham this year.

278 Ev 116

279 Ev 57

280 Ev 152

281 "Man sold stun guns at NEC fair", *Birmingham Mail* , p 6, 23 June 2007; "MP in call over stun gun sales", *Birmingham Mail* , p 19, 27 June 2007

282 Ev 157, paras 6-7

208. **We conclude that the Export Control Act 2002 does not impose an excessive burden on those organising arms fairs and exhibitions in the UK and that the current legislation provides a reasonable framework for regulating arms fairs provided that the legislation is actively enforced by the authorities and the organisers of arms fairs and similar exhibitions. We have, however, serious concerns about enforcement. We recommend that the Government in responding to this report set out the criteria for HMRC attending arms fairs and similar exhibitions. It would also assist us to have an account (a) from HMRC of the breach of export controls which arose at IFSEC 2007 and what information about the requirements of the Act had been conveyed to the defendant in the recent court case; and (b) from the Crown Prosecution Service about the charges brought and why no charges concerning breach of export controls were initiated. We further recommend that where HMRC attends a fair or exhibition its officers patrol during the opening hours, inspect the goods being displayed and put questions to those on stalls to ensure that export controls are not being breached. In addition, we recommend, where HMRC does not assign officers to attend a fair or exhibition at which goods subject to export control are displayed, that HMRC send officers to carry out spot checks and provide expeditious access to officers to deal with matters raised by the organisers, exhibitors or those attending.**

209. As a postscript we should add that Reed Exhibitions Ltd has invited the Committees to visit DSEi 07 and we have been pleased to accept the invitation.

End-use

210. In our Report last year we recommended that the Government establish a pilot programme of end-use monitoring focusing on cases where it had identified some degree of risk—though not sufficient to withhold the issue of a licence—when considering an application for an export licence and to report the outcome of the exercise in 2007.[283] The Government responded that the introduction of a process that allowed for the issue of licenses based on future end-use monitoring militated against the effective application of the EU Criteria at the licensing stage. The Government believed strongly that there was no substitute for a rigorous assessment of any proposed export at the time of application. The Government did not issue licences "where it has identified some degree of risk: if the issue of a licence is assessed to be inconsistent with the Consolidated Criteria then it will not be granted".[284] The end user's record in the use of equipment, whether from the UK or other supplier, in a manner inconsistent with the criteria, was taken fully into account by the Government when assessing export licence applications. On this basis, the Government argued that detailed end-use monitoring of specific UK exports would add little to future assessment of export licence applications.

211. We are disappointed that the Government has rejected the recommendation we made last year and this is an issue we may return to again. This year with the review of export

283 HC (2005-06) 873, para 91

284 Cm 6954, p 15

controls in view we have focussed on the need for obligations in export contracts as a condition for the issue of an export licence.

212. The UK Working Group took the view that there was always some risk of equipment or technology being misused or diverted.[285] It considered that there was a case for including obligations in the contract, which would make it clear in advance what the obligations of all parties to the transaction were. In this way if there was reason to suspect that there was a problem then a monitoring inspection could be requested. The Working Group pointed out that this was done in other areas: in weapons of mass destruction it was an accepted way of operating by the UK Government in terms of biological weapons protocols.[286] The Working Group also called for additional procedures:

a) specific restrictions to be included in the contract and/or the licence on use or retransfer, for example, the prohibition of re-export without permission;

b) the licence and/or contract to state that the UK Government reserved the right to conduct end-use checks; and

c) the licence to make clear what the implications of breaching end-use undertakings would involve, i.e. that all licences connected to the equipment or technology in question would be revoked, and that future licensing decisions would take any breaches into account.[287]

213. During our visits to the Export Control Organisation and Foreign and Commonwealth Office and in written and oral questions we asked the Government about end-use checking and monitoring. The Government explained that its

> preferred position […] remains to issue export licences without end-use conditions, undertaking instead strict risk assessment at the pre-licensing stage and refusing a licence when there is an unacceptable risk of diversion or misuse. In addition, UK Overseas Posts have standing instructions to report any misuse of UK-origin defence equipment. If the conditions of a licence were breached, this would be taken fully into account when the Government assesses any subsequent licence applications. The Government may also, if appropriate, revoke other related licences, and consider whether to prosecute if any criminal offence has been committed.[288]

214. We noted, however, in respect of Israel that the then Foreign Secretary pointed out

> [o]ur Embassy keeps a very close eye on these things; they are extremely conscious of the interest, the concern and the political sensitivity of these matters, and if there are any reports that indicate that there is misuse of material that might have been exported many years ago then clearly they look at it and draw it to the attention of

285 Q 29

286 *Ibid.*

287 Ev 44, para 46

288 Ev 82

> the relevant authorities. So we monitor to the greatest degree we can but we go back [to] the difficulty of detailed end-use monitoring.[289]

215. Following press reports we asked the Foreign Secretary about reports that maritime-patrol aircraft which had been exported from the UK to India were to be sold by the Indian government to Burma and suggested that the export licence should have required a clause in the contract restricting resale.[290] The Foreign Secretary commented:

> With the benefit of hindsight *I suppose one could say it might have been desirable* [emphasis added] but I think the original contract would have been rather a long time ago, possibly even decades […] because we are talking about quite elderly aircraft, but certainly obviously that is something that if a similar export took place today one would consider. We have been in touch with the Government of India to express our concern and they have assured us that these are unarmed aircraft and it is thought that that will remain the position, and obviously we would look very carefully to see whether any requests that were being made for military components in the future might be relevant to these aircraft because […] there was nothing in the original contract.[291]

216. The Government confirmed that it had complete discretion to revoke an export licence. Subject to due process and proper consideration, this discretion was not fettered in any way, including the possibility that compensation may need to be paid.[292]

217. **While we accept that little can now be done in respect of the proposed export of British-made maritime-patrol aircraft from India to Burma, we recommend that it should become a standard requirement of licensing that export contracts for goods on the Military List contain a clause preventing re-export to a destination subject to UN or EU embargo. In addition, the contracts should include a subrogation clause allowing the UK Government to stand in the place of the exporter to enforce the contract in British or foreign courts. We also recommend that the Government require as a condition of licensing that all export contracts make provision to allow for end-use inspections.**

218. After we had taken evidence in July 2007 European and international NGOs, including Amnesty International and Saferworld, claimed in a report[293] that a transfer to Burma of a military helicopter containing components and technology from as many as six European Union countries—including the UK—threatened to undermine an EU arms embargo on Burma. We have raised the case with the Government.

---

289 Q 247

290 "Curbs apply only to aircraft spares: UK," *The Hindu*, 4 February 2006, http://www.hindu.com/2006/02/04/stories/2006020403311300.htm

291 Q 232

292 Ev 146, question 2; the 2007 Consultation Document paras 2.6.1-2

293 *Indian helicopters for Myanmar: making a mockery of the EU arms embargo?*, European and international NGOs, including Amnesty International and Saferworld, July 2007

End-use controls on torture equipment

219. The Trade in Goods (Control) Order 2003[294] classified as "Restricted Goods" a limited range of security and paramilitary equipment that was already subject to UK export controls because of evidence of use in torture. The goods covered included, among others, electric-shock belts and outsize cuffs. Under the Order any person within the United Kingdom, or a United Kingdom person anywhere within the world is prohibited from supplying or delivering, or doing any act calculated to promote the supply or delivery of goods without a licence from the Secretary of State. In 2006, the Export Control (Security and Para-Military Goods) Order,[295] implementing the EU Torture Regulation, expanded the range of goods to include most equipment controlled by that Regulation, including thumb-cuffs, shackle boards and leg irons.

220. In the 2007 Consultation Document the Government pointed out that, although controls on torture equipment were as stringent as any within the UK legislative framework, they covered items which it had been agreed at EU level constituted the greatest risk of use in torture. They did not control any other general purpose equipment that could conceivably be used for torture such as ropes, blowtorches, and power drills. It noted that there had been calls for the current controls to be extended to include more items, or for an end-use control for equipment that could be used for torture or for cruel, inhumane or degrading treatment to be introduced. Such extensions would clearly be in line with the UK's support for international human rights and the strong lead that the Government had already taken in the field of torture equipment. The Government set out options for extending the controls: adding items to the list of torture equipment; an end-use control on torture equipment; or no change.[296]

221. In their evidence to us the UK Working Group and EGAD agreed on the need to introduce a torture equipment end-use control. The Working Group again pointed out that "catch-all clauses exist with regard to chemical, biological or nuclear weapons programmes and regarding military end-use to embargoed destinations" and said that "most stakeholders appear to see value in extending this approach to items which will be used in torture, degrading treatment or executions, or in connection with terrorist acts".[297] The Working Group explained:

> The purpose of such a clause would be to state that "if" the exporter is aware, or ought to be aware, that the intended use of items is to facilitate such prohibited acts, irrespective of whether the item was on a control list, the transfer would be prohibited without the express permission of the Government in the form of an export licence. It should be noted that while acts of terrorism and international crime and the development of WMD are included in the relevant consequences section of the 2002 Export Control Act, the facilitation of torture or other forms of cruel or

294 S.I. 2765/2003

295 S.I .1696/2006

296 2007 Consultation Document, paras 2.6.3-2.6.10

297 Ev 44, para 28

> degrading treatment are not. It is clear that such acts do fall within the definitions of internal repression and human rights violations, but it would seem sensible at this juncture to update the primary legislation to specifically include acts of torture under the relevant consequences section to bring the Act in line with existing UK Government and EU policy in this area.[298]

222. In its oral evidence the Working Group added this "is about the end-use and whether the exporter ought to be aware that the outcome of his transaction is to facilitate these acts. This is not saying that a list based system is not something we should be pursuing, of course we should; this is belt and braces, it is to make sure that the activity is brought under control and not necessarily just the goods themselves."[299] In addition "by having such a clause it means that once it does become known you can put whatever information you need to put around [for example] the DIY community that certain end users may well be using electric drills for torture. When you go to this particular area all sorts of things could be used for torture and it is not fair to expect industry to know the outcome of everything."[300]

223. EGAD put on record the industry's support for the Working Group's proposals for something more effective than was currently in place to control the export of, and trade in, torture equipment. It believed that the only effective way in which this could be done was through the creation of a torture equipment end-use control. EGAD pointed out that it was possible to use anything for torture and drew attention to recent reports of the use of electric drills in Iraq for this purpose. A control mechanism needed to be in place which was able to catch anything, rather than going down the EU's approach of trying to come up with a definitive list of torture equipment items. Technological advancements and new products developments, as well as the ease with which almost any item could be used for torture purposes, clearly demonstrated to EGAD the deficiencies of adopting a finite list based approach.[301] EGAD envisaged that the arrangement would work as follows:

> To take the scenario of the building company used as a front, it is probably very unlikely that the British exporter would know that that building company was a front. There is a greater possibility that the intelligence services might know that that company was a front. We would envisage a scenario where the Government notifies the exporter—as is the case within WMD—that it is making a particular export licensable under the end-use control because it has reason to believe that the goods are going to be used for the purposes of torture. At that point the transaction becomes licensable.[302]

> There will be a very small percentage of cases where you could be argued to know. There have been perfectly open procurement attempts for what may be described as

298 Ev 44, para 29

299 Q 26

300 Q 27

301 Ev 57

302 Q 43

> torture equipment from the security services of various countries. The exporter there would clearly know that there was a risk that that equipment was going to be used for torture. In the vast majority of cases you would be talking about the other situation where it is a front company, the exporter has no way of knowing and the only thing that is likely to prevent it is the intervention of the intelligence services.[303]

224. The Government commented that exporters had a legal obligation to contact the ECO if they knew or suspected that their exports would be used in connection with a WMD programme or associated WMD delivery systems. The ECO website provided extensive guidance to exporters, highlighting a number of factors that could reasonably raise the exporter's suspicions.[304] In the 2007 Consultation Document the Government said that the control could bite if a person had either been informed by the Government, or knew, that the equipment that he was intending to export would be used for torture. There is also the option of including a "suspicion" clause, though this might widen the net too far, and place unrealistic burdens of due diligence on the exporter given the range of household items that could potentially be caught.

225. We consider that the UK Working Group and EGAD have made a strong case for a "catch-all" or end-use control on equipment used for torture or to inflict inhuman or degrading punishment. **We recommend that the Government bring forward proposals for an end-use control on equipment used for torture or to inflict inhuman or degrading treatment. We conclude that given the range of items that could potentially be caught it would be unreasonable to impose a requirement of due diligence on all exporters for all goods. There are, however, two less stringent obligations we recommend the Government impose on exporters. First, there be a requirement to withhold an export where an exporter has reason to believe that the goods are to be used for torture or degrading treatment. Second, there be an obligation on exporters to inform the Government if they know or have reason to believe that an export is to be used for torture or degrading treatment. Irrespective of the duty on the exporter, we recommend that there should be an obligation on the Government to investigate reports that exports from the UK are being used for torture or to inflict cruel, inhumane or degrading treatment. We recommend that, where the Government establishes a reasonable suspicion of abuse, it be under an obligation to inform exporters who would then be in breach of export control if they exported the goods to the destinations or end users notified by the Government.**

303 Q 44

304 Ev 104, para 26

7 Gaps in the legislation

Licensed production overseas

226. In the 2007 Consultation Document the Government defined licensed production overseas as:

a) where a business based outside the UK produces goods under a licence granted by, or contract or other agreement with a UK company; and

b) an overseas company which is institutionally controlled by a UK parent (for example, the UK parent has a majority shareholding).[305]

227. During pre-legislative scrutiny of the draft Export Control Bill our predecessor Committees concluded:

> What is required is a system which ensures that the Government knows when a licensed production facility is being set up, and which ensures that the goods produced are not exported to countries or end-users where the UK would not licence them. It may be that the option of bilateral agreements offers a better way forward than obligatory contract terms. We do however continue to believe that some statutory powers may be necessary to control licensed production overseas, and recommend that the Bill provide for such powers to be taken in the future under secondary legislation, to be used only if a non-statutory regime is shown to have failed.[306]

228. During the Commons Committee Stage of the Bill the then Minister of State at the Department of Trade and Industry, Nigel Griffiths MP, said:

> the Government consider the amendment [to license production overseas] unnecessary because the Bill already gives us effective powers. It provides for significant control over the practical means by which licensed production arrangements are established and maintained. Such arrangements typically depend on the company in the UK that licenses the manufacture of its products supplying component parts or production technologies to the overseas producer. Where the product is manufactured under licence and has a potential military end-use, an export licence will, in most cases, be required before the equipment and technology necessary for the establishment and further operation of the licensed production facility can be supplied.[307]

305 2007 Consultation Document, para 2.3.1

306 HC (2000-01) 445, para 106

307 Stg Co Deb, Standing Committee B, *Export Control Bill*, 18 October 2001 on NC no. 2

229. The Government's approach was to control the export of equipment and technology, which would usually be required to set up a production facility overseas. In its view the new controls on the export of technology by electronic means, and on the provision of technical assistance "would also affect licensed production overseas". In the words of the then Secretary of State for Trade and Industry these indirect controls would be "very powerful controls on the supply chain on which licensed production almost always depends".[308]

230. In reviewing the secondary legislation in 2003 our predecessor Committees considered the need for specific regulation of overseas production and recommended 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 proved to be warranted in the light of this assessment.[309] There is no evidence that the Government has carried out an assessment.

231. There is a subsidiary issue which our predecessor Committees examined in 2003: whether the Government has enough information about licensed production facilities abroad to assess the likely impact of these facilities on the proliferation of military equipment.[310] In reply to the Committees' Report the Government said:

> The Government accepts the Committee's recommendation [to obtain more information]. 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.[311]

232. During our current inquiry we asked the Government what control it had over an overseas production facility once technology had been transferred overseas under licence and whether the Government could prevent an overseas facility selling equipment made in the plant to irresponsible or objectionable parties. The Government replied that it assessed all applications on a case by case basis. Where it had concerns about the transfer of equipment or technology for the establishment or ongoing supply of an overseas production facility, it could refuse an export licence application. It added:

> If an application is approved, and subsequent information comes to light that casts doubt on its veracity or appropriateness, the licence can be revoked. Any subsequent application for the export of equipment and/or technology to the same end-user would have the new information factored into the assessment. Although the Government does not have jurisdiction over overseas subsidiaries of UK companies, other than where the extraterritorial provisions of UK export controls apply, the

308 HC (2002-03) 620, para 59, Cm 5988, para 10, HC Deb 9 July 2001, col. 628

309 HC (2002-03) 620, para 65

310 HC (2002-03) 620, para 66

311 Cm 5988, para 11

> rigorous assessment of both items related to initial set up and ongoing supply at the licensing stage […] ensures that licences are only issued where they are consistent with the Consolidated EU and National Arms Export Licensing Criteria.[312]

233. In a subsequent memorandum the Government explained the licensing process in more detail:

> When they apply for a licence to export controlled goods or technology, exporters are expected to place all relevant facts before the Export Control Organisation. Where it is apparent that the export will pass through one end user on its way to another destination, or will be used by the initial end user to make controlled goods that will then be re-exported, the Government will need to consider the risks posed by both the initial end user and any known or potential end users after that. A more extended risk assessment is therefore necessary in these cases than in many others and ECO may need to contact the exporter to establish the details of onward supplies more fully.
>
> In the context of overseas production, the Government would wish to examine any risks posed by the known or potential end users of the licensed goods that will be produced overseas (i.e. whether they are likely to use the licensed goods in ways that might breach the Consolidated EU and National Arms Export Licensing Criteria), plus, more generally to consider the extent to which the country hosting the licensed production has any links with countries or programmes of concern or represents a risk of onward diversion. The Government therefore concurs that "what the likely end-use is going to be of whatever it is that is produced overseas" is examined as part of the risk assessment process involved in granting or refusing a licence. […]
>
> The Government will seek to provide the Committee with a case example, but this may prove difficult since the historical database does not specifically identify licences granted in connection with licensed production overseas.[313]

234. In its written evidence EGAD said that licensed production was "not totally outside of control" as there were UK export controls, for instance, on the transfer of technology and plant to allow licensed production to be undertaken overseas.[314] EGAD also argued that with the globalisation of industrial activity, coupled with the growing desire of countries not wanting to be seen "merely to be markets for the goods of companies from other nations, but as partners", the aspiration to see in-country industrial participation in major defence programmes had grown. This phenomenon, and that of offset which very frequently drove it, was constantly growing. EGAD stated that licensed production, as part of an offset package, was crucial to competitiveness and quoted the fifth annual report to the US Congress by the US Dept of Commerce:[315] "The importance of Offset now

312 Ev 100, para 9

313 Ev 104, para 15 See also 2007 Consultation Document, para 2.3.2.

314 Ev 57

315 "Offsets in Defense Trade", May 2001

transcends the traditional technical ones [i.e. quality, price and delivery] in the procurement decision making process".[316]

235. The UK Working Group on Arms took a different view. It argued that the "role of Turkish—supplied and—built Land Rover Defender vehicles in the Andijan massacre in May 2005 graphically demonstrates the particular challenges thrown up by inadequately regulated licensed production agreements". It seemed very unlikely to the Working Group "that Landrover Defender vehicles to this specification would have been licensed for direct export to Uzbekistan from the UK". The Working Group drew the conclusion that the current practice of only licensing the technology associated with production or specific military components supplied as a result of the deal was not sufficient to regulate such re-exports. It suggested that controls "need to be applied to the licensed production agreement itself, placing clear and binding contractual obligations on production ceilings and permitted export markets".[317]

236. We asked the Government whether tailored provisions could be inserted into licences, for example, to regulate the overseas manufacture of products with a potential military end-use. The Government replied that the Export Control Organisation (ECO) did, in a small number of applications, insert special provisos into licences. This happened where the ECO risk assessment of the end user and destination was satisfactory but certain steps needed to be taken by the UK exporter to reduce specific risk elements or protect the security of UK equipment before it reached its destination. Provisos might then be inserted by the ECO to advise the exporter to, for example, remove sensitive elements of the equipment prior to export or ensure that the export moved through agreed routes and methods. The ECO would insert provisos only where they could be discharged by the UK exporter, and related to events within that exporter's control. Provisos could not be used where they could only be discharged by overseas entities.[318] The Government added:

> Whilst this has not been done to date, there could be scope for using provisos to influence contractual arrangements between UK exporters and overseas customers. The difficulty here would be that whilst a proviso might ensure that the UK exporter drafted a contract in an acceptable way, it could not guarantee that the overseas customer adhered to the terms of that contract and so would not be a completely reliable way of ensuring that undesirable sales did not occur. The Government will however, consider the scope for using provisos in this way during the Government's forthcoming review of the Export Control Act 2002 and will invite contributions both from key stakeholders, and more widely during the course of the public consultation.[319]

316 Ev 57

317 Ev 44, para 19

318 Ev 100, para 10

319 *Ibid.*

237. In its 2007 Consultation Document the Government was alert to globalisation "with international collaboration firmly to the fore" and to the "additional challenges for export controls".[320] In particular, that it would conflict with the Government's counter proliferation aims, and its broader support for international human rights, if UK exporters were able to use systematically overseas linked companies or production facilities to supply destinations or end users where the same supplies would undoubtedly have been refused if applications had been put before the UK authorities. The Government acknowledged that there had been some recent examples where equipment or components originating from the UK had been exported to destinations of concern. These had involved goods for which (when they left the UK for further processing overseas) no UK licence was required, but which would have required a licence if exported from the UK in the form in which they subsequently left the overseas production facility. These cases raised difficult questions about what was reasonable and practical in terms of both due diligence and the reach of UK jurisdiction. The Government put forward a number of options which would require the UK company to take a close interest in the ultimate output of the production facility:

a) treat overseas production or subsidiaries as if they were UK exporters and oblige them to apply to the UK for licences to export their products from the overseas destination;

b) control the licensed production agreement itself;

c) make export licences for supplies to licensed production facilities or subsidiaries subject to conditions relating to the relevant commercial contracts; or

d) make no change.[321]

238. We have not taken detailed evidence on the Government's proposals. **On the basis of the evidence we have received this year and the work done by our predecessor Committees we conclude that the current controls over licensed production overseas are inadequate and need to be extended. We conclude that there are advantages in pursuing the third option put forward by the Government in the 2007 Consultation Document: the Government make export licences for supplies to licensed production facilities or subsidiaries subject to conditions relating to the relevant commercial contracts.** Under this approach, any UK export licence could include a condition requiring the commercial contract underpinning the production agreement to satisfy certain conditions, which might, for example, state that the contract should require the licensed production facility or subsidiary to seek permission from the UK company before making any onward supplies, or onward supplies to specified high risk destinations. The UK company would then be obliged to seek approval, in the form of a Standard Individual Export Licence, to supply the listed goods or technology that the licensed production overseas or subsidiary would need to fulfil those orders. Any changes to a contract would also require the UK exporter to submit a new application. In our view this option therefore has the advantage of requiring the UK exporter to review the activities and customers of

320 2007 Consultation Document, para 2.3.4

321 2007 Consultation Document, para 2.3.4-2.3.13

the overseas company and if necessary seek a fresh export licence. **In addition, we recommend that where licences encompass overseas production the Government make it a condition of the license that the contract underpinning the agreement prevent exports from the overseas facilities in breach of EU and UN embargoes and allow inspection. In addition, the contract should include a subrogation clause allowing the UK Government to stand in the place of the exporter to enforce the contract in British or foreign courts.**

239. We are disappointed that the Government was not able to provide us with a sample case to enable us to scrutinise an application for an export licence which encompassed licensed production overseas and we are concerned too that it cannot identify such applications from its database. **We recommend that the Government ensure that its database identifies licences which encompass overseas production.**

Overseas subsidiary companies

240. On the position of overseas subsidiary companies, the UK Working Group started from two principles: that every "country is responsible for ensuring that the arms and the military equipment it exports are not used in contravention of international humanitarian law or human rights law";[322] and that "parent companies do control the activities of subsidiary companies".[323] It reasoned that in a globalised defence market "it is quite logical to see if you can apply these principles along the supply chain where there is the UK connection"[324] and that if a "subsidiary is planning transferring controlled goods or strategic goods then it must seek the permission of the parent company to do so".[325] The UK Working Group argued that "at the very minimum, embargo legislation should be amended to include transfers from subsidiary companies. If it would be illegal to supply the equipment from the UK, it is clearly a loophole to allow UK-owned companies to bypass embargo legislation via the activities of their overseas subsidiaries."[326]

241. The Working Group also urged the Government to look again at whether re-export controls could be applied in these cases. It was clear that overseas subsidiary companies had supplied, and were likely to continue to supply, military equipment to a variety of destinations in cases where the UK parent would not receive an export licence to export similar equipment directly from the UK.[327]

242. **We recommend that the Government extend export controls to encompass exports of goods and destinations subject to EU or UN embargo by overseas subsidiary companies, in which a majority shareholding is held by a UK parent or where UK beneficial ownership can be established. In such cases the parent company would be**

322 Q24 (Mr Sprague)

323 Q 24 (Mr Isbister)

324 Q24 (Mr Sprague)

325 Q 24 (Mr Isbister)

326 Ev 44, para 20

327 Ev 44, para 21

required to obtain a UK export licence or, in the absence of a licence, would be in breach of the Export Control Act 2002.

Military End-Use Control (or "catch-all")

243. There is currently a Military End-Use Control that applies only where the UK exporter has been informed by the UK authorities, that the proposed exports are or may be intended for:

a) incorporation in a third country into military list equipment;

b) for the development, production or maintenance of such equipment; or

c) for use in a plant for production of such equipment;

d) in an embargoed destination or incorporated into a piece of larger Military List equipment that has been exported without a valid export licence to any destination. If the exporter is aware that the proposed export is or may be intended for any of the uses described above, they must inform the ECO, which will decide whether they must apply for a licence and inform them accordingly.[328]

244. In the 2007 Consultation Document the Government pointed out that the Military End-Use Control was an area of EU competence. The scope for unilateral UK changes was therefore limited, and in its view it would be preferable to negotiate changes at EU level to ensure all Member States were applying the same standard of control, and to avoid the risk of exporters exploiting differences in approach by exporting through Member States with less stringent controls.[329] As EU dual-use regulation is currently being revised now is a prime opportunity to propose a change.

245. The Government set out a number of options for change:

a) extend the control to cover specifically listed items of complete equipment that might be of significant operational value to the military in an embargoed destination (under this option, the control would still apply only where the exporter has been informed that a licence is required);

b) extend country coverage beyond embargoed destinations, which has the advantage that as the principle has already been accepted, only the range of sensitive destinations would be extended;

c) extend coverage to both non-controlled components (as now) and specifically listed items of complete equipment that might be of significant value to the military in an embargoed destination or other agreed destination of concern;

328 2007 Consultation Document, paras 2.4.1-2.4.2

329 2007 Consultation Document, para 2.4.4

d) extend coverage to include both non-controlled components (as now) and any significant non-controlled complete item where the exporter knew, or had been informed by the Government, that the item was for use by the military in an embargoed destination or other destination of concern; or

e) no change.

246. The UK Working Group proposed that the legislation be amended to provide a military end-use "catch-all" requirement.[330] It explained that the "globalisation of the arms trade means that occasionally goods that are of critical importance to the operation of the weapons system will by-pass the licensing system as they are not falling into any of the definitions or specifications on the control lists themselves".[331] The Working Group pointed out that the Government already expected exporters who were producing and exporting goods which they think could be intended for use in weapons of mass destruction (WMD) in military systems destined for countries under embargo to report the matter.[332]

247. In its memorandum the Working Group cited the example of a US Predator unmanned aerial vehicle (UAV) which reportedly fired a Hellfire missile seven kilometres across the Afghan border into Pakistan in January 2006. It appeared to the Working Group that the Department of Trade and Industry (DTI) had classified the "electronic" brain of the Predator UAV as civilian off-the-shelf (COTS) technology, and thus not a licensable product and so not subject to export controls, despite the fact that the end product—a UAV—was subject to some of the most restrictive controls under the Export Control Act 2002.[333] The Working Group argued that with "the trends towards globalisation and the increasing importance of dual-use and COTS goods in the development of modern weapons systems […] more and more goods critical to the operation of these systems will bypass the licensing system as they do not fall within the definitions or specification of the control lists".[334] The UK Working Group proposed the expansion of "the concept of military end-use catch-all clauses to capture such goods and technologies". While acknowledging that there were complications, it argued that the system "must clearly be able to differentiate between 'mission critical' components and mundane goods like nuts and washers, wiper blades and fan belts" [and] "it must be possible to develop either threshold systems (as happens in the US) or significance criteria for the role of the component in the finished item".[335] The Working Group cited the example of the US threshold system:

330 Q18

331 *Ibid.*

332 *Ibid.*

333 Ev 44, paras 22-23

334 Ev 44, para 25

335 Ev 44, para 26

> "They have two categories of threshold. They have a 25% threshold system, 25% of the value of the goods of US origin that goes into these systems requires control. For a group of their sensitive destinations which are published on their websites that threshold goes down to 10%."[336]

248. As was the case with the other "catch-all" provisions the question of the knowledge of the exporter was relevant. The Working Group said that there was "clearly a reasonableness issue: is it reasonable for the supplier to have known that its goods are going to end up in military systems?" The Working Group pointed out that there were "all sorts of guidance notes on the DTI website mainly around the WMD side of things, which is essentially a whole trigger list of questions that exporters can ask themselves about a particular customer, the nature of the payment, all of those things which might help". It stressed, however, that it was not arguing that "every item that could have a dual-use that is not on the list should be licensed".[337]

249. The Government was not convinced of the merits of extending UK controls to duplicate the export controls of other nations, "thus subjecting overseas customers to the need to get approval from two licensing authorities for the same transaction". The Government explained that it took account of known subsequent supplies when initially assessing the application to export goods or technology from the UK. Where those subsequent supplies would, in its view, be likely to result in breach of the Consolidated EU and National Arms Export Licensing Criteria, the Government did not issue a licence. The Government believed that this system was both simpler and more effective.[338]

250. On practical issues, HM Revenue and Customs (HMRC) said that

> any extension of the military end-use control, either to extend its breadth to cover more countries or to extend the list of goods, would obviously raise questions on the impact of the vast majority of trade that is going through export controls, in particular if it led to us detaining more goods which were then held up whilst the DTI rating unit had to examine them and conclude whether or not the catch all should be invoked. If lots of goods were subsequently released on that basis, traders might legitimately challenge us. The flip side of that would be the enforcement costs for ourselves and other departments in policing such a scheme.[339]

251. The Predator case raised by the UK Working Group in our view highlights a serious issue: whether components outside export control should be brought within control if their intended use is incorporation into military goods.[340] We are attracted to the arguments that the UK Working Group advanced but we have reservations. First, it is not clear that a system of control based on a threshold for the value of UK goods in the final product, along

336 Q 21

337 Q 22

338 Ev 104, para 17

339 Q 174

340 Direct exports to embargoed destinations are already within export control. The proposed change would extend control to all countries and to re-exports to embargoed destinations.

the lines of that used in the USA, would have brought the IT used in Predator UAV within control. Second, as we have noted already, the imposition of a duty on exporters to enquire into the intended use of their goods—and in this case also ascertain the value of the end product—will impose a burden on industry. Third, in contrast to other suggested "catch-all" provisions such as that for items that could be used for torture, we cannot see that there is a leading responsibility that the Government could play to collect and disseminate intelligence to exporters. Without such a role played by the Government enforcement will be problematic. As HMRC pointed out, the goods brought within control would no longer be defined on control lists and potentially more goods would be held up while rating decisions were made. **On the basis of the evidence we received we conclude that the feasibility and practicability of a Military End-Use Control "catch-all" provision has not yet been established. We recommend that the Government examine other countries' experience with Military End-Use Control "catch-all" provisions before reaching its conclusions.**

Transportation and other services

252. In reviewing the secondary legislation our predecessor Committees considered whether transportation services, financing and financial services, insurances services and general promotion and advertising should be brought within strategic controls. They recommended bringing transportation agents within control in certain circumstances.[341] The Government replied to the Committee:

> Transportation will be regulated in deals involving "Restricted Goods" [long range missiles and torture equipment] 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.[342]

253. In its evidence to our current inquiry the Government said that ancillary services had been brought within export controls only where those services were provided in relation to restricted goods or to the supply of controlled goods to embargoed destinations but that such services were specifically exempted from controls when provided in relation to other controlled goods. The legislation defined ancillary services as;

a) transportation services;

b) financing or financial services;

c) insurance or reinsurance services; and

d) general advertising services.[343]

341 HC (2002-03) 620, para 56

342 Cm 5988, para 9

343 Ev 104, para 7; 2007 Consultation Document, para 2.2.1

254. In their memorandum drawing out lessons from other EU countries, Dr Bauer and Ms Wetter concluded that to "be comprehensive, [sanctions] should apply to all actors in the supply chain, e.g. producers, traders, financers, freight forwarders".[344] They explained that

> comprehensive and clear legislation should be in place, including liability for the different types of activities in the supply chain, such as exporting, shipping, trading, brokering and financing of dual-use goods. One actor may engage in more than one of these activities, and both individuals and companies can carry out the activities. Depending on the type of activity, intent may be more or less difficult to prove, and the character of liability has to reflect this. Moreover, one needs to distinguish between intent to violate export control laws or intent to contribute to a WMD programme.[345]

255. The Government said that there had been no HMRC prosecutions of transport companies or finance companies in relation to strategic export controls and neither had HMRC issued any formal warning letters to transport companies or finance companies. However, if, during the course of an investigation, it were found that a UK transport company or finance company had committed an offence, the Government said HMRC would take appropriate action up to and including reporting the case to the Revenue and Customs Prosecutions Office.[346]

256. The UK Working Group argued in their written evidence that there was an urgent need to bring those involved in the transportation and the financing of the defence transfers more into the transfer control process. It advanced several reasons.

> As more jurisdictions introduce controls on arms traffickers, brokers are tending to "reinvent" themselves as transporters, and thereby to once more step beyond the law. These brokers are typically adept at creating vastly complicated deal structures involving myriad participants, whereby isolating brokering responsibilities becomes increasingly difficult for authorities. Regulating the activities of the transporters would help to address this problem. Furthermore, tracing transportation is more straightforward than tracing brokering paperwork. There is also the possibility of seizing the means of transportation, which would create an incentive for those who would stand to lose their plane or vessel to ensure that they were not involved in an illicit transfer.[347]

257. The Working Group added in its oral evidence:

> Transporters operating out of the UK have a raft of things that they have to look at already—regulations covering hazardous goods, section five requirements applying to the movement of firearms—so extending that to look at export controls as a whole

344 Ev 137, section 2

345 Ev 137, section 4

346 Ev 104, para 7

347 Ev 44, paras 16-17

> does not seem unreasonable. [Although] you would not capture all circumstances; it is about widening the net. If you had any transporter involved in moving stuff through the UK or on behalf of UK persons who themselves fall within the licensing regime, what they have to do is to find out: is this good controllable? If it is, where is your licence? The same would go for financiers.[348]
>
> The transport sector is regulated by a whole raft of commercial practices (there are invoices, manifests, airway bills) all of which should specify the movement of strategic goods on them for a variety of reasons, so there is already an audit paper trail through the transport sector of the movement of goods from A to B.[349]

258. We consider that bringing ancillary services beyond those services that are provided in relation to restricted goods and to the supply of controlled goods to embargoed destinations or for WMD end-use within export control would improve the regulation of strategic export transfers. But a general extension would add to UK service providers' costs and, as services are increasingly globalised, could place them at a competitive disadvantage.[350] As Dr Bauer and Ms Wetter point out, the provision will need to address the question of intent, which may be difficult to establish.[351] Before, however, any extension of the controls on ancillary services could be made, an evaluation of the controls currently in place needs to be made. **We recommend that the Government in responding to this Report explain how the existing WMD end-use controls work and why no prosecutions have been initiated.**

Crown exemption

259. When it reviewed the draft Bill our predecessor Committees recommended "that consideration be given to the desirability of ending the blanket exemption from controls of Government and its agencies as exporters of licensable goods and technology".[352]

260. The UK Working Group submitted that the "Government should apply and should be seen to apply the same transfer criteria when involved as a principal in a strategic transfer".[353] It pointed out that the Government was not obliged when involved as a principal in an arms transfer to apply the licensing process as it would for a sale by a defence manufacturing or trading company. The UK Working Group understood that the power at section 7 of the 2002 Act empowering the Government to "make provision binding the Crown" was included to ensure the UK could comply with international legal

348 Q13

349 Q15

350 A point also made by the Government in the 2007 Consultation Document, para 2.2.5

351 Ev 137, section 2

352 HC (2000-01) 445, para 53

353 Ev 44, para 35

commitments, for example EU Dual-Use regulations, but that, where only national laws applied, the Government had not used this power.[354]

261. The then Minister of State for Trade and Industry, Nigel Griffiths MP, justified the Government's approach during the Commons Committee Stage of the Export Control Bill:

> Our exports (i.e. Government to Government transfers) tend to be items of essential equipment used by our armed forces or in connection with important international collaborative defence projects such as peacekeeping and projects in Kosovo and Macedonia. Items are also exported for international development purposes such as mine clearance.[355]

262. The UK Working Group acknowledged this argument at the time, and proposed that the power to bind the Crown could be subject to certain exceptions, but maintained and still maintained in its evidence to our current inquiry that there were many circumstances where the Crown should be bound—for example, government-to-government sales, disposal sales and gifts—and for which a strict application of the Consolidated Criteria was essential. In the UK Working Group's view the most obvious of these was the al-Yamamah contracts for sales to Saudi Arabia, which were then in the process of being supplemented by the sale of a further 72 "Typhoon" aircraft. Other government-to-government transfers of note included the transfer of 226 Challenger battle tanks to Jordan between 2002 and 2004, and the gifting to Nepal of two Mi17 helicopters in 2002 and of two STOL aircraft in 2004.[356]

263. The Working Group understood that the Government applied the same standards to government-to-government transfers as to commercial transactions, in which case it could see no reason why it refused to allow the use of the same formal process. The Working Group said that changing the legislation to bind the Crown, while providing for some exceptions, would simply guarantee that, at both the contract-negotiation stage and in terms of public and parliamentary scrutiny, the same standards were applied across the board. The Working Group also suggested that the current arrangements could be changed by governmental discretion. In the interests of transparency reporting on commercial transfers, which was centred on licences (both awarded and refused), was more revealing of government policy than reporting on government dealings. The specific information contained in the annual reports on government-to government transfers related only to physical transfers, not to the amount that the Government was willing to transfer or to deals the Government refused.[357]

354 Ev 44, para 35

355 Stg Co Deb, Standing Committee B, *Export Control Bill*, 16 October 2001

356 Ev 44, para 37

357 Ev 44, para 38

264. In its oral evidence the Working Group added that there was also a timing issue: "now we have quarterly reporting on licenses it takes longer to get information on Crown exemption transfers than licensed transfers" as Crown exemption transfers are only published in the annual report.[358]

265. In its written evidence the Government confirmed that "all forms of government-to-government transfers are subject to rigorous examination against the Consolidated EU and National Arms Export Licensing Criteria before being approved". In addition, F680[359] applications were considered case-by-case against the Consolidated Criteria.[360] The Government contended that there would be significant practical difficulties if Crown immunity were revoked:

> We invoke Crown immunity where the Government has ownership or right of disposal over items that are required to be transferred overseas both for its own use, and for certain transfers to other Governments being made as gifts. Where items of military equipment are gifted by the Government this is subject to assessment in accordance with the F680 process […] and such gifts are reported in the Annual Report on Strategic Export Controls. The Ministry of Defence, including UK Armed Forces, transfers its military equipment overseas for its own use, including for operations and training, the transfer of which without Crown immunity would otherwise be subject to export control. The Committee will appreciate that these are not transfers in the normal sense of the word, since the equipment remains in the possession and under the control of the UK authorities. Licensing, including consultation with Other Government Departments which is the bedrock of the assessment of export licence applications, or the reporting of such transfers, would not add any value in these circumstances.[361]

266. We raised the treatment of non-government purchases with the Foreign and Commonwealth Office, which replied:

> all four of the departments would apply the same criteria to non-governmental purchasers as they would to governmental ones so in that sense all of us including the Ministry of Defence would have a stake in it, but in looking at a non-governmental purchaser we would want to look at all the criteria in the export control regime and look at it particularly carefully, because we would want knowledge about a non-governmental purchaser and it might be more difficult to come by than for a governmental one.[362]

358 Q 30, footnote 1

359 See above, para 104.

360 Ev 104, para 11

361 Ev 104, para 13

362 Q 233

267. The Committee in carrying out its recent inquiries has received no evidence that the Crown exemption has covered any exports which have ended up in irresponsible hands (other than as the result of theft in Iraq). The key issues are transparency and consistency of treatment. The EU Code of Conduct on Arms Exports increasingly sets the standard for countries outside the EU such as those in the Balkans. It could undermine the force of the Code and its Criteria which is supposed to apply to all a country's strategic exports if the UK's Crown exemption were to provide a precedent for exemption of government-to-government sales. Unless it is clear that the Code is also applied to government-to-government transfers, it sends out the wrong message and could encourage States with significant state manufacturers and large stockpiles of armaments under government control to dump surpluses on the market and export them to sensitive destinations. In the interest of communicating a clear message to other governments we consider there should be no broadly drawn Crown exemption. We consider that all strategic exports should be treated in the same manner unless there are compelling reasons for an exception.

268. Having now seen the new system operate for three years we cannot see convincing reasons for separate treatment, with one exception, of the government and industry as exporters. **We recommend that the blanket exemption from controls of Government and its agencies as exporters of licensable goods and technology be ended and that details of the Government's and its agencies' exports be reported on the same basis as those of industry. There should, however, be one exception. In order to ensure that exports by the Government and its agencies to UK forces overseas are made expeditiously they should continue to be covered by Crown exemption.**

Prior scrutiny and end-use verification

269. During inquiries into recent annual reports on strategic export controls we and our predecessor Committees have called for the prior scrutiny of certain export licences by Parliament. **We reiterate the conclusion we set out in our Report last year that a prior scrutiny model for certain sensitive (or precedent-setting) arms export decisions should be developed on a trial basis for transfers to countries under, or recently under, embargo. We recommend that the Government examine this proposal in detail as part of its review of export controls.**

Future Proofing

270. We asked both Miss Kidd and Dr Bauer to scan the horizon for any matter that might affect export controls in the future and to consider whether the legislation needed any revisions to address likely future developments. Miss Kidd and Dr Hobbs pointed out that "since the Act came into force in 2002 there have been a number of IT developments and changes in common practice which have increased the ease with which information can be transferred and shared globally". They noted increases in computer power and ease of access to the Internet, and use of resources such as blogs, podcasts, wikis and online forums had become increasingly mainstream. Miss Kidd and Dr Hobbs considered that online resources were by their definition of use available in the public domain and that "any information posted using these resources will come under the public domain exemption of the Act". They were concerned, however, about the increasing use of e-mail as a means to transfer large documents in electronic format and that with most e-mail servers now able

to cope easily with attachments of 10Mb or more this was of a large enough size to facilitate the instant transfer of entire software packages or detailed technical manuals between groups. They pointed out that "developments in this area have substantially increased the ease in which the Act could be circumvented".[363]

271. Dr Bauer and Ms Wetter considered that there needed to be a regular legal revision to harmonise and streamline laws, which might have become a "patchwork after successive amendments, and to take political, legal and technological developments, as well as changes in trade patterns and threats into consideration". The need for specific amendments might also become obvious through loopholes detected through prosecutions (in particular failed ones). They commented that, ideally, loopholes should be detected before proliferators found them.[364]

272. **We recommend that the Government consider whether the development of e-mail to allow it to be used as a means to transfer entire software packages or detailed technical manuals between groups comes within export control and, if it does not, whether it should be brought within control. Given the pace of technological change and globalisation of industry we recommend that the Government carry out a further review of the legislation in five years. In the meantime we recommend that the Government set up an ongoing internal review which responds to technological and global developments and examines best practice and innovative ideas that enhance the effectiveness of export controls in other countries.**

363 Ev 130

364 Ev 137, section 4

8 Effects on business and economic consequences of the legislation

Introduction

273. When the legislation was prepared, in line with policy, the Government prepared a Regulatory Impact Assessment (RIA) which analysed the likely impact of the proposed legislation on the private sector.[365] We asked the Government how accurate were the predictions made in the RIA of an additional 1,000 Standard Individual Export Licences (SIELs) per year (for electronic transfers and goods/technology with a weapons of mass destruction (WMD end-use)[366] and an additional 1,500 Standard Individual Trade Control Licences (SITCLs)[367] and that companies would incur training costs on average of between £100,000 and £460,000.[368] The Government replied:

> The number of additional SIELs and OIELs predicted by the RIA has not in fact materialised. This is due to a number of factors. Chiefly, SIELs and OIELs that already licensed the export of technology in a physical form at the time the new controls came into force, were automatically extended to cover the export of that technology electronically. Other measures, such as the introduction of new OGELs to cover, amongst other things, electronic transfers and personal use of technology overseas by employees of UK companies, also helped to reduce the number of new applications and ensure that the burden on UK businesses was proportionate. The number of SITCLs received since 2004 is also less than predicted, due mainly to use of the Open General Trade Control Licence (OGTCL). It is possible that industry's original estimates which influenced the RIA calculations, were based on the number of transactions to be brought under control, which, in the event, proved to be significantly less than the number of actual licences needed, due to the above proactive measures.[369]

274. **We note that the Government's predictions about the effect of the legislation overestimated the number of licences likely to be sought by exporters. We conclude this was in part a product of industry's apprehensive approach to the legislation and the greater than anticipated use of open licences.**

365 Cabinet Office, Better Policy Making: A Guide to Regulatory Impact Assessment, Overview, at http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/

366 RIA, para 7.1

367 *Ibid.*

368 *Ibid.*

369 Ev 100, para 11 See also 2007 Consultation Document, para 1.1.3.

Economic consequences

275. During the debates on the primary and secondary legislation a number concerns were expressed about the economic consequences. For example, BAE Systems expressed the "hope that the Bill will not have the effect of adversely affecting either the competitiveness of UK companies or their ability to collaborate effectively with EU and/or US partners".[370]

276. We sought evidence to establish whether the licensing regime has had any effects on the UK's defence industries and on their competitiveness. EGAD responded:

> It has been reported to us that the new regulations have, on occasion, been perceived to have played a part in costing UK companies prospective sales, due to the perceptions on the part of the customers that they have less bureaucratic hassle with some other, alternative suppliers. We most certainly would not want this to develop further and to become a parallel with the existing situation with regard to doing business with US companies, where there is an increasing trend internationally, wherever possible, to "buy American last", due to the bureaucratic difficulties attached with using US suppliers, goods, technology and services. Some multinational firms in areas particularly affected could well seek to make future decisions on the locating of investments based on where they perceive that the business climate is most beneficial and easier, especially in this modern global commercial environment.[371]

277. We note the concerns of EGAD, most of which seem directed to the future, but we have received no detailed evidence that the export controls introduced under the Export Control Act 2002 have systematically undermined the competitiveness of the UK's defence industries. **We conclude that the implementation of the Export Control Act 2002 has not undermined the competitiveness of the UK's defence industries.**

Burdens on business

278. When the secondary legislation was in draft, the defence manufacturers expressed "grave concerns" about the burden it would place on business. More specifically their concerns and the Government's response at the time were as follows:

a) the proposals lacked clarity and were too loosely worded; The Government said it would issue guidance and work with industry.[372]

b) the burden of record keeping, particularly for intangible transfer and brokering; The Government's premise was that the records companies kept for their own purposes would also fit the requirements of the licensing regime.[373]

370 HC Deb, 8 November 2001, col 464

371 Ev 57

372 Cm 5988, para 12; RIA, paras 14.1-14.2

373 HC (2002-03) 620, paras 87-88; Cm 5988, paras 17-18; RIA, para 8

c) the need for adequate transitional arrangements;[374] and

d) need for a revised regulatory impact assessment agreed with industry.[375]

279. In its evidence to our inquiry EGAD said that much of the RIA had been "based on inputs provided by industry and […] thanks to the constructive approach adopted in the implementation of the new regulations by the ECO, many of industry's worst fears and predictions of what might happen did not come to pass". EGAD said that "the guidance produced by [the Government], with industry input, addressed many of the issues of clarity for companies about what they needed to do to comply with the new regulations". EGAD was appreciative of the "functional approach" which the Government adopted to implementation of the legislation[376] and by the use of open licences.[377]

280. We suggested to EGAD that is predictions had been wide of the mark. EGAD replied that they "were looking at the possible worse scenario and […] they then warned government they had to talk very seriously with industry to find solutions, as they always have done in the past".[378]

281. The chemical, biological, radiological and nuclear (CBRN) sector of industry, however, reported higher than estimated costs. Costs associated with export licensing had been a frequent complaint of members of NBC UK,[379] which reported:

> The regulatory impact assessment estimated [costs] to be negligible. Two of the larger companies, Smiths Detection and Avon Technical Products, initially estimated that the direct costs were 1% of fixed costs. This is a considerable rise in any company's costs especially when the company has no control over them. As time has gone on practical experience has revealed that the true figure is in excess of 3%, a common figure from many members. Companies with a larger number of products and technologies reported much higher percentages. […] However the indirect costs, which are more difficult to calculate, seem even greater, again a common theme from members. Every time a person within the company wishes to communicate with anyone new they first have to discover whether there is export licence/680 cover in place (680 cover often being a mandatory condition of the licence) and whether it covers the subject under consideration.[380]

374 HC 620 (2002-03), para 103; Cm 5988, para 23

375 HC (2002-03) 620, para 100

376 Ev 57

377 Q 54 (Mr Hayes)

378 Q 56 (Mr Flecther)

379 NBC UK, is a special interest group of the Defence Manufacturers' Association (DMA). NBC UK ensures that complete and co-ordinated information is available for customers requiring equipment from a range of products manufactured within an industry.

380 Ev 122, paras 16-17

282. We consider the concerns of the CBRN sector from paragraph 286 below. **Taking the defence manufacturing sector as a whole we reach two conclusions about the implementation of the export control legislation. First, the cooperation and involvement of industry in drawing up guidance assisted the smooth implementation of the export control secondary legislation. Second, while we acknowledge the constructive approach taken by EGAD, we had concerns about the tone and inaccuracy of some of industry's representations about the implementation of the legislation.**

283. With an eye to the future EGAD suggested that regulatory impact assessments "should be reviewed not just in terms of what it has cost legitimate industry in order to comply with the new regulations, but also, perhaps more importantly, what effective, practical benefit there has been in counter-proliferation terms from their introduction". While not ruling out further extensions and tightening of the regulations EGAD wanted "to be totally convinced of the real, practical (and not just theoretical) benefits which would result from the adoption of such new measures in terms of effective count-proliferation".[381] EGAD put forward no mechanism for measuring the practical benefit. **Whilst we accept that it is reasonable to assess the benefit in terms of counter-proliferation of any extension of export controls, we conclude that a detailed objective test may not be practicable and its absence should not preclude changes to the system of export controls consistent with a precautionary approach.**

Implementation of the controls on intangible transfers of technology

284. On record-keeping for intangible transfers of technology, EGAD was "extremely gratified by the ECO's adoption of a 'functional record-keeping' approach".[382] While noting that there had been some uncertainty EGAD said that two and a half years' worth of practical experience, and the highly welcome publication earlier this year by the ECO of its "Compliance visits explained" manual should assist enormously in clarifying exactly what records need to be kept by exporters.[383] We note that the "functional record-keeping" approach adopted by the Government met with the approbation of industry.

Transitional arrangements

285. Whilst defence manufacturers would have liked to have had a longer implementation period in which to "bed down" the new regulations, EGAD said that for the most part companies coped with the six months that they were given.[384] **We conclude that transitional arrangements lasting six months were adequate for the full introduction of the new export controls.**

381 Ev 57

382 *Ibid.*

383 *Ibid.*

384 *Ibid.*

Unforeseen consequences

286. We asked respondents to identify any unforeseen consequences that the legislation has had. EGAD responded:

> Companies in those areas where the broadest possible level of control has been sought (eg the CBRN sector, and dealing with "restricted goods" under the trade controls) have encountered compliance issues which we do not believe had been foreseen or intended. We are certain that the need for companies such as Jane's Information Group to have to apply for trade control licences for the production of its publications, where they are carrying advertising for "restricted goods", or for companies to have export control compliance coverage in place for submitting CBRN-related technical information to our own Armed Forces (and blue light services) here in the UK, prior to contract signature, cannot have been foreseen or identified as having been amongst those proliferation threats which needed to be brought under control, as aspirations for the new legislation by [the Government].[385]

287. NBC UK explained that Blue Light Services (police, fire and rescue services) were increasingly expected to advise and operate overseas when their help was requested either planning for, or responding to, an incident or event such as the Athens Olympics. Companies, therefore, had to get export licences to discuss these issues with the UK's Blue Light Services, who, themselves, were, according to the Department of Trade and Industry (DTI), not covered by "Crown Exemption" and would in turn need export licences to deploy goods, technology and technical assistance overseas.[386]

288. NBC UK explained that in drafting a "catch all clause" to prevent proliferation the authorities failed to take into account the impact it would have on the industry involved in defence against the threat. In its view the "Relevant Use" clause in the legislation seemed to be at the heart of the problem because it applied "for use in connection with the development, production handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons".[387] NBC UK said that its warnings had not been heeded and the result had been "confusion, bureaucratic issues and unnecessary additional work"[388] with the consequence that "more and more business is turned away or going elsewhere".[389] NBC UK said that "CBRN is important because it encompasses substances not traditionally thought of as warfare agents in NBC terms. The UK is arguably the World's leading nation at providing an integrated CBRN response."[390] NBC UK put forward a number of proposals to revise the secondary legislation and administrative arrangements or, if these changes were not possible,

385 Ev 57

386 Ev 122, para 10

387 Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, (S.I. 2764/2003), para 2

388 Ev 122, para 2

389 Ev 122, para 7

390 Ev 122, para 4

suggested that "an OGEL for the Blue Light Services and users perceived to be under threat should be brought into operation".[391]

289. The Government said that it was "open minded" about the Jane's case and that "we will continue to work with stakeholders to identify possible solutions and will look very carefully at the evidence that is brought before us as a result of the forthcoming public consultation".[392] On the CBRN equipment, the Government said that in recent months the ECO had been working closely with EGAD to review the current coverage of OGELs. A number of alterations to OGEL coverage had been agreed in principle, and the necessary drafting work was now being undertaken with a view to releasing a package of OGEL changes within the next two months.[393] The Government explained that part of the package would be an extension to the Government and NATO End-Use OGEL, to allow that OGEL to be used for supplies of the listed goods and technology where they were for detection and identification purposes. In this way, OGEL coverage for supplies by the CBRN equipment industry—which whilst related to WMD are by definition, not of concern—would become available. The Government believed that this would in large part deal with the concerns raised.[394]

Conclusions

290. EGAD cited two instances where it considered that the reach of the legislation had gone further than expected. On the first case, on the basis of the limited information supplied we cannot conclude that the application of the Export Control Act 2002 to advertisements for restricted goods is either unintended or unjustified. The second case—a requirement on the chemical, biological, radiological and nuclear sector to obtain export licences before submitting technical information to UK Armed Forces and blue light services prior to contract signature—appears *prima facie* excessive**. We recommend that the Government work with industry to produce an Open General Export Licence as soon as possible to address the concerns of the chemical, biological, radiological and nuclear sector about the need to obtain export licences before submitting technical information to UK Armed Forces and blue light services prior to contract signature.**

391 Ev 122, para 25

392 Ev 104, para 28

393 *Ibid.*

394 Ev 104, para 28 See also 2007 Consultation Document, para 1.3.3.

9 Organisational and administrative issues

Export Control Organisation

291. We visited the Export Control Organisation at the Department of Trade and Industry, now the Department for Business, Enterprise and Regulatory Reform, in March. We were briefed by the Minister of State for Science and Innovation, Malcolm Wicks MP, and senior officials and met staff in the Export Control Organisation (ECO) processing applications for export licences as well as having a demonstration of the SPHIRE IT system.[395] We found the visit useful and informative.

292. In our Report last year we reported on the ECO's performance in 2005. EGAD had been complimentary about the improvements in the time ECO took to determine applications for licences.[396] When it gave evidence this year we asked about the service EGAD's members had received from the ECO in 2006. EGAD considered that the ECO had maintained a good performance during 2006.[397] The 2007 Consultation Document stated that figures showed that the percentages of Open Individual Export Licence (OIEL) applications processed within their target time of 60% within 60 working days increased from 64% in 2004 to 74% in 2006, and those for Standard Individual Export Licence (SIEL) applications (where the target is to process 70% within 20 working days) increased from 79% in 2004 to 82% in 2006.[398] EGAD, on behalf of UK industry, warmly welcomed these figures, which it believed were the best ever achieved, and congratulated all of those within Government who had made this possible though their hard work.[399] We add our congratulations to the ECO on achieving this performance.

293. We do, however, add a word of caution. We accept that the speed with which licences are turned around is important, particularly for industry. But other performance indicators are crucial to ensure effective outreach controls: the number of compliance visits, outreach to UK industry and outreach and assistance to third countries.

ECO's website

294. The only issue of concern to EGAD's members was ECO's website[400] which had, in the view of many companies, "been significantly downgraded in its user friendliness and accessibility".[401] EGAD considered that

395 SPIRE is the Export Control Organisation's new fully electronic system for processing licence applications. When it goes live in September 2007, it will replace all the methods currently in use to apply for any of the licences processed by the Export Control Organisation within the DTI - http://www.dti.gov.uk/europeandtrade/strategic-export-control/spire/index.html.

396 HC (2005-06) 873, para 55

397 Q 33

398 2007 Consultation Document, para 1.1.4

399 Ev 69

400 http://www.dti.gov.uk/europeandtrade/strategic-export-control/index.html

401 Q 34

> Whilst the ECO's website used to be […] amongst the best in the World, invaluable, full of easily-accessible information about our export control system and highly user-friendly, this is, sadly, no longer the case, and much searching is now required to find the documents which are needed, which are all still there, but not easy to find (especially for the uninitiated). This retrograde step, which represents a triumph of corporate branding over functionality, is deeply regrettable.[402]

295. ECO is aware that a number of people have found its section of the Department for Business, Enterprise and Regulatory Reform's website difficult to navigate. The Government said that the ECO was working with those responsible for the Department's website to try to address these criticisms.[403] Having used the website for several years we share EGAD's concerns about the deterioration in the usefulness of the ECO website. **We recommend that the ECO review and modify its website to make it easier to use.**

WMD publications by the ECO

296. Miss Kidd and Dr Hobbs in their memorandum urged that an "emphasis should be placed on efforts to prevent the inadvertent transfer of seemingly innocuous goods to entities which may then re-export UK goods (and possible intangible transfers such as designs and software) to states of proliferation concern". They identified front companies and re-exports as difficult to control. They noted that

> Proactive actions by the [ECO] are clearly being taken to prevent inadvertent exports by UK companies to states of proliferation concern. An example of such action took place in March 2006, when the ECO published a special supplement to its Guidance on the Operation of the [weapons of mass destruction] WMD End-Use Control. This listed various Iranian entities which were suspected of being involved in WMD programmes. The publication of such lists is to be commended, as it will help UK exporters to be more wary when dealing with these entities, and also to be cautious when dealing with other Iranian customers.[404]

297. We concur with Miss Kidd and Dr Hobbs. **We conclude that the Export Control Organisation has a key role to play in preventing inadvertent transfer of goods and technologies which can be used in weapons of mass destruction. We recommend that the ECO publish and regularly update Guidance on the Operation of the WMD End-Use Control, including lists of suspected front companies.**

Outreach: UK

298. In our Report last year we concluded that outreach to UK industry was critical to the operation and control of strategic exports and we recommended that the outreach

402 Ev 57

403 Ev 104, para 14

404 Ev 130

programme be expanded significantly.[405] In reply the Government welcomed the Committee's comments on the value of outreach to UK exporters and pointed out that the ECO had been running a number of very successful events around the UK raising the awareness of current exporters and also informing those new to export control and licensing. These events had been well attended and received. However, with the current constraints on resourcing and, with possible further cuts to come, the Government could give no guarantee that the same level of events and awareness could be maintained in the long term.[406]

299. One of the lessons which Dr Bauer and Ms Wetter identified from examination of prosecutions in other European countries was that a joint strategy across government departments and agencies for outreach to industry provided the most effective approach within the enforcement community.[407]

300. The evidence we received this year has strengthened our conclusion that we made in our Report last year that outreach to UK industry is critical to the operation and control of strategic exports. We are convinced that without a comprehensive programme of outreach the risk of dual-use goods falling—through inadvertent transfers—into the wrong hands will increase. If preventing such transfers is a priority for Government, it will have to find the resources to expand its outreach programme. **We recommend, as we did last year, that the outreach programme to industry be expanded significantly.**

5 year open individual export licences

301. We asked the Government how many OIELs with terms of five years or longer were issued in 2005 and 2006. It replied:

> Of a total of 503 OIELs issued between 1 January and 31 December 2005, 336 have a validity period of 5 years or longer. For the period 1 January 2006—30 November 2006, 399 OIELs were issued of which 347 have a validity of 5 years or longer. OIELs are usually issued for 5 years, but ECO will consider issuing them for shorter or longer periods depending on the circumstances. OIELs of any validity period will only be issued following careful assessment and if consistent with the criteria. [The Government] keeps its export licensing decisions under review, for example in the light of changing circumstances, and our advisory Department carry out a review once a year of extant OIELs to determine if their original advice to DTI is still current. OIELs can be revoked or amended at any time.[408]

302. On the basis of the figures supplied the proportion of OIELs with a term of five years or more has increased from 67% in 2005 to 87% in 2006. By any reckoning this is a significant increase. **To ensure that the export control system maintains its integrity we**

405 HC (2005-06) 873, para 69

406 Cm 6954, p13

407 Ev 137, section 4

408 Ev 111, para 15

conclude that the holders of OIELs with terms of five years or longer must be subject to regular compliance checks and we recommend that in its reply the Government explain the extent to which the holders of such licences are subject to compliance visits and checks.

Export enforcement agency

303. We put to HM Revenue and Customs (HMRC) the suggestion made by Mr David Hayes that there should be a single export compliance agency drawing together the DTI, now the Department for Business, Enterprise and Regulatory Reform, and HMRC which would focus exclusively on implementing export controls.[409] HMRC commented:

> looking at it purely in terms of the implementation from a customs point of view, looking at the advantages and disadvantages […] is quite easy to get carried away […] in any area of operational difficulties that Departments face to suggest "Let's have an agency to solve that problem". You have to look quite critically at what setting up an agency would do differently and how it could be made to be more effective compared with the status quo because, on the face of it, creating an agency does not itself create any additional resources. Indeed, it makes it quite difficult to get even the existing level of resources you have got because you have got to denude large multifaceted teams, particularly in Revenue and Customs, which are working together across a number of issues at the same time because it makes sense to do so. You have to take the resources out of that and get the central overheads for the agency.[410]
>
> One of our particular concerns […] is that without having a multifaceted team you have not got quite the same ability to react quickly.[411]

304. We found the points HMRC made against the creation of a single enforcement agency to be cogent. We cannot see that the creation of a single enforcement agency is going to overcome the operational difficulties that are currently faced such as the difficulty in obtaining evidence from overseas to put before a UK court. **On the basis of the evidence put before our inquiry we conclude that there is no overwhelming case in favour of setting up an export enforcement agency.**

Monitoring of imports

305. For the first time this year we raised with the Government the controls on imports of weapons into the UK. Our concerns focussed on the large volume of assault rifles which came into the UK from the former Yugoslavia. The DTI's (now the Department for Business, Enterprise and Regulatory Reform's) Import Licensing Branch issues licences for the import of firearms and ammunition and the Government explained that import

409 Ev 153

410 Q 145

411 Q 146

licences were only granted to those with domestic authority to possess firearms under the Firearms Act 1968, as amended, and that the import licensing regime backed up domestic controls on firearms possession, which were the responsibility of the Home Office.[412]

306. Between 2003 and 2005 import licences which specifically referred to assault rifles were issued as follows:

- 2003 — 40 licences covering 6,220 assault rifles;
- 2004 — 16 licences covering 226 assault rifles; and
- 2005 — 40 licences covering 194,659 assault rifles.

During the same three years, the ECO issued Standard Individual Exports Licences (SIELs) covering assault rifles as follows:

- 2003 — 43 SIELs allowing the export of 1,202 assault rifles;
- 2004 — 47 SIELs allowing the export of 2,205 assault rifles; and
- 2005 — 56 SIELs covering 2,502 assault rifles.

307. In addition, the Export Control Organisation also granted six Open Individual Export Licences (OIELs) during this period for the export of broad categories of weapons which could include assault rifles. The Government explained that one of these was a temporary OIEL for film production purposes and that the remaining five were for exports to countries with rigorous firearm control regimes.[413] As OIELs are not normally quantity limited it was not possible for the Government to state precisely how many assault rifles (if any) had been exported under cover of these OIELs. The Government assured us, however, that, before any OIEL was granted, a range of factors were taken into account, including the items to be exported, the destinations, the Consolidated EU and National Arms Export Licensing Criteria, and that the exporter had the relevant authorisations to hold firearms in the UK. It added that the ECO also carried out regular audits of OIEL holders to ensure that they were complying with the OIELs and any particular conditions applied to them.[414]

308. More specifically on 20,000 assault rifles imported from Bosnia in May/June 2005 the Government assured us that the import procedures had been fully complied with and that checks had been carried out. It pointed out that the removal of weapons from the former Yugoslavia had been an agreed objective of both NATO and the UN, which was fully supported by the UK. The UN Development Programme has been active in running a programme for the destruction or removal of weapons from the former Yugoslavia, and NATO had also played its part in arms reduction in the region.[415]

412 Ev 98

413 *Ibid.*

414 *Ibid.*

415 *Ibid.*

309. We asked HMRC about the checks made on imports. It told us that:

> There is a 100% check on commercial imports of firearms […] Officers have some discretion over how they execute that. If they regard the importer as a well known, regular shipper through their port, they may confine that to a documentary check, but they have the discretion to physically examine the goods and to count them. Supplementing that we have a small team of officers who work throughout the UK called Firearms and Explosives Officers whose job is to audit the books of registered firearms dealers with particular regard to declared imports. We have the frontier control backed up by a deeper audit that takes place of all registered firearms dealers, registered to hold section five firearms, which is exactly what these assault rifles would be. They undertake a number of audit checks. They check that all imported goods have been entered into the firearms register.[416]

310. While we took some comfort from the evidence supplied by the Government, no comprehensive account of the 200,000 assault rifles that were imported between 2003 and 2005 was provided. Our concerns focus on two issues. First, to be told by that Government that "the purpose of the DTI's import controls on firearms is to provide a back up for domestic controls on possession" concerns us. It appears that in contrast to the export regime, the import licensing regime may contain little scrutiny and cross-departmental checking and that licences are issued largely as a matter of course to registered firearms dealers. Given the volume of assault weapons coming into the country we consider that there must be adequate monitoring arrangements to ensure none of these weapons leak onto the streets of the UK and that, if they are part of a weapons destruction programme, they are made unusable. Second, if imported weapons are re-exported they pass through two separate sets of controls each operated by the DTI and HMRC: import and export controls operated by HMRC at the ports of entry and export; and a requirement for import and export licences from the DTI (now the Department for Business, Enterprise and Regulatory Reform). HMRC explained to us that it was not "counting […] out" the imports.[417] We saw no clear evidence that the functions within the respective departments joined up to track the assault rifles or that these departments worked closely together, or with the Home Office, to monitor these large volume of assault weapons. **We recommend that the Government improve the arrangements for monitoring and controlling large volumes of weapons that enter the UK for destruction or re-export. In addition, we recommend that the Government provide a full account of the 200,000 assault rifles that were imported into the UK from the former Yugoslavia between 2003 and 2005, explaining how many were made unusable and how many were re-exported.**

Defence attachés

311. Following press and other reports we raised the possibility of reductions in the numbers of defence attachés with the then Foreign Secretary. She replied: "I am sure everybody realises, it is going to be a stretching public spending round and in the FCO we

416 Q 195

417 Q 196

have to look very carefully at what are going to be very limited resources and make the best possible use we can of them".[418] She added "in our own department very much reprioritising, beefing-up our posts in areas where we believe the challenge and need will be greater in the future and in consequence reducing areas where it would be enjoyable, comfortable, to continue to maintain posts at the level we do".[419]

312. Whilst we appreciate the serious pressures on budgets, we took little assurance from the Foreign Secretary's response and we are concerned that UK defence attaché posts may be cut, particularly in countries where the export of goods and technology from the UK requires careful consideration to ensure that they meet the EU Code of Conduct on Arms Exports and the National Export Licensing Criteria. In responding to our Report last year the Government said that the UK Overseas Posts had standing instructions to report any misuse of UK-origin defence equipment.[420] We consider that defence attachés provide an essential role in the assessment of applications for export licences and also in checking on end-use. **We recommend that the Government do not cut defence attaché posts in countries where the export of goods and technology from the UK requires careful consideration to ensure that they meet the EU Code of Conduct on Arms Exports and the National Export Licensing Criteria, and in countries where the UK and other members of the international community are assisting in the destruction of surplus conventional weapons and WMD materials, or where there are concerns about the exporting of such surplus weapons and materials.**

418 Q 223

419 Q 225

420 Cm 6954, p 22

10 EU regulations and guidelines

Introduction

313. The EU Code of Conduct on Arms Exports adopted on 8 June 1998 forms the basis of the UK's decision-making process for licence applications. The Code contains political commitments, but is not legally binding. It represents minimum standards which all Member States have agreed to apply to exports of controlled goods. These standards are defined through a common set of criteria to be used in deciding whether proposed exports should be allowed. The Government has published consolidated EU and National Criteria which explain how it interprets the terms of the Code.[421] The EU, like the Government, publishes an Annual Report on strategic exports.[422] It includes data on the value of licences issued and actual exports for all EU governments, broken down by Military List category. The report should also include data on the application of the EU Code of Conduct on Arms Exports to dual-use items related to munitions items as they fall under the Code. In December 2006 the EU adopted the Stability Instrument, which during 2007-13 makes €270 million available to reduce weapons of mass destruction (WMD) proliferation risks, which includes measures to strengthen dual-use export controls in third countries, and measures to combat illicit trafficking.

314. As we noted in our Report last year, the implementation of EU Council Regulation 1334/2000 on the control of dual-use items in an enlarged EU was reviewed in 2004. The review revealed discrepancies in implementing legislation, in industrial awareness programmes, in the technical capacities available to national authorities to evaluate licence applications and classify items and as regards the intelligence infrastructure. The review also found that the application of the dual-use regulations differed with regard to, *inter alia*, the use of the catch-all clause, the implementation of denial exchanges, intangible technology transfer controls and transit and trans-shipment controls.[423] In our view the EU review's conclusions reached on these issues might have a bearing on the 2007 Review of Export Control Legislation. In responding to our Report the Government said that the review's recommendations were being assessed by Member States and the Commission.[424]

421 European Union Code of Conduct on Arms Exports, Council Document 8675/2/98 See also HC Deb, 26 October 2000, col 203W and http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1014918697565.

422 For example, *Eighth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports*, Official Journal of the European Union, C250 (16 October 2006) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_250/c_25020061016en00010346.pdf

423 Council of the European Union, *Progress Report on the implementation of Chapter III of the EU Strategy against the Proliferation of Weapons of Mass Destruction*, document 15246/04, Brussels, 3 December 2004, and *Implementation of the recommendations of the peer review of member states' export control systems for dual use goods*, Document 15826/05, Brussels, 15 December 2005 - http:// register.consilium.eu.int/pdf/en/05/st15/st15826.en05.pdf. See also Stockholm International Peace Research Institute, SIPRI Yearbook 2005: *Armaments, Disarmament and International Security*, Oxford University Press, 2005, pp. 699–719 ("Transfer controls" by Ian Anthony and Sibylle Bauer), and *SIPRI Yearbook 2006: Armaments, Disarmament and International Security*, Oxford University Press, 2006, pp 775-97 ("Transfer controls" by Ian Anthony and Sibylle Bauer), and Council of the European Union, 2630th Council Meeting General Affairs and External Relations, Brussels, General Affairs, Press Release no. 15460/04 (Presse 343), 13 Dec. 2004, p 17 - http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/83083.pdf.

424 Cm 6954, p 20

We recommend that in responding to this Report the Government set out the progress that has been made in carrying out the recommendations arising from the 2004 review of the implementation of EU Council Regulation 1334/2000 on the control of dual-use items in an enlarged EU. We further recommend that the Government consider whether the EU review's conclusions have implications for its own 2007 Review of Export Control Legislation.

315. As our predecessor Committees stated in their last two Reports[425] and as we noted in our last Report,[426] the EU Code on Arms Exports has been subject to a fundamental review. It was originally believed that the review was drawing to a close in March 2005. Since then, although the revised code has been agreed at a technical level, its implementation has been blocked by primarily one Member State. We put on record our frustration with this state of affairs but recognise that there is little the UK Government can do to move the matter on.

Transfers of military goods with the EU

316. Article 296 of the Treaty of Amsterdam makes it clear that security and defence are the responsibility of Member States and not within the competence of the European Union. The European Commission has, however, estimated that intra-European export controls cost defence companies in the EU in the region of €3 billion a year on internal trading and it has been examining ways to streamline intra-EU exports.[427] When we asked the then Foreign Secretary about the UK Government's view of these proposals she replied:

> at the moment the Commission is mulling over something like a three-stage process, and we have been engaged in discussions with them to try to shape it in the direction we would hope for. Secondly, they have not made any formal proposals yet; we think they might by the end of the year. Anyway, they are working on some proposals and have not put them forward yet, but the Commission already has the power to regulate public procurement, so while we are keeping an eye and are conscious of the issue […] given what we understand informally of the nature of what the Commission is envisaging we do not think it will encroach on existing Member State competences.[428]

317. In his letter of 6 March 2007 the Minister for Defence Procurement and Support at the Ministry of Defence, Lord Drayson, informed the European Scrutiny Committee that the Commission was planning to issue a three part package of proposals related to European defence equipment procurement:

425 HC (2003-04) 390, paras 108-14; HC (2004-05) 145, paras 83-86

426 HC (2005-06) 873, paras 139-41

427 Commission Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement (28212) 6223/07 COM(06) 779 + ADDs 1–2 The background is set out in the Twentieth Report of the European Scrutiny Committee, Documents considered by the Committee on 2 May 2007, Including: *Fisheries: by-catches and discards The European Research Area Simplification of legislation on transport rates and food hygiene* HC (2006–07) 41-xx, pp27-32

428 Q 370

- a Communication on the context of the European defence equipment market and the challenges foreseen by the Commission;
- a proposal for a Defence Procurement Directive; and
- a draft Regulation on intra-Community transfers.[429]

318. From press reports it appears to us that there is a groundswell for change. It was reported in April that European Union defence ministers had agreed on the need to break down national barriers in the EU arms market, to open up cross-border investment and to reduce Europe's reliance on U.S. military imports. The ministers were reported as saying

> We cannot continue routinely to determine our equipment requirements on separate national bases, develop them through separate R&D (research and development) efforts, and realize them through separate national procurements. This approach is no longer economically sustainable.[430]

319. Having examined the Government's previous statements in the light of the more recent correspondence the European Scrutiny Committee formed the view that the Government's position had shifted, from not supporting the development of a new Directive, to seeking to identify what benefits to defence procurement might be derived from one; that alternative interpretation might be that, with the Commission intent on pursuing this matter, the Government had concluded that damage limitation was the right approach; and that though the Government had said that UK involvement was without commitment to supporting the adoption of a Directive, it seemed to the Committee unlikely that, once produced, it would not in due course become law.[431] The European Scrutiny Committee concluded:

> We have seen nothing so far to justify the apparent change in the Government's position. Perhaps this will become clearer as and when the Commission concludes its consultations and proposals are put forward. If that transpires […] they will need to be able to demonstrate clearly and persuasively why further legislation is the right way of making defence markets more effective and efficient and that it is not "an additional regulatory burden on top of those already in place".[432]

320. If the EU were to acquire a competence in defence manufacturing and to remove the barriers to the free movement of military goods and technology that currently exist within the EU, it would have a profound effect on the UK's system of strategic export controls, potentially such a development could be cause for serious concern, given that EU Member States' export control policies and practice vary. **In our view the Government needs to formulate a policy to respond to any proposals emerging from the European**

429 European Scrutiny Committee, Documents considered by the Committee on 14 March 2007, *Fourteenth Report of Session 2006–07*, HC HC 41-xiv

430 *A Strategy for the European Defence Technological and Industrial Base*, European Defence Agency, 14 May 2007

431 HC (2006-07) 41-xx, para 6.14

432 HC (2006-07) 41-xx, para 6.21

Commission to remove the barriers to the free movement of military goods and technology that currently exist within the EU. The Government's policy needs to address the effect that any changes would have on export controls and to ensure that UK and EU export controls are not weakened. We recommend that the Government set out its policy in responding to our Report.

New dual-use EU Regulations

321. On 18 December 2006 the European Commission brought forward a proposal to revise the Council Regulation on the control of exports of dual-use items and technology.[433] It takes into account the conclusions of the 2004 Peer Review of Member States implementation of the Regulation and the results of a subsequent 2005-2006 impact assessment study, as well as the EU's obligations under UNSCR 1540.[434] The Commission now is involved in the ongoing discussions in the Council and has collected comments from exporters on its proposals. Proposals currently discussed also involve the creation of new community general export authorisations and they would cover export of low value shipments, export for repair, export for exhibition, computers, telecom and information security and chemicals.[435] In a memorandum EGAD said that European industry viewed the proposed new regulation as a "missed opportunity to pursue real reform and amounts to little more than tinkering with the current status quo".[436] In its view the real prize would have been the acceptance of the "certified company" concept in which multi-national corporations with a proven record of compliance were treated as a single entity for export control purposes, regardless of geographic location, and only when goods/data left that global corporate entity would a licensable act occur. EGAD said that this proposal had been dismissed out of hand by the Commission.[437]

322. EGAD said that the new proposed controls centred on brokering dual-use goods, but only in the context of WMD, so the impact would be limited for the vast majority of industry. EGAD's greatest potential concern was the proposed introduction in the new draft regulation of controls on "intermediation" in the supply of dual-use items, i.e. where one party in the EU was an intermediary for the export by another EU party of dual-use items. There was no definition of "intermediation", which left the position of transport companies and insurers unclear. EGAD said that a "clear and concise harmonised definition across the EU of what actually constitutes an act of 'intermediation' is absolutely essential".[438]

433 Council Regulation No. (EC) 1334/2000

434 Communication from the Commission: On the Review of the EC Regime of Controls of Exports of Dual-Use Items and Technology, COM(2006) 829 and SEC(2006) 1696

435 COM(2006) 829 and SEC(2006) 1696

436 Ev 68

437 *Ibid.*

438 *Ibid.*

323. We consider that some changes are required and necessary and that this is a good opportunity to examine revising the regulation while the UK is conducting its Review of the legislation. It is a good opportunity to ensure that UK best practice and proposals are adopted across the EU. **We share EGAD's concerns about the European Commission's proposals for changes to the dual-use regulations and recommend that the Government in its response to this Report explain its policy to the changes proposed by the Commission to the regulations.**

Human rights

324. Criterion 2 of the EU Code on Arms Exports requires:

> The respect of human rights and fundamental freedoms in the country of final destination
>
> "Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:
>
> a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression;
>
> b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.
>
> For these purposes, equipment which might be used for internal repression will include, *inter alia*, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression.
>
> The nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment; summary, arbitrary or extra-judicial executions; disappearances; arbitrary detentions; and other major suppression or violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. […][439]

325. In its written evidence to us Saferworld argued that the Government should introduce a "presumption of denial" for arms exports to an agreed list of countries which raised *prima facie* concerns against the Consolidated Criteria.[440]

439 Cm 6882, p 70

440 Ev 51

326. When she gave evidence we asked the then Foreign Secretary how explicit the link had to be between an export and the risk of its use for internal repression before an export licence was refused. She replied:

> Obviously we take a certain amount of account of the country—for example, if it were Burma then we just would not be selling anything—but the emphasis on scrutinising and taking human rights issues into account is more on the basis of what is the equipment rather than the top of the list being what is the country, so that is always what you would look at. First, is this equipment that could be misused in this way, and then one would look at whether these are circumstances in which one might anticipate it would be safe to let such equipment go, or not so safe.[441]

The Foreign Secretary added that "in 2006 there were 54 submissions that went to ministers and, of those 54, 47 of them were on the basis of human rights concerns".[442]

327. When we pressed on the question of a presumption of denial of exports to countries of concern, Mariot Leslie, Director for Defence and Strategic Threats, Foreign and Commonwealth Office (FCO), said that the "Government considers that in some cases the use of force by a government within its own borders, for example, to preserve law and order against terrorists or other criminals, is legitimate and does not constitute internal repression". Ms Leslie continued:

> I can think of a number of countries where we might have serious concerns about human rights but rather good co-operation on counter narcotics, for instance, and there might be occasions in which we wanted to give potential dual-use equipment to a counter narcotics force provided we were very satisfied with all the measures we would take to assure ourselves we could be satisfied that we could give or sell material to a counter narcotics force and work with it in the mutual interests of dealing with crime, for instance. So I think a blanket criterion that removed the ability to take a case-by-case approach to this would not necessarily be in our interests.[443]

328. The FCO told us subsequently that in 2006 there had been 631 licences, where there was a concern on the grounds of Criterion 2, which were sent to the FCO's Human Rights Group. The FCO asserted that this was "one way we try to ensure consistency".[444]

329. We can see the strength of both Saferworld's position and that of the Government. We have also had the advantage to request additional information when we identify an export that appears questionable in an Annual or Quarterly Report on Strategic Export Controls. We are pleased to be able to say that in nearly all the cases the Government has produced a satisfactory answer—often along the lines of that given by Ms Leslie. In our view a significant part of the problem is the opaque manner in which these exports are

441 Q 257

442 Q 269

443 Q 259

444 Q 260 (Mr Arkwright; footnote 1)

presented and the obfuscating and frustrating terms in which the Government seeks to justify its decision to grant, or withhold, licences. When an interested party notes, for example, the export of armoured vehicles to a government with a poor human rights record it is entirely understandable that he or she is concerned that the export may be used for internal repression. When a question is put to the Government the habitual reply is: *all applications are considered on a case by case basis against the Consolidated EU and National Export Licensing Criteria. Any licence which we assess is inconsistent with the Criteria will be refused*. The answer provides no information and asks the questioner to take the Government's decision to export (or withhold) arms on trust. We remind the Government of one of the conclusions of the Scott Report:

> Without the provision of full information it is not possible for parliament, or for that matter the public, to assess what consequences, in the form of attribution of responsibility or blame, ought to follow. A denial of information to the public denies the public the ability to make an informed judgement on the Government's record. A failure by Ministers to meet the obligations of Ministerial accountability by providing information on their departments undermines, in my opinion, the democratic process.[445]

330. We note that Criterion 2 requires the exercise of "special caution and vigilance in issuing licences, on a case-by-case basis". In our view this means the Government must examine each application for an export licence on its merits. It is not a cloak to throw over every decision to prevent scrutiny of the Government's reasons for issuing or withholding an export licence. **We recommend that the Government provide firm and explicit answers to questions about its decisions to grant, or withhold, export licences for goods or technology which could be used for internal repression in countries where human rights are abused.**

Transparency

331. Exports to a group of countries which include Israel, Saudi Arabia and China show the lack of transparency in the interpretation of the EU Code of Conduct on Arms Exports at its most stark. The reasons for refusal are not published and so may encompass some or all of the Criteria in the EU Code of Conduct on Arms Exports. This of itself is an indication of lack of transparency.

332. We start with a general proposition: whether export controls on goods or technology should be used as an instrument of foreign policy. In written evidence EGAD commented that there "has always been an innate link between foreign policy and sales of defence and other strategic goods, and always will be […] this is unavoidable". EGAD pointed out that arms embargoes were imposed on countries for which no UK defence companies had any commercial interests or perceptions of prospective business—such as Cote d'Ivoire—for political and foreign policy reasons, rather than to prevent potential exports from taking

445 Scott Report, K8.3

place. EGAD believed, however, that the UK was generally less inclined towards using its export licensing system as an instrument of foreign policy than many other nations.[446]

333. From our work and from that of our predecessor Committees we endorse the central point of EGAD's analysis: strategic export controls cannot be divorced from foreign policy. **We conclude that it is entirely reasonable for a government to have a policy of refusing to license exports to a particular country for a stated reason or a foreign policy objective.** A clear statement of policy ensures that everyone—exporter, the licensing authority, the public, etc.—knows where he or she stands. Problems arise, however, where the policy is unclear or where there is a relaxation or tightening in the licensing of exports without an announcement of a change in policy.

Exports to Israel and Jordan

334. In our report last year we recommended that the Government explain its policy on exports to Israel. The policy is that no weapons, equipment or components which could be deployed aggressively in the Occupied Territories will be licensed for export from the UK to Israel.[447] The Government replied:

> All applications are considered on a case by case basis against the Consolidated EU and National Export Licensing Criteria. Any licence which we assess is inconsistent with the Criteria will be refused. This includes taking into account Criteria 4, the preservation of peace, security and stability.[448]

335. As we found the Government's reply unenlightening we have pursued the matter further this year. We start with the statistics for applications for Standard Individual Export Licences (SIELs) which we compare with Jordan for the same period. We selected Jordan because it is a neighbour of Israel, exports to Jordan came under scrutiny during the Scott Inquiry and the value of SIELs since 1997 was not dissimilar to those for Israel in the same period.

Table 6

Israel: standard individual exports licences[449]				
	Issued		Refused	
Year	Number	Value £	Number	Refused
1997	109	-	1	1%
1998	221	-	2	1%

446 Ev 57

447 HC (2005–06) 873, para 62

448 Cm 6954, p 22

449 Statistics complied from 1997 to 2005 UK Annual Reports on Strategic Export Controls and 2006 Quarterly Reports on Strategic Export Controls

1999	190	11,500,000	0	0%
2000	191	12,500,000	3	2%
2001	277	22,500,000	31	10%
2002	161	10,000,000	84	34%
2003	136	9,000,000	25	16%
2004	90	10,500,000	13	13%
2005	96	22,500,000	8	8%
2006	120	14,500,000	23	16%
Total	1,591	113,000,000	190	11%

Table 7

Jordan: standard individual exports licences[450]				
	Issued		Refused	
Year	Number	Value £	Number	Refused
1997	51	-	1	2%
1998	65	-	0	0%
1999	78	3,500,000	0	0%
2000	65	12,000,000	0	0%
2001	85	55,000,000	0[451]	0%
2002	69	7,500,000	0	0%
2003	46	25,000,000	0	0%
2004	61	8,500,000	1	2%
2005	46	9,000,000	0	0%
2006	87	16,000,000	0	0%
Total	626	136,500,000	2	0%

450 Statistics c53plied from 1997 to 2005 UK Annual Reports on Strategic Export Controls and 2006 Quarterly Reports on Strategic Export Controls

451 6 licences were revoked.

336. The statistics for Israel show significant movement compared to those for its neighbour Jordan. The pattern of the two countries was broadly similar until 2000 when the percentage of refusals of applications to Israel increased dramatically: from 2% in 2000 to 10% in 2001. The rise continued into 2002 when 34% of applications were refused. After a fall in 2003 to 2005 it rose to 16% in 2006.

337. Saferworld pointed out that, despite an escalation in violence in the Middle East in the summer of 2006, the UK Government continued to authorise licences to Israel: SIELs to the value of £15.5 million were granted for *inter alia* armoured all wheel drive vehicles, components for military utility helicopters, components for military training aircraft, components for submarines, components for unmanned air vehicle control equipment, components for air-to-surface missiles, components for airborne electronic warfare equipment and technology for use of combat aircraft; and OIELs were granted for *inter alia* components for combat helicopters and components for electronic warfare equipment.[452] The UK's Human Rights Annual Report for 2006 states: "Progress on improving the human rights situation in Israel and the Occupied Territories has been limited […] the UK remains concerned about Israel's failure to respect the human rights of Palestinians in the Occupied Territories."[453]

338. When we raised exports to Israel the Foreign Secretary said that she believed that "something like 0.1% of Israel's total arms imports comes from the United Kingdom and we have not sold main equipment like tanks or artillery or warships to Israel since 1997, so it seems to me we are visibly taking Criterion 4 into account"[454] and that "we do not sell them anything major […] precisely because we do take account of Criterion 4, as you would wish us to do".[455]

339. We accept that the percentage of refusals of applications to particular countries depends on the content of the applications made by exporters. But it can also fluctuate as other factors are taken into account by the Government. **We conclude that on the basis of the statistics there is evidence that the licensing policy to Israel may have been tightened up. We conclude that the Government's "case by case" response in explaining decisions to grant or refuse licences is unclear. While the "case by case" approach gives the Government flexibility this appears to allow latitude to adjust policy without the need for public explanation, which is neither transparent nor accountable.**

340. **We recommend again this year that the Government explain its policy on licensing exports to Israel, Jordan or other countries in the Middle East and that it explain whether it has adjusted its policy since 1997 as events in the Occupied Territories and Middle East have unfolded. We further recommend that Government explain how it assesses whether there is a "clear risk" that a proposed export to Israel might be used for internal repression (for the purposes of Criterion 2).**

452 Ev 51

453 Foreign and Commonwealth Office, *Human Rights Annual Report 2005*, Cm 6606, July 2006, para 2.12

454 Q 242

455 Q 244

Saudi Arabia

341. We have previously received memoranda alleging that bribes were paid by the Defence Sales Organisation (DSO, the predecessor of Defence Export Services Organisation, DESO) to senior Saudi Arabian officials to obtain defence contracts.[456] We put these allegations to the Ministry of Defence (MoD) and attached weight to its responses. In particular, in a memorandum in June 2003 the MoD stated it was a principle that officials "should not engage in, or encourage, illegal or improper actions whether in their relations with UK or overseas firms" and "MoD no longer employs agents nor pays commissions in its Government-to-Government defence export programmes". We asked the Government how the payment of commissions and DESO's activities more generally had been affected by the coming into force of Part 12 of the Anti-Terrorism, Crime and Security Act and the Government replied:

> The Corruption Act of 1906 applied to acts committed in the UK. This position changed with the implementation of the Anti-Terrorism Crime and Security Act 2001 that provided extraterritorial reach in respect of acts of bribery by UK citizens overseas. It has, however, been the position for many years that, even prior to the introduction of the power in the 2001 Act, UK civil servants were already subject to extra territorial jurisdiction for criminal offences if all the elements of the offence were committed overseas. Section 31, sub-section (1) of the Criminal Justice Act of 1948 provides that where any British subject employed by HMG in the UK, when in a foreign country and acting in the course of his employment, commits an offence which if committed in England would be punishable on indictment, then that individual shall be guilty of an offence and subject to the same punishment as if that offence had been committed in England.[457]

342. Following the announcement on 14 December 2006 of the decision to call off the Serious Fraud Office's (SFO) investigation into allegations of corruption in relation to the 1980s al-Yamamah arms sales contract with Saudi Arabia on public interest grounds and because of "the need to safeguard national and international security"[458] further allegations were made by the BBC that MoD officials processed quarterly "invoices" from a Saudi prince, who was seeking payment for "support services" for his role in the al-Yamamah arms deal. It was alleged the officials involved in handling any such payments were based at DESO and that BAE Systems have said it made the payments with the "express approval" of the MoD.[459]

456 See HC (2003-04) 390, Ev 34 and HC (2005-06) 873, para 22.

457 HC (2003-04) 390, Ev 34

458 HL Deb, 14 December 2006, col 1712

459 "MoD accused over role in Bandar's £1bn: BBC says officials processed payments Goldsmith refuses to answer questions", *The Guardian*, 12 June 2007, p 1; and Panorama: Princes, Planes and Pay-offs, *BBC*, 11 June 2007

343. We wrote to the MoD seeking a further memorandum.[460] Rt Hon Des Browne MP, the Secretary of State for Defence, replied that he had nothing further to add to the memoranda already provided to us and our predecessor Committees. He agreed that any allegations of corruption should be taken seriously and he confirmed that the MoD had cooperated fully with the SFO investigation.[461]

Arms embargo on China

344. The EU Arms Embargo on China remains in place. The Government explained, however, that as the Embargo was politically binding, this placed the responsibility on Member States individually to define the precise scope of the embargo as they saw fit. The UK Government interpreted the scope of the embargo as follows: lethal weapons such as machine guns, large calibre weapons, bombs, torpedoes, rockets and missiles; specially designed components of the above, and ammunition; military aircraft and helicopters, vessels of war, armoured fighting vehicles and other such weapons platforms; any equipment which might be used for internal repression.[462]

345. The Foreign Secretary said that there were no particular signs that China was changing its way as far as arms exports were concerned.[463] Paul Arkwright, Head of the Counter Proliferation Department, FCO, added:

> there is an EU pilot project aimed at consulting with the Chinese and improving our own exports controls and the deputy of my department was in China recently talking to the Chinese, both the industry and the officials concerned, about export controls and China represents a very large part of our outreach effort so we are talking directly about export controls and the way we do things, but, as the Foreign Secretary has said, this is a long process which is going to take some time to bear fruit.[464]

346. We understand that there is an EU pilot project which aims to assist non-EU countries strengthen their export control systems for dual-use items. We are unclear why the UK delegation appeared to use the visit to discuss a different issue, the improvement of the UK's own export controls. **We recommend that in responding to this Report that the Government explain what was the purpose of the Foreign and Commonwealth Office's recent visit to China to discuss export controls and what was the outcome.**

347. The FCO assured us that: "The China arms embargo was also raised in the context of an Arms Trade Treaty. There is no read-across between the embargo and encouraging China to engage positively on the ATT initiative. A cross-Whitehall team are proposing to

460 Ev 157

461 Ev 158

462 Ev 83, para 8(d)

463 Q 281

464 Q 282

travel to China in the near future to have formal discussions with Chinese Government officials to explain the case for the ATT, and encourage them to engage."[465]

348. We note what the Foreign Secretary and the FCO have said and see no prospect of immediate change by the Chinese Government either in respect of its arms exports or human rights. **We reaffirm the recommendation we made in our last Report that the Government work within the EU to maintain the arms embargo on the People's Republic of China.**

465 Ev 112, para 4

11 The international perspective

Arms trade treaty

349. On 26 October 2006 the United Nations General Assembly First Committee adopted a resolution to begin a UN based process to take the initiative for an international arms trade treaty forward. The resolution was co-authored by the UK, Argentina, Australia, Costa Rica, Finland, Japan and Kenya, and co-sponsored by a total of 115 countries. In a vote it was passed with 139 countries in support, 24 abstaining, and one (the USA) voting against. The resolution called on the UN Secretary General to:

a) seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export, and transfer of conventional arms, and to submit a report on the subject to the General Assembly at its sixty-second session (2007), and

b) to establish a group of governmental experts, on the basis of equitable geographic distribution, commencing in 2008, informed by the report of the Secretary-General submitted to the sixty-second General Assembly, to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, and to transmit the report of the group of experts to the General Assembly for consideration at its sixty-third session (2008).[466]

350. The deadline for States to send their views on the proposed treaty to the UN Secretary General was April 2007. The Foreign and Commonwealth Office (FCO) had circulated the UK's submission in draft in February and then submitted it in March,[467] in order for it to provide both a stimulus to, and model for, other countries. The UK co-ordinated its approach with Germany which held the EU Presidency during the first six months of 2007 and the basic principles behind the submission had been agreed by the States of the EU. But in order to maximise impact there had been 27 submissions from the States of the EU, rather than a single EU submission, although the European Commission drew the Secretary General's attention to the EU Code on Conduct on Arms Exports. The submissions will inform the work of the Group of Governmental Experts who will formulate the terms of a draft treaty in 2008.

351. The Department for International Development (DFID) explained that it was working closely with the FCO and Ministry of Defence (MoD) to promote an Arms Trade Treaty, and was focusing in particular on building support among developing countries. DFID said that the UK Government had worked hard to secure support for the UN General Assembly resolution of December 2006 and the resolution establishing a Group of Governmental Experts in 2008 to examine the scope, feasibility and parameters of a treaty.

466 Ev 83, para 8

467 HC Deb, 2 July 2007, cols 895-96W

DFID looked forward to working with other government departments, with civil society, and with its developing country partners, in working towards a treaty.[468] The Parliamentary Under-Secretary of State for International Development, Mr Gareth Thomas MP, added

> I think to reduce dramatically the flow of illicit small arms and light weapons we are going to need a comprehensive arms trade treaty. Frankly, that is the single biggest priority internationally for making progress on controls of those types of weapons.[469]

352. The UK Working Group said "whether it is the [arms trade treaty] that we all want will depend on whether or not the supporters of the treaty grab the metal right now and say, 'We have a massive opportunity to turn this treaty into a reality which will actually make a difference for millions of people on the ground'".[470] This view was echoed by the then Foreign Secretary: "I suspect that like a lot of these things there will turn out to have been more support for the general principle of trying to make progress of this kind than there will be for the detail when we come to contemplate that".[471]

353. EGAD made the point in its evidence that the 2002 legislation while strengthening international regulation of the arms trade in the UK had not strengthened it globally. This, in its view, was due to the sheer diversity of export control policies, systems and procedures which were in place around the World, and which had been "developed entirely egocentrically by each nation".[472]

354. We were grateful to receive a briefing from the FCO on the UK's submission on the scope and contents of the treaty. We fully endorse and support the UK Government's submission. We commend the Government, and the FCO in particular, for its energy and skills in encouraging other countries to support the treaty. The next stage in the process is going to be crucial and we hope that we shall be able to report next year that a comprehensive and wide-ranging treaty is in prospect.

Small arms

355. One of the key provisions which we consider should be included in the prospective treaty is the regulation of small arms and light weapons (SALW). The United Nations estimates that since 1990, SALW have been used to kill more than five million people and force 50 million to flee their homes. Millions more have lost their property and their livelihood.[473] The SALW trade is estimated to be a $1 trillion market and there are more than 1,300 arms companies in almost 100 countries competing to sell 8 million new weapons every year. The United States, UK, France, Germany, Russia and China

468 Ev 71, para 37

469 Q 126

470 Q 31

471 Q 206

472 Ev 57

473 UNDP Human Development Report, *Human rights and human development*, 2000, p 36

collectively account for more than 85% of the global SALW sales. But since 1990 the number of new firms in the top 100 manufacturers has more than doubled. India and South Korea now have three companies each on the list, Israel four and Singapore one. Data on Chinese producers are not released, but at least three or four state-owned corporations are believed to be of this scale.[474]

356. We conclude that an international arms trade treaty regulating the trade in small arms and light weapons provides the best prospect to curb the death, destruction and disruption caused by the proliferation of small arms and light weapons. **We recommend that the Government press for the inclusion of provisions in the arms trade treaty to regulate the trade in small arms and light weapons. We recommend that the Government provide a report on progress on the treaty in responding to this Report.**

Bribery and corruption

357. Transparency International (UK) drew attention to UN resolution L55 which noted that "the absence of a common international standard on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and terrorism". Transparency International (UK) argued that the absence of such standards undermined "peace, reconciliation, security, stability and sustainable development" and believed that anti-corruption had to be at the core of the arms trade treaty".[475] It put forward a package of proposals which would require

- export licensing to be strictly conditional on presentation by exporting companies of rigorous contract-specific no-bribery warranties; These would be reinforced by clear evidence that companies had in place sufficient internal compliance systems capable of detecting corruption-risk and preventing the payment of bribes.

- where material was being exported to very high corruption perception countries, additional controls would be required as a condition of the export license.[476]

358. **We recommend that the Government press for the inclusion of provisions in the arms trade treaty to promote good governance and combat bribery and corruption in arms transfers.**

International outreach

359. In our Report last year we recommended that the Government expand its programme of overseas outreach.[477] In reply the Government welcomed the Committee's comments on the value of overseas outreach programmes. It said, however, that there was little prospect

474 *Arms Without Borders*, Amnesty International, iansa (International Action Network on Small Arms) and Oxfam, October 2006 *See also SIPRI Yearbook 2006: Armaments, Disarmament and International Security*, Stockholm International Peace Research Institute (2006)

475 Ev 128, para 1

476 Ev 128, paras 3-4

477 HC (2005-06) 873, para 74

of any expansion of this programme in the short term due to resource constraints. But in the light of these constraints the Government had made a priority of ensuring effective EU outreach.[478] When she gave evidence to us in March we pointed out to the Foreign Secretary that, if there were an international arms trade treaty, the UK would need to give considerable assistance to developing countries to be able to implement the enhanced export control systems. We asked her how the UK would respond to requests for resources. The Foreign Secretary said:

> What we are trying to do is work with people now and in the future to build up understanding and acceptance of the kind of standards that might be useful, to learn from best practice and so on. So I do anticipate that we will do what we can to assist others with the process of enforcement, compliance and so on, but I am not envisaging there will be some kind of big push as we come towards a point of a treaty being considered.[479]

360. We consider that, if the Government takes its commitment to the arms trade treaty and weapons of mass destruction (WMD) non-proliferation seriously, then it is going to have to put resources into international outreach and, in particular, to ensure staffing levels are such that UK licensing, technical and enforcement staff can participate in EU outreach missions. **We conclude that, if a comprehensive treaty is secured, its full benefit will only be realised if countries across the world put into operation export control systems capable of implementing the provisions of the treaty as well as with non-proliferation requirements under UN Security Council Resolution 1540 of 2004 and other treaties and that countries with fully developed systems will have to assist those without. In the UK this will include providing licensing, technical and enforcement staff to participate in outreach missions.**

Multilateral Export Control Agreements

361. The UK is one of the leading proponents of the non-proliferation regime, which includes the Chemical Weapons Convention,[480] the Biological and Toxin Weapons Convention[481] and the Nuclear Non-Proliferation Treaty,[482] and of the export control

478 Cm 6954, p 14

479 Q 208

480 The Chemical Weapons Convention (CWC) was signed in 1993 and entered into force in 1997. It augments the Geneva Protocol of 1925 on chemical weapons. It does not cover biological weapons. The convention is administered by the Organization for the Prohibition of Chemical Weapons, which conducts inspection of military and industrial plants in all of the member nations as well as working with stockpile countries.

481 The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction—more commonly known as the Biological and Toxin Weapons Convention (BTWC)—was simultaneously opened for signature in Moscow, Washington and London on 10 April 1972 and entered into force on 26 March 1975. The Convention bans the development, production, stockpiling, acquisition and retention of microbial or other biological agents or toxins, in types and in quantities that have no justification for prophylactic, protective or other peaceful purposes. It also bans weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict. The actual use of biological weapons is prohibited by the 1925 Geneva Protocol. As of November 2001, 162 states had signed the BTWC and 144 of these had ratified it.

482 The Treaty on the Non-Proliferation of Nuclear Weapons, also Nuclear Non-Proliferation Treaty (NPT or NNPT) is an international treaty, opened for signature on 1 July 1968 to limit the spread of nuclear weapons. There are 189 states party to the treaty. Only four states are not. Two (India and Pakistan) out of eight confirmed nuclear powers

regimes including the Missile Technology Control Regime,[483] the Nuclear Suppliers Group,[484] the Wassenaar Arrangement,[485] the Australia Group,[486] the Zangger Committee,[487] the Additional Protocol of the Non-Proliferation Treaty[488] and UN Security Council Resolution 1540 of 2004.[489] Whilst progress had been made in some of these areas, such as the Additional Protocol, Miss Kidd and Dr Hobbs considered that other areas might be going backwards and that the non-proliferation regime itself was under increasing pressure internationally and seemed to be weakening. They cited the following evidence:

- Slow progress in expanding the membership and effectiveness of the various multilateral export control groups and arrangements: the Wassenaar Arrangement had a membership of 40 and did not include key states such as India and China; membership of the Zangger Committee stood at 36 members, but did not include Pakistan, Brazil, the UAE or India; and participation in the Australia Group stood at 40 but Russia, Israel, China, Brazil, the UAE, Pakistan and India were not participants.

(i.e. those who have openly tested nuclear weapons), and one presumed nuclear power (Israel) neither signed nor ratified the treaty. One further nuclear power, (North Korea) ratified the treaty, violated it and later withdrew.

483 The Missile Technology Control Regime (MTCR) was established in April of 1987 by Canada, France, Germany, Italy, Japan, the UK, and the United States. The MTCR was created in order to curb the spread of unmanned delivery systems for nuclear weapons, specifically delivery systems that could carry a minimum payload of 500 kg a minimum of 300 km. The scope of the MTCR was expanded in 1992 to include non-proliferation of unmanned aerial vehicles for all weapons of mass destruction, making the payload/range threshold much less rigid than the original 500kg/300km.

484 The Nuclear Suppliers Group (NSG) is a multinational body concerned with reducing nuclear proliferation by controlling the export and re-transfer of materials that may be applicable to nuclear weapon development and by improving safeguards and protection on existing materials.

485 The Wassenaar Arrangement (or more fully "The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies") is an arms control convention with 40 participating states. It is the successor to the Cold war-era Coordinating Committee for Multilateral Export Controls (COCOM), and was established on 12 May 1996, in the Dutch town of Wassenaar. A Secretariat for administrating the agreement is located in Vienna, Austria.

486 The Australia Group is an informal group of countries (now joined by the European Commission) established in 1985 to help reduce the spread of chemical and biological weapons by monitoring and controlling the spread of technologies required to produce them. The name comes from Australia's initiative in the 1980s to prevent proliferation, and it manages the secretariat. The group maintains a common list of technologies that could be used in chemical and biological weapons programs which have export restrictions placed upon them. Delegations representing the members meet annually in Paris.

487 The Zangger Committee, also known as the Nuclear Exporters Committee, is derived from Article III.2 of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which came into force in 1970. Each State Party to the Treaty undertakes not to provide: (a) fissionable material, or (b) equipment designed for the processing, use or production of fissionable material, to any non-nuclear-weapon State for peaceful purposes without safeguards. Between 1971 and 1974, a group of 15 nuclear supplier states held a series of informal meetings in Vienna chaired by Professor Claude Zangger. The group, which became known as the Zangger Committee, decided that it would be informal and that its decisions would not be legally binding upon its members. The Committee maintains and updates a list of equipment that may only be exported if safeguards are applied to the recipient facility (called the "Trigger List"); and (b) allows members to coordinate on nuclear export issues.

488 The Additional Protocol is a legal document granting the IAEA complementary inspection authority to that provided in underlying safeguards agreements. A principal aim is to enable the IAEA inspectorate to provide assurance about both declared and possible undeclared activities. Under the Protocol, the IAEA is granted expanded rights of access to information and sites.

489 United Nations Security Council Resolution 1540 (2004) adopted by the Security Council on 28 April 2004. The Resolution requires States to implement a wide range of legislation to prevent the proliferation of weapons of mass destruction.

- The unchecked acquisition of nuclear weapons by Pakistan, India and North Korea and the current nuclear activities of Iran.[490]

362. **While we consider that the Government ought to give top priority to the international arms trade treaty, there is a risk that it may distract support for the non-proliferation regimes. We recommend that the Government bring forward proposals to extend the non-proliferation regimes.**

Cluster bombs

363. The Ministry of Defence defines cluster munitions as follows:

> A cluster munition is an air-carried or ground-launched dispenser, containing numerous sub-munitions, which is designed to eject those sub-munitions over a predefined target area. Cluster munitions are not the same as anti-personnel landmines and are not covered by any weapon-specific conventions, including the Ottawa convention.[491]

364. During the debate in Westminster Hall on the Report we produced last year and subsequently in questions to both the Parliamentary Under-Secretary of State for International Development and the Foreign Secretary we raised the Government's policy on cluster bombs. The Parliamentary Under-Secretary of State explained that the Government had "always made clear that we want progress on the elimination of particularly the so-called "dumb" cluster munitions".[492] The Foreign Secretary said that

> We are happy to work with the Oslo Declaration but our objective is to work through the CCW [Convention on Certain Conventional Weapons] process to try to get agreement. There is nothing wrong with the Oslo process and that is why we were happy to go along and to be part of it and encourage it, but engaging those countries who are producers and users of cluster bombs seems to us to be a more productive way forward and that is why we are seeking in parallel to work through the CCW process.[493]

The Foreign Secretary confirmed that the Government's objective was to phase out the use of "dumb" bombs and to encourage others to phase them out and to work for a treaty that bans them.[494]

365. We also asked the Government what it was proposing to do with its own stock of cluster bombs, and in a memorandum in March 2007 the Government explained:

490 Ev 130

491 HC (2006-07) 269, Q 58

492 Q 78

493 Q 237

494 Q 238

> On 4 December 2006 we stated in a Written Ministerial Statement the UK position on cluster munitions and that we would withdraw dumb variants by the middle of the next decade. On 15 December, in debate in the House of Lords, we explained that we were examining the possibility of bringing this date forward. We have now completed our assessment and, as we stated in a Written Ministerial Statement on 20 March 2007, we will now withdraw our dumb cluster munition variants with immediate effect.[495]

366. On "smart" bombs the Government said that it would retain the 155mm L20A1 artillery round, which contained the M85 sub-munition and which it did not consider to be a "dumb" cluster munition due to each sub-munition having a self-destruct mechanism. The Government explained that "this will remain in service until approximately the middle of the next decade (although this date is subject to review). Consequently, the Government does not consider it possible to work for an early international agreement to ban all cluster munitions."[496]

367. "Dumb" cluster bombs have a failure rate which is estimated to be between 25% and 30% and even "smart" cluster bombs may have a failure rate which may be between 5% and 10%.[497] In other words, even in cluster bombs which have a relatively sophisticated self-destruct mechanisms, up to one in 10 bomblets (or ejected sub-munitions) that do not explode will lie live on the battle field. The potential to inflict death and injury on innocent non-combatants entering the field after the engagement is therefore substantial.

368. **We congratulate the Government on its support for a ban on "dumb" cluster bombs and on its commitment to withdraw the UK's stocks of "dumb" cluster munitions with immediate effect.** We note that the Government has excluded any commitment to ban "smart" cluster bombs. **We recommend that the Government also withdraws "smart" cluster bombs, provided that an operational alternative is available for military use to counter massing troops in formation on the battlefield.**

495 Q 34

496 Cm 7127, para 29

497 Evidence submitted by Chris Clark at UNMASS in Lebanon to the Foreign Affairs Committee, 11 May 2007; communicated by the Foreign Affairs Committee on 19 June 2007 under the provisions of Standing Order No. 137A (Select committees: power to work with other committees) to the Defence, International Development and Trade and Industry Committees

12 Annual and Quarterly Reports on Strategic Export Controls

Introduction

369. We concur with the view of the UK Working Group that "for effective parliamentary and public scrutiny to take place in this area, information covering all forms of UK transfers is required and the information needs to be current, precise, and comprehensive".[498] We consider that the publication of current, precise, and comprehensive information is essential for the effective operation and scrutiny of the system of strategic export controls. The Government can be rightly proud of its achievements and has a good story to tell on the publication of information but the account is not finished and there is room for more improvements. We are disappointed that the Government has not made the publication of information and transparency part of the 2007 Review of Export Control Legislation.

Date of publication of the Annual Report

370. The 2005 Annual Report on Strategic Export Controls[499] was published in July 2006 and therefore does not take account of any of the recommendations we made about the form or content of Annual Reports in our last Report which was published in August 2006. In reply to our recommendations the Government indicated that it was "always looking for ways to improve the content of the Annual Report and will consider these suggestions in the context of the 2006 Annual Report".[500] We had hoped that the 2006 Annual Report on Strategic Export Controls would be published before we completed our deliberations on this Report. In the event this did not happen. While we appreciate that the Annual Report has to be cleared by five departments,[501] it would considerably assist scrutiny of strategic export controls if the Government were to publish future Annual Reports by the end of April. This would allow us to carry out at least a preliminary examination of the Annual Report within six months of the end of the year rather than report 18 months after the end of the year. **We recommend that the Government publish future Annual Reports on Strategic Export Controls by the end of April each year.**

498 Ev 44, para 42

499 Cm 6882

500 Cm 6954, p 4

501 Departments of Defence, Foreign and Commonwealth Affairs, International Development, Business, Enterprise and Regulatory Reform and HM Revenue and Customs

2005 Annual Report on Strategic Export Controls

371. Without the 2006 Annual Report on Strategic Export Controls our assessment is therefore unfinished business. We set out below the recommendations which we made last year and, where indicated, reaffirm them or having reviewed the 2005 Annual Report on Strategic Export Controls set out fresh recommendations.

Annual Report: section on resources

372. **We recommend that future Annual Reports on Strategic Export Controls set out in a consistent and systematic manner the resources made available by the Government to implement and enforce strategic export controls with details of enforcement actions.**[502]

373. The Government replied to this recommendation last year:

> ECO will provide information in future reports. In terms of enforcement, HMRC officers are multifunctional, covering a wide range of fiscal controls as well as many regimes prohibiting or restricting the import and export of goods. HMRC estimated in broad terms the number of staff years actually deployed on strategic export controls – noting firstly that resources expended fluctuates in response to demand and secondly that deployments can be increased if operational priorities change. HMRC's central records do not break down the operational time spent into individual prohibitions and restriction regimes as there would be a high cost in recording information in this detail. However, in line with the above recommendation, and to assist the Committee, HMRC is currently undertaking work to identify a more accurate estimate of resource deployed, though for operational reasons it may be necessary to "sanitise" the figures before publication. HMRC agrees to provide details of enforcement actions. In line with its own annual report HMRC's figures will be based on the financial year.[503]

374. We welcome the Government's response. Given indications that departments will face a squeeze on their resources as a result of the current Comprehensive Spending Review we consider that it is essential that the resources made available for strategic export controls are set out in future Annual Reports. We shall review the information on resources provided in the 2006 Annual Report. We reaffirm the recommendation at paragraph 372 which we made last year.

502 HC (2005-06) 873, para 34

503 Cm 6954, p 5

Annual Report: section on policy overview

i. We recommended last year that the section in the Annual Report, which provided an overview of policy, be expanded to assist the informed reader to:

ii. include an assessment of the effectiveness of arms control policy and enforcement during the year covered by the Report, including a review of risks and of areas where improvements are required;

iii. provide an analysis of trends in, and volumes and values of, strategic exports;

iv. identify areas where the Government has concerns about the supply of arms and the adequacy of its controls;

v. set out changes in policy since the last Annual Report; and

vi. provide a detailed overview of outreach and assistance to overseas countries.[504]

375. The Government replied:

> Regarding [paragraph 374.i] (i), (ii) and (iv) above, the Government considers that this need is already met through the significantly expanded Section 1 of the UK Strategic Export Controls Annual Report 2005. In addition to this, a form of analysis of licences refused and processing times is already provided in the "Information on Refusal Percentages and Standard Individual Export Licence Application Processing Times by Destination" which is available from the ECO's website. This is published at the same time as the Quarterly Reports.
>
> Concerning [paragraph 374.i] (iii), although the Government is confident that its export control regime is one of the most robust in the world, the 2007 review will provide an opportunity to look again at the adequacy of its controls.
>
> In relation to [paragraph 374.i] (v), the Government has done and continues to do much in terms of outreach. Although the Government would be content to brief the Committee on the detail of its outreach programme, it may not be appropriate diplomatically for this information to be placed in the public domain. The Government will consider the possibility of providing a "Restricted" report to the Committee.

376. We have carefully read section 1 of the 2005 Annual Report on Strategic Export Controls and we welcome the additional information provided. It does not, however, fully meet our recommendation. In our view section 1 should be broadened to include a detailed report on UK export control policy as a whole along the lines of that provided in the Swedish Annual Report, which includes, for example, information on market developments and trends and detailed information of transfer of manufacturing rights

504 HC (2005-06) 873, para 35

outside Sweden and cooperation agreements with foreign companies.[505] **We recommend that section 1 (Policy Issues Relating to Strategic Export Controls) of future Annual Reports be widened to include a detailed report on UK export control policy as a whole along the lines of that provided in the Swedish Annual Report. We welcome the Government's offer of a "Restricted" report on outreach and recommend that the Government provide such a report at the same time that it publishes its Annual Reports on Strategic Export Controls.**

Annual Report: section containing "country by destination" statistics and analyses

377. In our Report last year we recommended that the "country by destination" section of future Annual Reports provide, for each country, a summary of export policy with tables containing total figures for arms exports and licence applications as follows:

i. a statement on the general arms transfer control approach or policy toward the recipient state, along with any policy changes that have occurred over the year;

ii. a table providing the total number of applications and value of Standard Individual Export Licences (SIELs) for the previous year and a breakdown by quarter for the current year; and

iii. a summary information on the types of transfer authorised during the reporting period and explanation of how these reflect the Government's stated commitments.[506]

378. The Government replied:

> The Government applies the Consolidated Criteria to every destination country. This is the basis of all export licensing decision. The Government also publishes in the Annual Report a list of its International Commitments, setting out country specific policy. Consequently, the Government believes that it already meets this information need.
>
> Information on the value and number of SIELs by quarter is already published. The Government sees no benefit in repeating the previous year's data tables on value and number of SIELs, where that data is already in the public domain.

379. We are disappointed by the Government's response which misses the point we made last year: that the Annual Report provides an opportunity for the Government to set out summary figures and to identify trends as well as provide a statement of export policy towards individual countries. As we have already stated the Government's reliance on the case by case response is opaque and unhelpful.[507] The country by destination section of the

505 *Strategic Export Controls in 2006—Military Equipment and Dual-Use Products*, Swedish Government 2006/07:114, 15 March 2007

506 HC (2005-06) 873, para 35

507 See above, para 329-330.

Annual Report provides a clear opportunity to explain policy, and changes in policy, on exports to individual countries. The problem with the data in the Quarterly Reports is that it is laborious to organise for analysis. If summary information can be provided via a route other than summary tables in the Annual Report—for example through a database—that would be acceptable. **We recommend that the "country by destination" section of future Annual Reports provide, for each country, a statement on the general arms transfer control approach or policy, along with any policy changes that have occurred over the year. We also recommend that the Government bring forward proposals to allow the data in the Quarterly Reports to be easily extracted in order to be summarised and analysed.**

2006 Quarterly Reports on Strategic Export Controls

380. The Government produced four Quarterly Reports in 2006.[508] Each Report was produced about three months after the end of the quarter and the Government also supplied us with additional classified information each quarter, which we found useful. As we are looking back to the 1990s it is worth making the point that the information supplied in 2006 has come a long way since the first Annual Report which was produced for 1997.[509] The Quarterly Reports now provide

- a description of the goods covered by the licences issued, broken down by type of licence;
- the financial value of licences issued, broken down by type of licence;
- the number of licences issued, broken down by type of licence and Military List items and 'Other';
- additional information on the type of end-user for licences granted to embargoed destinations;
- an indication of whether the licence was for a temporary of permanent export; and
- separate information on 'incorporation licences'.

381. The quantity, detail and usefulness of the data provided have improved greatly since 1997 and the Government should be commended for its openness and achievement.

382. In the late 1990s the UK Government set the standard for transparency in reporting on strategic exports. But this is no longer the case. For example, the German Annual Reports provide more detailed descriptions on which items account for the bulk of licences granted to a particular destination including what percentage of the overall financial value

508 Four reports for January-March 2006, April-June 2006, July-September 2006 and October-December 2006 were published by the Foreign and Commonwealth Office on the Internet at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1119522594750

509 Foreign and Commonwealth Affairs Department of Trade and Industry and Ministry of Defence, *Strategic Export Controls: Annual Report*, March 1999

they account for.[510] The Danish Annual Reports break down licences granted by type of end-user: private companies, the military, museums or peacekeeping missions.[511] The Dutch Monthly Reports provide separate information on each licence issued, giving the category of goods covered, a description of the goods covered, and the financial value.[512] The Dutch Annual Reports give separate information on each licence denied, giving a description of the goods, the destination country, recipient, end-user and the reasons for the denial, citing the relevant EU Code criteria.[513] We consider that these countries are now setting best practice and that the UK Reports will benefit if they adopt their approaches. **We recommend that the Government make the following changes to its Quarterly Reports.**

- **Divide up information on financial values and descriptions between Military List items and "Other".**
- **Combine the information on financial values, number of licences issued and descriptions to give a better indication of the volume of each type of goods licensed for export.**
- **Provide more systematic information on the type of end-user.**
- **Provide information on the final destination of goods covered by "incorporation licences".**
- **Provide separate information on each license denial with a description of the goods covered the reasons for the denial.**

383. The EU itself also publishes an Annual Report on strategic exports.[514] It includes data on the value of licences issued and actual exports for all EU governments, broken down by Military List category. From these reports it appears that UK, unlike many other EU States, cannot produce information on the value of exports broken down by Military List category but that it can produce data which excludes dual-use goods. **We recommend that the Government produce data on the value of exports broken down by Military List category and data on the value of dual-use exports, which is published in future Annual Reports. In addition, as the EU Code of Conduct on Arms Exports applies to dual-use goods we recommend that the UK press the EU to produce an EU reporting standard**

510 *Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2005*, Rüstungsexportbericht— Federal Ministry of Economics and Labour of the Federal Republic of Germany, 2005

511 *Udførsel Af Våben Og Produkter Med Dobbelt Anvendelse Fra Danmark*, Ministry of Foreign Affairs of Denmark, 2006

512 *Maandrapportages*, The Ministry of Economic Affairs, The Hague, The Netherlands at http://www.minez.nl/content.jsp?objectid=149938&rid=147546

513 *Annual report on The Netherlands arms export policy 2005*, The Ministry of Economic Affairs and The Ministry of Foreign Affairs, The Hague, The Netherlands, June 2006

514 *Seventh Annual Report According To Operative Provision 8 of the European Union Code of Conduct on Arms Exports*, C 328 (23 December 2005) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_328/c_32820051223en00010288.pdf; *Eighth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports*, Official Journal of the European Union, C250 (16 October 2006) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_250/c_25020061016en00010346.pdf

for data on conventional dual-use exports and for the data on dual-use goods to be included in the EU's own Annual Reports.

Statistics on defence exports

384. In the 2005 Annual Reports the Government said that it "continues to explore opportunities to extend the data available on defence exports".[515] We asked what opportunities had been identified and they replied:

> There is a cross departmental Defence Trade Statistics Working Group (DTSWG) which brings together the relevant experts from the statistics and data collection areas (HMRC, MoD) and policy fields (MoD, DfID, FCO and DTI) which was established to address the significant and quite longstanding difficulties associated with the production of robust defence export statistics. Some of these difficulties were highlighted in the report produced by MoD economists and university academics in November 2001 entitled "The Economic Costs and Benefits of UK Defence Exports". The work of the DTSWG has been further challenged by the current drive to reduce the data collection burden on business and on Government resources. The Working Group continues to try to improve the robustness of current defence trade data, but to date has not found it possible to extend the coverage of the data.[516]

385. We continue to be concerned about the accuracy of the data on defence exports. One of the options open to the Government would be to amend the customs code either to include a sub-category of controlled items in each relevant category or to add a digit that indicated that a good was listed. This could be done at WCO[517] level or via a European customs agreement. In our view better figures recording what actually leaves the country, and better linking up of the customs and licensing authorities and their relevant data will also strengthen enforcement. **We recommend that the Government consider amending customs codes either to include a sub-category of controlled items in each relevant category or to add a digit that indicated that a good was listed.**

Database of decisions

386. In response to our recommendation last year that the Government evaluate the production and maintenance of a fully searchable and regularly updated database of all licensable decisions with a search facility that would allow the user to sort licences by country and by goods[518] the Government said in the longer term it would consider whether such a facility could be provided, whilst still maintaining the integrity of the searchable data, and subject to cost and resource constraints. It added that, if this did prove feasible, it would have to consider the value and practicality of continuing the Quarterly Reports in

515 Cm 6882, para 4.2

516 Ev 83, para 16

517 World Customs Organization

518 HC (2005-06) 873, para 28

their current format. In its evidence this year the UK Working Group called as a matter of priority, for the Government to develop a fully searchable, periodically-updated database of all licensing decisions.[519] We concur with the Working Group and take the Government's point that a database may supersede and replace the Quarterly Reports. **We recommend that the Government bring forward a proposal for a fully searchable and regularly-updated database of all licensing decisions. If the Government propose that the database replace the Quarterly Reports it must demonstrate that there will be no loss of functionality or data. In addition, the Government will need to make a proposal for supplying the classified information that it provides to us each quarter.**

Specific cases raised with Government

387. Following press coverage the Committees raised with the Foreign and Commonwealth Office reports that the Israeli Defences Forces (IDF) had found British-made thermal imaging equipment during the war in south Lebanon in 2006. In its response the Government stated that the equipment found by the IDF was not exported to Iran, as the media have speculated, nor did it include night vision goggles. The Government explained that "the circumstances surrounding this matter will be factored into our consideration of export license applications in the future".[520] **We conclude that the Government's explanation about the breaches of export control in respect of UK-manufactured imaging equipment found in South Lebanon was satisfactory.**

388. Following the military coup in Thailand in September 2006 we asked whether the Government had changed its assessment of the application of the criteria for export licenses. The Government explained that it had issued 36 SIELs and 7 OIELs between 20 September 2006 and 08 February 2007 for Thailand and that its policy remained that all export licence applications were assessed against the Consolidated Criteria. Following the military coup on 19 September, all export applications for Thailand continued to be considered on their merits against these Criteria, on a case by case basis. It added that the situation was being kept under review.[521] We found the Government's response unhelpful. It appears to mean that the coup in Thailand did not result in any greater restriction in the issuing of export licences to Thailand but that the Government is watching developments and may tighten the controls to refuse licences which previously it would have granted. The Government's response reinforces the recommendations we made at chapter 10 about the explanations which the Government gives for its decisions to grant or withhold licences.

389. We also raised the volume and monitoring of assault rifles from the former Yugoslavia—see paragraph 305.

519 Ev 51

520 Ev 82

521 Ev 97, question 2

13 Conclusion

390. **The DTI's (now the Department for Business, Enterprise and Regulatory Reform's) 2007 Review of Export Control Legislation is an opportunity to stand back and look at the changes in strategic export controls since the 1990s. As a result of the Export Control Act 2002, and the secondary legislation made under it, the UK now has generally efficient and reliable export controls. The volume and quality of information that the Government provides about strategic export controls has improved considerably in the past ten years and we hope will continue to improve.**

391. **We conclude that the DTI's 2007 Review is a constructive process that addresses many of the issues which we and other interested parties have raised over several years. Much careful thought and work has gone into the Consultation Document and it shows that the Government has been listening. The options for changes it sets out in important areas such as extra-territoriality are welcome and we conclude provide the basis for change. The Review has two shortcomings. First, it ignores the fact that strategic export controls rely on Government-wide cooperation and communication. The Consultation Document does not mention HMRC, which enforces strategic export controls. Second, it ignores the EU dimension. The States of the EU face exactly the same problems as the UK in administering an export control regime, a significant part of which is derived from EU legislation.**

392. **We look forward to reviewing the Government's conclusions arising from the 2007 Review in our next Report.**

393. **The past year has seen the start of the UN process to secure an International Arms Trade Treaty. The groundswell of support for the treaty has been greater than could have been anticipated and we are pleased to report significant progress. We conclude that the Government has continued to show skill in promoting the treaty and, significantly, to press for a comprehensive treaty including both military and dual-use goods and technology. The next year will be crucial for the treaty when the governmental experts start on the details. We hope that in our next report we shall be able to report further significant progress.**

Annex

List of offences committed overseas for which a British citizen could be prosecuted in the United kingdom.

a) Sexual offences committed against children and young people under the age of 16 (*Sexual Offences (Conspiracy and Incitement) Act 1996* and *Sexual Offences Act 2003* s.72 and Schedule 2);

b) Offences of dishonesty and blackmail where property is despatched from, or received at, a place in England and Wales; or where there is a communication of information etc. sent by any means from a place in England and Wales to a place elsewhere, or from a place elsewhere to a place in England and Wales (*Criminal Justice Act 1993* ss.1-6);

c) Offences connected with aircraft (*Civil Aviation Act 1982* s.92);

d) Homicide (Offences Against the Person Act 1861 s.9-10);

e) Offences in connection with taxation etc. within the European Community (*Criminal Justice Act 1993*, s.71);

f) Offences by servants of the Crown (*Criminal Justice Act 1948* s.31(1);

g) Offences in connection with the slave trade (*Slave Trade Act 1873*);

h) Offences under the *Merchant Shipping Act 1995* (*Merchant Shipping Act 1995* ss.279-281) offences committed by British seamen (*Merchant Shipping Act 1995* s.282) and offences in the Admiralty jurisdiction;

i) Offences on offshore installations (*Petroleum Act 1998* s.22);

j) Bribery and corruption committed outside the UK (*Anti-Terrorism, Crime and Security Act 2001*, s.109)

k) Torture (Criminal Justice Act 1988, ss.134-135);

l) International Criminal Offences (*International Criminal Court Act 2001*);

m) Offences against the Geneva Convention (*Geneva Convention Act 1957*);

n) Explosives offences (*Explosive Substances Act 1883* ss.2-3);

o) Treason

p) Offences under the *Terrorism Act 2000*:

- Membership of a proscribed organisation (*Terrorism Act 2000* s.11)
- Weapons training (*Terrorism Act 2000* s.54)
- Directing a terrorist organisation (*Terrorism Act 2000* s.56)

- Collecting information likely to be useful to a person committing or preparing an act of terrorism (*Terrorism Act 2000* s.58)
- Inciting terrorism overseas (*Terrorism Act 2000* s.59)
- Terrorist bombing (*Terrorism Act 2000* s.62)

q) Offences under the *Terrorism Act 2006*:

- Encouragement of terrorism and dissemination of terrorist publications (*Terrorism Act 2006* ss1-2)
- Preparation of terrorist acts (*Terrorism Act 2006* s.5)
- Terrorist training and attendance at a place used for terrorist training (*Terrorism Act 2006* ss.6, 8)

r) Offences against United Nations personnel (*United Nations Personnel Act 1997*)

s) Offences against the safety of Channel Tunnel trains and the tunnel system (*Channel Tunnel (Security) Order 1994* [S.I.1994/570])

t) Offences against the Foreign Enlistment Act 1870

u) Offences against the Official Secrets Acts 1920 and 1989

v) Fraudulent evasion of duty etc. (*Customs and Excise Management Act 1979* s.170(2)(b))

w) Bigamy (*Offences against the Person Act 1861 s.57*)

x) Offences covered by the War Crimes Act 1991

y) Offences involving the supply or delivery of restricted goods without a licence from the Secretary of State (*Trade in Goods (Control) Order 2003 SI 2003/2765*)

Formal minutes

Monday 23 July 2007

The Defence, Foreign Affairs, International Development and Trade and Industry Committees met concurrently, pursuant to Standing Order No. 137A.

Members present:

Defence Committee	Foreign Affairs Committee	International Development Committee	Trade and Industry Committee
Mr James Arbuthnot	Mike Gapes	Malcolm Bruce	Roger Berry
Mr David S Borrow	Mr Fabian Hamilton	Richard Burden	Mr Brian Binley
Mr David Crausby	Mr John Horam	James Duddridge	Mr Lindsay Hoyle
Robert Key	Sir John Stanley		Judy Mallaber

1. Roger Berry was called to the Chair, pursuant to Standing Order No. 137A(1)(d).

2. The Committees deliberated, pursuant to Standing Order No. 137A(1)(b).

3. Draft Report: Strategic Export Controls 2007 Review

Draft Report (The Quadripartite Committee's 2007 review of export controls), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be considered concurrently, pursuant to Standing Order No. 137A (1)(c).

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 393 read and agreed to.

The following Annex to the Report read and agreed:

List of offences committed overseas for which a British citizen could be prosecuted in the United Kingdom.

DEFENCE COMMITTEE

The Foreign Affairs, International Development and Trade and Industry Committees withdrew.

Mr James Arbuthnot, in the Chair

Mr David S Borrow
Mr David Crausby
Robert Key

Resolved, That the draft Report (The Quadripartite Committee's 2007 review of export controls), prepared by the Defence, Foreign Affairs, International Development and Trade and Industry Committees, be the Fourteenth Report of the Committee to the House.

Ordered, That the provisions of Standing Order No. 137A(2) apply to the Report.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134 (Select committees (reports)).

Several Papers were ordered to be appended to the Minutes of Evidence.

Several Memoranda were ordered to be reported to the House for printing with the Report, together with certain Memoranda reported and ordered to be published on 7 December, 1 and 15 March.

Ordered, That Roger Berry make the Joint Report to the House.

[Adjourned till Tuesday 24 July at 10.00am

FOREIGN AFFAIRS COMMITTEE

The Defence, International Development and Trade and Industry Committees withdrew.

Mike Gapes, in the Chair

Mr Fabian Hamilton
Mr John Horam
Sir John Stanley

Resolved, That the draft Report (The Quadripartite Committee's 2007 review of export controls), prepared by the Defence, Foreign Affairs, International Development and Trade and Industry Committees, be the Seventh Report of the Committee to the House.

Ordered, That the provisions of Standing Order No. 137A(2) apply to the Report.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134 (Select committees (reports)).

Several Papers were ordered to be appended to the Minutes of Evidence.

Several Memoranda were ordered to be reported to the House for printing with the Report, together with certain Memoranda reported and ordered to be published on 7 December, 1 and 15 March.

Ordered, That Roger Berry make the Joint Report to the House.

[Adjourned till Wednesday 25 July at 2.00pm

INTERNATIONAL DEVELOPMENT COMMITTEE

The Defence, Foreign Affairs and Trade and Industry Committees withdrew.

Malcolm Bruce, in the Chair

Richard Burden James Duddridge

Resolved, That the draft Report (The Quadripartite Committee's 2007 review of export controls), prepared by the Defence, Foreign Affairs, International Development and Trade and Industry Committees, be the Eleventh Report of the Committee to the House.

Ordered, That the provisions of Standing Order No. 137A(2) apply to the Report.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134 (Select committees (reports)).

Several Papers were ordered to be appended to the Minutes of Evidence.

Several Memoranda were ordered to be reported to the House for printing with the Report, together with certain Memoranda reported and ordered to be published on 7 December, 1 and 15 March.

Ordered, That Roger Berry make the Joint Report to the House.

[Adjourned till Wednesday 25 July at 11.00am

TRADE AND INDUSTRY COMMITTEE

The Defence, Foreign Affairs and International Development Committees withdrew.

Roger Berry, in the Chair

Mr Brian Binley
Mr Lindsay Hoyle
Judy Mallaber

Resolved, That the draft Report (The Quadripartite Committee's 2007 review of export controls), prepared by the Defence, Foreign Affairs, International Development and Trade and Industry Committees, be the Tenth Report of the Committee to the House.

Ordered, That the provisions of Standing Order No. 137A(2) apply to the Report.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134 (Select committees (reports)).

Several Papers were ordered to be appended to the Minutes of Evidence.

Several Memoranda were ordered to be reported to the House for printing with the Report, together with certain Memoranda reported and ordered to be published on 7 December, 1 and 15 March.

Ordered, That Roger Berry make the Joint Report to the House.

[Adjourned till Tuesday 24 July at 10.45 am

Witnesses

Thursday 7 December 2006

Page

Thursday 1 March 2007

Thursday 15 March 2007

List of written evidence

Reports from the Defence, Foreign Affairs, International Development and Trade and Industry Committees since 2001

Government responses to Reports from the Committees are published as Command Papers. They are listed here in parentheses by Cm number, after the Report they relate to.

Session 2005-06

First Joint Report	Strategic Export Controls: Annual Report for 2004, Quarterly Reports for 2005, Licensing Policy and Parliamentary Scrutiny	HC 873 (*Cm 6954*)

Session 2004–05

First Joint Report	Strategic Export Controls: Annual Report for 2003, Licensing Policy and Parliamentary Scrutiny	HC 145 (*Cm 6638*)

Session 2003–04

First Joint Report	Strategic Export Controls: Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny	HC 390 (*Cm 6357*)

Session 2002–03

First Joint Report	The Government's proposals for secondary legislation under the Export Control Act	HC 620 (*Cm 5988*)
Second Joint Report	Strategic Export Controls: Annual Report for 2001, Licensing Policy and Parliamentary Scrutiny	HC 474 (*Cm 5943*)

Session 2001–02

First Joint Report	Strategic Export Controls: Annual Report for 2000, Licensing Policy and Prior Parliamentary Scrutiny	HC 718 (*Cm 5629*)

Oral evidence

Taken before the Defence, Foreign Affairs, International Development and Trade and Industry Committees

on Thursday 7 December 2006

Members present:

Roger Berry, in the Chair

Mr James Arbuthnot
John Barrett
John Bercow
Mr David S Borrow
Malcolm Bruce
Mike Gapes
Linda Gilroy
Mr John Horam
Mr Paul Keetch
Judy Mallaber
Mr Ken Purchase

Witnesses: **Mr Oliver Sprague,** Programme Director, Military Security and Police Transfers, Amnesty International, **Mr Simon Gray,** Policy Adviser on Arms Control, Oxfam GB, and **Mr Roy Isbister,** Team Leader on small arms and transfer controls, Saferworld, UK Group on Arms, gave evidence.

Q1 Chairman: Good afternoon. Welcome to our witnesses; I will ask you to introduce yourselves in a moment for the record. This is a public evidence session and hopefully the transcript will be available on the Internet in about a week (quicker if possible). Members of the Committee declared their interests 12 months ago when they first joined the Committee. If anyone has any interests they feel are relevant and have not declared shout now, but I think it has all be done. Yes, good. Welcome to the Working Group. Can I ask you to introduce yourselves?
Mr Isbister: I am Roy Isbister. I work for Saferworld as the Team Leader on transfer controls and small arms.
Mr Sprague: I am Oliver Sprague and I am Programme Director for Amnesty International UK's arms control work.
Mr Gray: I am Simon Gray. I work for Oxfam GB as Policy Advisor on arms control.

Q2 Chairman: Thank you very much, and thank you for your memoranda. I noted that you said it was in a work in progress and formal review of the Export Control Act does not start until May next year or thereabouts. You kindly offered to submit further memoranda as you saw fit and we will be very pleased to receive those obviously. As you know, we are taking a broad look at the Export Control Act, including the primary legislation. One of the purposes of the Act was to respond to the Scott Report's recommendations about accountability and transparency in this field. Could you briefly identify the areas where you think accountability and transparency have been improved as a result of the Act?
Mr Sprague: The short answer to the question is yes. Clearly the Export Control Act 2002 and the subsequent secondary legislation of 2004 is a major improvement on what we had before which, as you all know, was legislation dating back to 1939 which essentially said that export control is the responsibility of the government, full stop. At least we now have in law a section of relevant consequences so everybody is clear about why we have export controls and the need to stop undesirable activity. It is a shame for us that things like sustainable development and, for Amnesty, a specific reference to torture are not in the list of relevant consequences, but by and large I think it is extremely important to have these things clearly specified. I think it is also great that we have new controls on things we did not have before. However whilst not comprehensive—and I am sure we are going to come onto that—the new controls on brokering, technology and intangible transfers are now included in controls that we did not have before. If you look at the annual reports it is clear that there are activities taking place that are now licensed that were not before. In 2005, for example, there were 71 trade control licences that were applied for for brokering activities and five refused. Before 2004 none of those things would have been controlled. I think it is also good that there is a requirement that government has to be accountable and report to Parliament on its export control policy every year. There are areas which I think increasingly relate to what we would say would be the globalisation of the defence trade where the national based export control system has been slow to adapt and in many cases has struggled to adapt. It is not just us who are saying that; the Government, industry, other governments in Europe are increasingly looking at issues of components (licence, production and subsidiary companies).

Q3 Chairman: Excuse me for interrupting, is this an issue of accountability and transparency or is this an issue, in your view, of the regulations to control simply not being there? I want to come onto some of these questions of policy in a moment, but in terms of accountability and transparency are there particular areas where you would be looking for greater transparency and greater accountability as such?

Mr Isbister: Maybe I can give an example of how this can be problematic. Incorporation would be an example and this relates to the guidance. With the new Act and with the consequences of export control we are very pleased with that, but when the Act was going through Parliament we were concerned about the way that actual guidance was issued to licensing officials, *et cetera*, and we were calling for Parliament to be more involved in the event that there were changes of substance in the guidance, not changes in the number of copies of the licensing application you have to send. We were looking for a resolution procedure, affirmative or negative, from Parliament to be applied to these changes. That, we thought, would improve accountability. We were assured that this was not necessary and that consultation would be entered into before any changes of substance were made and yet within just a few months of the Act entering into force new guidance was issued for cases of incorporation which, to our mind significantly weakened the then existing guidance. This was issued retrospectively so there was no consultation or debate on this; there had already been licences issued under the new guidance. This would be an example where there are improvement in accountability and transparency that have not gone as far as it should have done.
Chairman: Thank you, that is very helpful. We will come back to that specific issue of incorporation a little later on.

Q4 Mr Horam: In your response, Mr Sprague, to the Chairman's initial question, you mentioned the issue of sustainable development which is a very big issue, very much in use these days, particularly in the context of climate change and world poverty and so on. I just wonder how you see sustainable development playing a role in arms export. What do you really mean by sustainable in this context?
Mr Sprague: Last year I would have answered that question seeing as I was representing Oxfam, but I will hand over to my colleague.
Mr Gray: That is a really good question. For us it is absolutely essential that there are sustainable development criteria at the heart of the Government's export controls.

Q5 Mr Horam: I know that, but I want to know what you mean by sustainable development in this context of arms exports.
Mr Gray: I think we would see sustainable development in two particular areas. The first one is about preventing irresponsible arms transfers which we know fuel conflict and which undermine security which therefore undermines development. We see irresponsible arms exports as potentially threatening development but there is the other side which the Act addresses more which is about excessive and irresponsible spending by developing countries in terms of arms purchases.

Q6 Mr Horam: They are spending so much money on arms they cannot spend it on development.
Mr Gray: The economic and technical capacity and whether that is comparable with the actual capacity on the ground and whether the transfers that are going there will actually be useful in aiding that country to increase its security and look after its population.

Q7 Mr Horam: What would be a trigger for your concern about sustainable development? Would it be the sheer accumulation of arms in a particular country, for example? Is that the sort of thing you would look at?
Mr Gray: If you look at the way that criterion 8 of the EU Code of Conduct has been elaborated there is a system of triggers which is based firstly on the amount of the actual exports and the financial value of the export and also the level of development of the country to which the export is going. There is a kind of double filter system there. Then once you have triggered the criteria then underneath that in the elaboration there are a whole set of indicators which will allow you to judge whether or not that transfer should go ahead.

Q8 Mr Horam: In other words there is a clear framework in which you could regulate sustainable development and bring it into account in this area.
Mr Gray: Yes, absolutely. If you look at the table in the annual report—Table 3.2—which actually documents the reasons for refusals of transfers we are surprised that there are not any refusals against criterion 8. We have been looking at some of the reasons why that might be. I think that we would conclude that one of those reasons is certainly that those applying the criteria are not applying the sustainable development rigorously enough. Part of the basis for that is that if you look across Europe at the Consolidated Report since 2003 there have been 52 refusals based on sustainable development and the UK has just refused one back in 2003.

Q9 Mr Horam: So the UK is not paying sufficient attention to the outcomes of sustainable development.
Mr Gray: We would want the Committee to question whether or not there is sufficient rigour being paid to the criteria of sustainable development given that there are all these refusals going on across Europe but very few in the UK. One of the suggestions might be for the Government to talk to the French Government who, out of a total 52, have actually been responsible for 42 of those refusals. It might be that the French are applying the criteria in a slightly different way to the UK.
Chairman: I do not know whether there are particular exports that you have in mind, transactions that you believe would fall foul of criterion 8. I am not asking for an on the spot answer now, but if, over the next few weeks and months, there are examples of transactions that give strength to your argument on this we would be very pleased to hear from you.

Q10 Mike Gapes: Can I ask you about extra-territorial controls? Your memorandum to us—paragraphs 12 to 16—calls for an extension of extra-territorial controls and new categories to be created. Can I put it to you that that position is a little bit at variance with the evidence we have had from elsewhere? EGAD say that extra-territorial controls are virtually unenforceable and they have given us examples of conflicts between national jurisdictions and difficulties in interpretation. How do you respond to that?

Mr Isbister: I suppose this is following up on something that Ollie said in answer to the first question. This is one of the areas that is clearly difficult to deal with and we have already had discussions (where industry and government have been present) about the review and this is one of the areas that is acknowledged as being difficult and in need of further exploration. If we come back to first principles, the Export Control Act—again as Ollie has said—is about dealing with consequences and if the activity that has been entered into by UK persons or by people or companies in the UK has consequences that we consider unacceptable there has to be a way found to deal with this. I think that we can but it is going to be a long process; not too long, but it is going to be a complicated process. As I have said, we have been having discussions with industry and with government and the idea that there could be a third category is something that everybody seems to think is worthy of further exploration and explanation. We have the slightly strange situation at the moment whereby items which can be considered on occasions, a legitimate subject for transfer, lumped in with the brokering goods that are clearly always beyond the pale, such as torture equipment. But there are particularly sensitive goods where a greater than average level of control should be applied and one of the obvious ones is small arms and weapons for example, which seem to be the weapons of choice in conflict and the type of weapons that brokers are involved with all the time. The current regime internationally is not dealing with this problem.

Q11 Mike Gapes: Is there not another problem which is not specifically about categories of weapons, it is actually about categories of countries or nationals of certain countries? Some countries—the United States is one—apply rules whereby if something is deemed to be exported onto somewhere else it can actually lead to a prosecution because nationals of that country are not permitted to be receiving exports from the US. In those circumstances is it not going to be impossible for us to get an international regime which covers all of these areas?

Mr Isbister: There is work internationally to improve the controls on brokering but I think that is one of the reasons why individual countries do have to do more to address brokering. The controls on brokering as they exist at the moment around the world are not strong enough. Individual countries do have an opportunity to try to have more effect on their nationals. Getting evidence, for example, from overseas is problematic but if you introduce the licensing regime so that you require a licence, for those people who do not get a licence what you have to do is prove the connection with the deal—you have to prove a single connection with that deal—and that they have stepped outside the law. You do not have to trace that deal right from the source to the final destination to find out whether someone has been in breach of the law. For transfers to embargo destinations, at the moment you have to prove that link right from the source to the embargo destination before you can get a prosecution of an individual, whereas if you extended the concept of extra-territoriality, even if you could only prove that a deal made to a state bordering an embargoed destination, if there is no licence you still have grounds for prosecution.

Q12 Mike Gapes: The essence of this is that there are some countries which have some approaches which are at variance with our own approach and the logic of extra-territoriality is if we in the UK are to apply the rule as regards nationals of other countries being involved then similarly presumably our government would therefore accept that whatever the US system is should apply to UK citizens.

Mr Isbister: I think that is where the use of open licensing and that kind of thing has to come in. Yes, it is a difficult situation and it also involves speaking with other states, but we should be working with partners not necessarily all states of the world but with EU partners *et cetera*. If we could agree a common regime with a certain number of partners then we would go a long way to solve some of these problems.

Q13 Mr Keetch: Moving on to transportation and financial services, the 2002 Export Control Act gives the Government powers to regulate these ancillary services but the Government has chosen not to do so, except in restricted goods. You have argued that the Government should be doing that. How would the British Government physically do that with exports that may not actually pass through the UK? How would you follow the paper trail?

Mr Isbister: Transportation and financial services are interesting because these are the types of operations which touch on arms deals peripherally if you like, it is not necessarily central to their business. If you set up administrative structures and rules that they have to follow they have a strong interest in following those because they do not want to put their business at risk over individual transactions that are going to cause them problems. It would seem to me that they are a point of leverage to apply. Transporters operating out of the UK have a raft of things that they have to look at already—regulations covering hazardous goods, section five requirements applying to the movement of firearms—so extending that to look at export controls as a whole does not seem unreasonable. I am sure you would not capture all circumstances; it is about widening the net. If you had any transporter involved in moving stuff through the UK or on behalf of UK persons who themselves fall within the licensing regime, what

they have to do is to find out: is this good controllable? If it is, where is your licence? The same would go for financiers.

Q14 Mr Keetch: You would be confident that the Government could physically track those things; it is possible to actually do that.
Mr Isbister: Yes, then you kick into the whole enforcement and implementation side of things. You have to put the resources in so that transporters and financiers know that they are potentially subject to potentially random compliance visits, especially if you are using intelligence based policing and enforcement then pseudo-random visits would be made for a purpose. You need to introduce that as well so that transporters and financiers know that they do have to do their job properly or there are risks that they run.

Q15 Mr Keetch: On the specific point of restricted goods the Government tell us that they do do this. Do you have any evidence that they are not doing that on restricted goods or do you have any evidence that that regulation is falling down?
Mr Sprague: Can I just go back to one point that I think is relevant about your control of the transport sector? The transport sector is regulated by a whole raft of commercial practices (there are invoices, manifests, airway bills) all of which should specify the movement of strategic goods on them for a variety of reasons, so there is already an audit paper trail through the transport sector of the movement of goods from A to B. In that respect the harmonisation of that process and bringing that process more within an export control situation would be extremely helpful and, I would argue, not entirely difficult to do. Back on your specifics, if you look in our submission this year (and I think last year) Amnesty International did document a case of a UK based transporter where we believed we had *prima facie* evidence of a potential breach of embargo.

Q16 Mr Keetch: That is why I asked you the question.
Mr Sprague: It is the movement of strategic goods from one country into central Africa and a UN panel of experts who have looked at the documents and have concluded that in all likelihood the stuff was going to go to the Democratic Republic of Congo. It appears to us from our own sources, that the investigation that was done on the company was to go around to offices and maybe have a quiet word with them. There does not seem to have been an attempt to analyse the documents, look at their computer records, look at their invoices, interview the crew that were involved, take any other eye witness testimony. It is quite interesting that this particular company—since it has been involved in supplying 250 tons of munitions into central Africa, the consequences of which are extremely likely to be very serious indeed—has since been given two government contracts to supply humanitarian goods, one to Haiti and one to New Orleans for Hurricane Katrina. That, to me, does not send a very clear message that being involved in the trafficking of weapons to conflict zones is something you should not be involved in.

Q17 Mr Keetch: Is that the prime example of where you would say that the implementation of that regulation has not been done?
Mr Sprague: We can only go on evidence when we come across it and that is one specific example where we have evidence and documents that appear to me to be pretty strong.

Q18 Mr Borrow: Moving onto the issue of dual-use items, you have come forward with some proposals to perhaps strengthen that area. How would this work?
Mr Gray: The idea that we are proposing is around a military end-use catch-all clause. It is clear from the work that we have been doing and a lot of research work that went into a report on the globalisation of the arms trade *Arms Without Borders* which was published recently. The globalisation of the arms trade means that occasionally goods that are of critical importance to the operation of the weapons system will by-pass the licensing system as they are not falling into any of the definitions or specifications on the control lists themselves. We think that with a list based system inevitably as new technology arises you are going to miss certain goods and that a military end-use catch-all clause would help the Government to actually control these items that are outside the dual-use list. Whether or not it is reasonable for the Government to expect a transporter to actually take an interest and responsibility to actually report the fact that they think their item may well be at risk of ending up in some sort of military system is a question to which we would say the answer is certainly yes. The answer is yes because the Government already expects exporters who are producing and exporting goods which they think could be intended for use in weapons of mass destruction in military systems destined for countries under embargo or any military items that have been exported from a state without authorisation from that state or in violation of an authorisation should have to notify the authorities that they think these parts may be ending up on these categories and the authorities would then make a judgment on whether or not the export should go ahead. It clearly places a responsibility on exporters but we think the level of responsibility is fair. We do not expect this to overwhelm the export control system and without this we think that goods will continue to end up by-passing the controls which you could reasonably expect the goods within a final product to be caught by.

Q19 Mr Borrow: In effect you are asking for exporters of dual-use products to ask questions as to where that particular bit of equipment is to be made up.
Mr Gray: Yes.

Q20 Mr Borrow: You feel that the amount of work involved for the exporter in doing that is not too great and would not place too big a burden. Have you carried out any enquiries to work out the number of dual-use components that have been exported each year that are ending up in a non-military use as a starting point because obviously every one of the those exports will need to have been tracked to ensure that it is a non-military use rather than a military use?
Mr Gray: We have not done the calculation in total but Ollie has an example.
Mr Sprague: I will just preface the answer by saying that the 2002 Export Control Act actually recognises that these kinds of areas are important. If you refer to it it actually says, "Export controls may be imposed in relation to any goods, the exportation or use of which is capable of having a relevant consequence". Within those words there is always an understanding that there may be certain categories of goods which need to be controlled because of the effect they have. I do not want to talk about the Land Rover example—we have talked about that an awful lot—but I will give you another example which is in our submission. It is the Predator UAV and the fact that a British company called Radstone makes computer technology for that UAV. UAV themselves are subject to the most restrictive controls that there are; currently it is on the list of prohibited goods. If you wish to put an advert for such equipment in your publications you need to apply for an export licence to do so. However, as I understand it, the computer systems that this British company supplies (the managing director of the company has said that without this equipment the product would not fly and if you look at the brochures and things they publish around it it is quite clear that they see it is pretty central to the whole communication, command and control of these kinds of items) there is no licence required because the category of goods does not fall within the certain specification to make it listed. Yet this company specialises in what is called COTS technology (Civilian Off The Shelf technology) and a significant proportion of this business is around supplying components for military systems of this kind. To me that is exactly the kind of equipment that needs to be controlled in a catch-all.

Q21 Malcolm Bruce: I have a particular concern about companies (not the ones who are deliberately trying to evade it; they will find their way) who are inadvertently exporting products which could be put to military use particularly perhaps in the oil and gas industry not least because quite a lot of oil and gas activity takes place in dubious areas and conflict areas. In fact the Export Group for Aerospace and Defence in their memorandum said, "We know that there are large numbers of companies and individuals currently operating outside the regulatory framework". They know because they come to them. They cannot tell us who they are because there is a confidentiality rule but they estimate that 10 to 15% of an audience at a particular conference they had were people who stood up and said, "But we've been doing this for years"; they had clearly been in breach of the regulations. What is your take on the extent to which equipment that can be adapted is not really being picked up? In your own memorandum you suggest a threshold system as there is in the United States; could you explain how that would work?
Mr Sprague: The threshold system applies in the US and it is clearly one area we could look at. They have two categories of threshold. They have a 25% threshold system, 25% of the value of the goods of US origin that goes into these systems requires control. For a group of their sensitive destinations which are published on their websites that threshold goes down to 10%.

Q22 Malcolm Bruce: You have to know where the goods are going.
Mr Sprague: Yes, but the whole principle around catch-alls and military end-use is: is the exporter aware? I am not a lawyer but there is clearly a reasonableness issue: is it reasonable for the supplier to have known that its goods are going to end up in military systems? There are all sorts of guidance notes on the DTI website mainly around the WMD side of things, which is essentially a whole trigger list of questions that exporters can ask themselves about a particular customer, the nature of the payment, all of those things which might help. What we are not saying is that every item that could have a dual use that is not on the list should be licensed, clearly not.

Q23 Malcolm Bruce: You would like every exporter to look at the website.
Mr Sprague: Yes. There comes a point where it is reasonable to assume that your goods may be ending up in a military system and you should ask the Export Control Organisation to see whether those goods require a licence or not.

Q24 Judy Mallaber: You have urged the Government to look again at whether re-export controls can be applied to overseas subsidiary companies but in your evidence you also accept that that is a challenge and clearly a complex legal area because those subsidiaries are also required to operate within the legal framework of the countries where they are based. Can you tell us what controls you wish to see applied and how you think that would work?
Mr Sprague: Again it clearly is a very difficult area. The good news is that we, as NGOs, are not alone in recognising that this is a difficult area. These issues are now formally part of the Export Control Review that is going to take place next year so government, industry and us are thinking about these issues. I think it is worth going back to the first principles. Every country is responsible for ensuring that the arms and the military equipment it exports are not used in contravention of international humanitarian law or human rights law. In a globalised defence market I think it is quite logical to see if you can apply these principles along the supply chain where there is the UK connection. The one example that was raised last year was about the supply of military

trucks to Sudan. The fact is that the company responsible for that was an Indian company but 71% controlled by a UK company. In terms of ownership it was a British company but because the law did not apply—even though the Sudan has been subject to an EU arms embargo since, I think, 1994 and the reason why it is subject to an EU arms embargo is the clear risk that any military equipment that you supply to Sudan would be used in gross violations of human rights or indiscriminate attacks on civilians and so forth—there is no power to stop that deal going ahead. In very clear cut examples like that I think most people accept that that is something we should look at in the control system and see whether it should be controlled. In terms of embargo legislation I think our starting point is that we must at least see if we can amend the embargo legislation to capture activities of overseas subsidiaries as a minimum level.

Mr Isbister: If I could just follow up on that, the fact is that as far as I understand it parent companies do control the activities of the subsidiaries in all kinds of ways. I think it is a bit disingenuous to claim that that kind of parent to subsidiary relationship does not exist. Something we have to look at more and which may work is that the relationship between the parent and the subsidiary would set out at the beginning that if the subsidiary is planning transferring controlled goods or strategic goods then it must seek the permission of the parent company to do so. That would then be about establishing a relationship between the UK Government and the parent company. If you start with the principle that parent companies do control the activities of subsidiary companies maybe we could work forward from there.

Q25 Judy Mallaber: So you are setting down an additional criteria on that relationship to fit on top of the legislation of whichever country they are operating in.

Mr Isbister: Potentially.

Q26 John Bercow: You want to extend the catch-all clauses from applying only to nuclear, chemical and biological weapons to items which will be used for the purposes of torture, degrading treatment or executions or in connection with terrorist offences. Can I put it to you that this is not merely a semantic dispute but a substantial one? The term "catch-all" is something of a misnomer in that, as I understand it, it applies only to situations and anticipates only situations in which authorities want to prevent a transfer of an unlisted item or to prosecute those responsible for its export if there was a clear intention and knowledge on the part of the exporter. That leads me to enquire how effective would catch-all provisions be if they were extended to items used for torture unless they were done on a different model from that which currently applies.

Mr Sprague: You are right to say that "catch-all" is a misnomer but unfortunately that is the acronym that is applied to these things, it is the buzz word for it. I do think there are certain areas where the activity should be rightly prohibited. Government policy, especially on torture equipment, is to outlaw the UK's involvement in the torture trade and acts facilitated to torture. I do not think that anyone would dispute that that is the proper and reasonable thing. Therefore there is a problem with systems based on lists; things will always fall off the list. We heard last year of the sting stick; there is interrogation equipment like foot heaters; there are things like handcuffs. All of these things can be supplied without a licence and can be used to facilitate torture. I just want to go back to the point I was making about the dual-use items for military systems. It is about the end-use and whether the exporter ought to be aware that the outcome of his transaction is to facilitate these acts. This is not saying that a list based system is not something we should be pursuing, of course we should; this is belt and braces, it is to make sure that the activity is brought under control and not necessarily just the goods themselves.

Q27 John Bercow: Handcuffs are a pertinent but, if I may say so, easy example to use because their potential use is fairly readily imaginable. Let us take a slightly more vexed issue and that would be electric drills which could of course be used to inflict the most terrible injuries. Is it to be expected that the secret police of a brutal regime would be so maladroit and transparent as to order drills directly from a UK manufacturer? Would I be guilty of the grossest and most unjustified cynicism in supposing that they might conceive of the idea of using a building company as a front? I do not seek to introduce levity; I am trying to put a humorous slant on what is a massively serious matter. How could the manufacturer possibly know for what the drills were going to be used?

Mr Sprague: The point of a catch-all clause is not designed to bring the whole DIY trade into the scope of export controls. In that particular case you could see that there was no way that the exporter could have known what its drills were used for, but by having such a clause it means that once it does become known you can put whatever information you need to put around the DIY community that certain end-users may well be using electric drills for torture. When you go to this particular area all sorts of things could be used for torture and it is not fair to expect industry to know the outcome of everything. It is this question of reasonableness; where is it reasonable to expect that they should have known? If such controls were in place when it does become known we have the power to stop it.

Q28 John Bercow: To summarise this very important point, what you are saying is that in a sense in the worst case scenario an abuse—including potentially lethal consequences for its victim—might take place but should probably be able to do so with impunity only once?

Mr Sprague: At the moment there is nothing to stop it happening. There is no legal impediment; there may be some other instrument of international law you could use and I hope if the violation was that grave there would be. At the moment there would be

no control to stop it. It is a bit like death penalty equipment before the EU controls came in. At least if we'd had something like this you could do something about it and stop it. Terrible as the initial act might be, it would then cease from that moment.
Mr Isbister: You would not catch all but you would hopefully catch some and the cost to do this—the administrative costs, *et cetera*—would be insignificant on a cost benefit analysis.

Q29 John Barrett: My question very much follows up on that because it is about end-use controls. The Government has argued against end-use controls because they say if they identify a degree of risk they would have had a licence in the first place. If there is always some risk of equipment or technology being misused or diverted and end-use controls were to come in, how would these be implemented and who would actually do it?
Mr Isbister: I think you are right, there is always risk and it is ridiculous to suggest that there is not a risk. I think it is perfectly doable. I think it is a case of including the obligations on the contract, making it very clear in advance what the obligations of all parties to the transaction are. If there is reason to suspect that there is a problem then you request a monitoring inspection. This is done in other areas. In weapons of mass destruction that is an accepted way of operating by the UK Government in terms of biological weapons, protocols, *et cetera*, but with conventional weapons it seems to be different and I do not understand what the problem is. It is not about making for a less extensive pre-licensing assessment; that should carry on as it is at the moment. The Government is to be congratulated on having very thorough pre-licensing assessment but should go the extra mile.

Q30 Chairman: You have called for the end of Crown exemption from export controls. Do you have any evidence that exports covered by the exemption have been made in breach of the Consolidated Criteria?
Mr Isbister: There are a number of exports that have gone through under Crown exemption that we raised concerns about at the time, for example equipment to Nepal, the military helicopters, the short take-off and landing aircraft. Eventually we do get to find out about this equipment through the reporting mechanism. We are told that basically the same standards are applied for government sales as for commercial sales, but then in that case I do not understand why we cannot follow the same process. It seems a more elegant way of operating, that you always follow the same process. It also has transparency issues in terms of reporting. The system of reporting on licences is that you know what the government was willing to allow. The system of reporting on government sales tells you what was exported but it does not necessarily tell you what the government policy was because, just as for licensing, a lot less can end up being exported than the government was willing to allow so you lose a level of transparency there. There is also a timing issue, it takes longer to get that information now we have reporting on licences than it used to do.[1]

Q31 Linda Gilroy: This is probably an issue we can talk about at some length but as we do not have the time perhaps a brief response from each of you on what are the prospects for the International Arms Trade Treaty (ATT).
Mr Gray: The prospects are good. The prospects are good for *an* international arms trade treaty; whether the prospects are good for the kind of treaty that we all want to end up with is a different question. The prospects are particularly good this afternoon because the resolution that went through first committee came in front of the UN General Assembly last night in New York and the "yes" votes went up from 139 in favour to 153 in favour, so we now have 80% of the world's governments who have formally stood up there and stuck up their hands and said, "Yes, we are in favour of a process working towards an arms trade treaty". That includes all of the EU, all of ECOWAS[2] (which is very important), most of North Africa, certainly most of Sub-Saharan Africa, most of Eastern Europe as well and most of Central Asia. There are obviously certain abstaining countries and I think that is why I prefaced this with *an* ATT will probably now happen but whether it is the ATT that we all want will depend, I think, on whether or not the supporters of the treaty grab the metal right now and say, "We have a massive opportunity to turn this treaty into a reality which will actually make a difference for millions of people on the ground". What the resolution has done is set up two processes, the first is a Secretary General's consultation which will probably start in February and run through to July and we are hoping that the UK Government will work together very closely with the six other co-authors in ensuring that we encourage as many supportive states as possible to respond to that Secretary General's consultation in a positive way, particularly from Africa and Latin America who will be able to come back and tell the story of how the uncontrolled trade in weapons is actually affecting the people in their country. We hope that a good number and a good quality of response will set the right atmosphere for the second stage of the process which is a group of governmental experts which starts in January 2008. We know that this group of governmental experts will be difficult because we know that most of the countries who have abstained or the one country that has voted against certainly have a right to be on the group. The reservations that some states have already expressed will come out in that group but what we need to make sure is that we maintain the momentum that we have right now and we will certainly be working as closely as possible with government to make sure that happens.

[1] *Note by witness:* "There is also a timing issue; now we have quarterly reporting on licenses it takes longer to get information on Crown exemption transfers than licensed transfers."
[2] Economic Community of West African States.

Chairman: On that positive note can I thank you very much indeed for your presence this afternoon and again for the memorandum. If you wish to submit any further written information on this important topic please do not hesitate to do so. Thank you very much indeed.

Witnesses: **Mr David Hayes,** Head of Export Controls, Rolls-Royce plc, and Chairman of the Export Group for Aerospace and Defence (EGAD), **Mr Brinley Salzmann,** Exports Director of the Defence Manufacturers Association and Secretary of the Export Group for Aerospace and Defence, **Mrs Susan Griffiths,** Export Control Manager, MBDA UK Ltd and **Mr Barry Fletcher,** International Export Consultant, EGAD, gave evidence.

Q32 Chairman: Good afternoon; you are very welcome. For the record could I ask you, David, to introduce yourselves and your colleagues?
Mr Hayes: On my right is Brinley Salzmann, the Secretary of the Export Group for Aerospace and Defence. On my left is Barry Fletcher, Independent Export Control Consultant, and Susan Griffiths from MBDA. I am David Hayes, the Head of Export Controls for Rolls-Royce and the Chairman of the Export Group for Aerospace and Defence.

Q33 Chairman: Thank you and thank you also for your presence this afternoon and for your memorandum. When you gave evidence to this Committee during the last inquiry you were complimentary about the Export Control Organisation's performance. Has it maintained its good performance throughout 2006?
Mr Hayes: Broadly speaking, yes.

Q34 Chairman: There are no serious weaknesses in the Organisation that you would wish to draw to our attention?
Mr Salzmann: The only one that has been raised by our members is the issue of the ECO's website which has undertaken a fundamental review this year and which has, in the view of so many companies, been significantly downgraded in its user friendliness and accessibility.

Q35 Mike Gapes: Can I ask you about the control of chemical, biological, radiological and nuclear materials? You called for a review of export controls on those areas. Given that these areas are very sensitive and that the Government has very strict restrictions on them already, what is the purpose of a review?
Mr Hayes: The first thing I will say is that I am not an expert in this field. Our expert in this field is at the moment sunning himself in Barbados. We will get you a full reply from NBC UK. Fundamentally the difficulty surrounds the inclusion of handling, detection and identification in the definition of relevant risk. That places obstacles in communicating in technical terms about those capabilities even within the UK, so between UK companies and UK MOD or UK companies and UK blue light services. To that extent there is a view that it endangers our own national security. Perversely it also damages our competitiveness because it is actually easier now for MOD or a blue light emergency service in the UK to communicate with a foreign supplier than it is with a British one.

Q36 Mike Gapes: Does this also relate to some issues to do with extra-territorial controls and relations with other governments?
Mr Hayes: If you are asking if all the governments take different approaches to the export of NBC related equipment, then yes, there is some evidence in that regard.

Q37 Mike Gapes: Do they take a more lenient approach to it?
Mr Hayes: Yes.

Q38 Mike Gapes: That is a cause of concern by some of our companies which might feel that they are losing potential markets.
Mr Hayes: It is, particularly when those markets are very high profile events. A classic example would be the Beijing Olympics.

Q39 Mike Gapes: Is there not a danger, even though we have a more restrictive regime, if we move to a less restrictive regime that we might actually facilitate proliferation of things that we do not want to proliferate?
Mr Hayes: I think that is the difference between something being permitted by the legislation and something being approved by the licensing authority. It is not a one-stop shop. Something can be permitted by the legislation and still denied by the licensing authority.

Q40 Mike Gapes: For good reasons.
Mr Hayes: Yes, for good reasons. We are not seeking the capability to export weapons of mass destruction or weapons associated equipment. The relaxation is purely in the area of handling, detection and identification.

Q41 Mike Gapes: You know as well as I do that something becomes a weapon when the components of the weapon are weaponised (when it is put together) but actually you can have a lot of components which in themselves are not weapons, they only become a weapon when all the different pieces of the jigsaw are put together.
Mr Hayes: True.

Q42 Mike Gapes: So we need sometimes to stop the pieces of the jigsaw being put together by stopping access to some parts to some people.

Mr Hayes: I would suggest that is exactly what the licensing system is for. Theoretically allowing something under the control does not remove the check of the licensing system.
Mike Gapes: We will wait to see if the review happens and, if so, what it comes up with.

Q43 John Bercow: You seem to extend catch-all clauses from their current application to weapons of mass destruction to items to be used for torture. The question is the same as I posed to the earlier set of witnesses, namely that the control that applies currently to WMD merely anticipates situations in which authorities seek to prevent a transfer of an unlisted item or to prosecute those responsible for its export where the clear intention and knowledge can be demonstrated. How effective, in your judgment, would a catch-all clause drafted along those lines be in preventing the export of items used for torture?
Mr Hayes: As someone who regards DIY as torture in its own right, very effective. Seriously, the way industry would envisage this operating is very much along the lines of the existing WMD end-use control. To take the scenario of the building company used as a front, it is probably very unlikely that the British exporter would know that that building company was a front. There is a greater possibility that the intelligence services might know that that company was a front. We would envisage a scenario where the Government notifies the exporter—as is the case within WMD—that it is making a particular export licensable under the end-use control because it has reason to believe that the goods are going to be used for the purposes of torture. At that point the transaction becomes licensable.

Q44 John Bercow: That implies a degree of supervision that would be expected to take place outwith the responsibility of the manufacturer. I am not saying that that would not or does not to a degree already happen, but I just want to be absolutely clear on the question of responsibility in the instance which I gave of electric drills and to which reference is made in your memorandum. What degree of diligence should be imposed on the manufacturer? Could he legitimately proceed on the basis of what he is told by the importer? Would he alternatively be expected himself to make detailed enquiries to check? What I am concerned about, to put it very simply, is that it is excellent if the intelligence services intervene and say, "Thou shalt not because we know it would be used for horrific purposes", but what if that did not happen?
Mr Hayes: I would see it as operating at the level of where the exporter knows or has been informed by a competent authority. There will be a very small percentage of cases where you could be argued to know. There have been perfectly open procurement attempts for what may be described as torture equipment from the security services of various countries. The exporter there would clearly know that there was a risk that that equipment was going to be used for torture. In the vast majority of cases you would be talking about the other situation where it is a front company, the exporter has no way of knowing and the only thing that is likely to prevent it is the intervention of the intelligence services.

Q45 Mike Gapes: Can I take you back to the question I asked in the earlier session about extra-territoriality? There seems to be a difference of approach between yourselves and the Working Group. Your memorandum is quite scathing and you even say that some observers say that extra-territoriality is just about feeling good rather than enforcement. Can I put it to you that this is really very depressing if you feel you cannot actually enforce these measures? Is that not a rather extreme view? What is your response to what was said earlier in the previous session about trying to create some kind of intermediate category of equipment which is particularly sensitive and getting a control regime there?
Mr Hayes: I think there are two separate questions there. Firstly is the question of extra-territoriality in the broader sense, in principle, and we are of the view that whether to go down the route of extra-territoriality or not is a proper agenda item for the scope of the review. We do believe there are very real enforcement difficulties with extra-territorial legislation; there are problems with clashes of legislation as we see with the clashes between our own legislation and the US extra-territorial provisions. There is the implication that if the UK imposes its laws extra-territorially then presumably we are going to assure all other countries, including the US that we will accept their own extra-territorial jurisdiction. Then there is the separate question of if the decision is that extra-territoriality is a valid route down which we should proceed, do we agree with the creation of another class of items under the extra-territorial regime, to which the short answer is yes.

Q46 Mike Gapes: In looking at those items do you think one way forward might be to extend the list of restricted goods because at the moment there are ambiguities. You talk in your evidence about long range missiles and unmanned aerial vehicles and you say it is baffling that they are included, but would it not be easier to then just extend it to all missiles and Man-Portable Air Defence Systems so that you cover everything? Or would that be a step too far?
Mr Hayes: It depends on what your concerns are. Typically if you look at a UAV system or a long range missile system these are not the sorts of things that are being irresponsibly brokered around the world and used in third world countries to cause significant numbers of deaths. They are already, by virtue of the regimes to which they are subject—including the MTCR and, in many cases, because of security restrictions—to a very—

Q47 Mike Gapes: Sorry to interrupt, are you saying that there are no examples anywhere in the world where these weapons have not been subject to abuse?
Mr Hayes: I did not say that; I said "typically".

Q48 Mike Gapes: "Typically" means perhaps generally but you might have a number of examples where that is not the case.
Mr Hayes: I am not aware of any.

Q49 Mr Keetch: A MANPAD missile was used to lock onto an Israeli jet going out of Nairobi.
Mr Hayes: Are talking about MANPADS or long range missiles?

Q50 Mike Gapes: We are actually talking about long range ones and UAVs. You said that UAVs might be subject to some criticism because certainly they have been used in a number of conflicts.
Mr Hayes: They have, yes.
Mr Salzmann: As far as we are aware they are not normally the subject of brokering. It is normally government to government deals rather than a broker bringing it together.
Mrs Griffiths: There are very, very tight restrictions on long range missiles. I will give you an example of our company who make Storm Shadow/SCALP EG, a joint venture programme in which the UK Government and the French Government are actively involved. The controls on that are very extreme. We have to have approval from either government before we can sell so where we see the restricted goods category on trade controls coming in for promotion basically we are now in a situation where we are trying to work as a pan-European company and if we had somebody who had the expertise who was a UK employee but we had a potential contract to have our French counterparts sell that system we would need a licence before we could allow that UK person to actually participate in that activity. We are tightly controlled because before the French Government were allowed to sell on that system, the UK Government would always have to give their approval. We have found that we have been caught up in some of this legislation which makes UK people—MBDA UK people—who might have the expertise with our other partners in France and Italy to actually be at a disadvantage.

Q51 Mike Gapes: Do you think there is a possible way forward on the question of controlling the movement of goods outside the UK but bringing in some kind of register of all UK nationals who might be involved in brokering?
Mr Salzmann: It would be very difficult to identify them when you are dealing with the actual brokers, but with restricted goods and embargo destinations you are also capturing the ancillary services (insurance services, re-insurance services, financial services, transportation services and advertising & promotional services). Trying to catch all the British expatriates operating anywhere in the world who are in the advertising sector, for instance, and making them aware of the fact that they have to beware of being involved in helping in the advertising of long range missiles or UAVs, for instance, would be an interesting challenge.

Q52 Mike Gapes: Do you think it is not possible?
Mr Salzmann: In awareness terms I cannot think how it can be done, certainly with regard to the peripheral activities. Also, of course, trying to define what actually constitutes an act of trafficking and brokering is so difficult that you will catch not just the traffickers and brokers but the UK expatriates who work for perfectly legitimate defence companies overseas, such as UK people working in MBDA in France or Italy.

Q53 Chairman: Do you think there is nothing we can do about the situation where a UK citizen brokers small arms outside of the UK, where no partner transaction takes place inside the UK, (some would describe small arms then as weapons of mass destruction in terms of the loss of life)? Are you saying you cannot imagine a situation where extra-territorial controls could operate over UK arms brokers in circumstances where they are operating entirely outside of the UK?
Mr Salzmann: Certainly in the meetings we have had with the NGOs when we have been discussing the creation of this third category, we have been looking at what might be possible and we can see the political dynamic which means that something should be done to try to do it but, for instance, the issue of registration would not actually make things any easier because at the moment you would have to try to prove that a person has been involved in facilitating a deal. In future, if you had a registration system, you would have to prove that they were not registered and they were trying to facilitate the deal. You still have to prove the involvement in the deal.

Q54 Linda Gilroy: Before my time on the Committee when the secondary legislation was being drafted business expressed grave concerns about the impact of the new export control regime on business and warned that they could be disastrous. There were phrases used like, "phrased far too vaguely and loosely"; the industry was unhappy about "relying on a pragmatic and commonsense approach by Government"; the burden of record keeping was a concern, particularly for intangible transfers and brokering; it was felt that it would undermine trade fairs held in the UK and might catch all those who are unfamiliar with it. Why were businesses predictions so wide of the mark? You are saying in your memorandum that very many of the industry's previously stated direst fears and predictions had not in fact arisen.
Mr Hayes: They were not actually wide of the mark. In fact industry's predictions were accurate and it shows the value of the consultation which took place at the time. Because of the very pragmatic approaches by both DTI and industry in relation to the use of open licensing and particularly the use of record keeping those burdens have been reduced to a manageable level. There was a very heavy training burden which was carried by industry and we had a very narrow window which was barely manageable in which to implement it. There has been a significant financial cost. The actual burden in terms

of operating the system has been significantly reduced by the approaches of functional record keeping and the use of open licensing.
Mr Salzmann: Praise where praise is due, I think the very constructive dialogue which has taken place between industry and the Export Control Organisation to address the issues and to make sure that the regulations were enforceable and practical has been enormously beneficial for both parties.
Mr Hayes: There are still areas of uncertainty in relation to the trade controls and in some areas in relation to CBRN but those issues too are being worked through in working groups between industry and the Export Control Organisation.

Q55 Linda Gilroy: Nevertheless, the fears were expressed in fairly strong terms and surely some of what you have just described should have been predictable; there would have been some pragmatism.
Mr Hayes: It was not predictable at the time. Certainly the functional record keeping approach was not predictable until the time that the then Secretary of State, Patricia Hewitt, came into the House and revealed it.

Q56 Linda Gilroy: In retrospect would you have used the same language again?
Mr Hayes: At that time, in those circumstances, yes.
Mr Fletcher: I think they were justified in doing so. They were looking at the possible worse scenario and I think they then warned government they had to talk very seriously with industry to find solutions, as they always have done in the past. The same thing happened over the introduction for the control of military technology when there were the same fears which were quite founded. It could have been disastrous if every single person exporting a piece of military technology to, let us say, the States was going to require an export licence and the DTI came up with the open general export licence for military technology. The same thing happened here, they had the starting point of assuming the worst.

Q57 Linda Gilroy: Perhaps looking forward you might not assume the worst in future in discussions on review and extension so we would not expect to see that kind of language again.
Mr Salzmann: I think we all hope not.

Q58 Mr Keetch: What if the Government were to say in its 2007 review that it is going to tighten controls on licensed production overseas? What would you say to that?
Mr Hayes: If that becomes the law then that becomes the law. If you are asking me what the view of that is at the moment, then the view at the moment is that licensed production overseas is already controlled by virtue of the controls over the initial export of the technology.

Q59 Mr Keetch: When you have examples like the Land Rover which we all know about, can you not see when instances like that happen that there is a very genuine call for people to say, "Hang on, it isn't working". If you can have a military vehicle that I think was 70% from Britain and then used to do what it was doing, surely that is a glaring example where you do need to tighten licensed production overseas.
Mr Hayes: I think I take exception with the description of it being a military vehicle because clearly it is not, otherwise it would have been caught under the military list controls.
Chairman: Let us be quite clear here. The 70% to which Paul Keetch is referring is the 70% that was not military, it was the flat pack exported from the UK that goes to make a military vehicle that ends up being used in a way that a direct export licence would certainly not have been granted.

Q60 Mr Keetch: How do you justify that circumstance where, as the Chairman said, the end result of that is a vehicle, a military vehicle that is used in a barbaric massacre and the end was not controlled? Had Land Rover sought to export that vehicle to that end-user it would have been controlled. The way in which it was done, because of licensed production overseas, it was not controlled.
Mr Hayes: This is a very difficult scenario and not representing Land Rover it is a difficult one for me to answer. The Land Rover could just as easily have been any other vehicle; it could have been a Jeep, a Toyota Land Cruiser, anything you care to name. I think the answer to your question is that you have to draw the line somewhere. Whether it is drawn in the right place is a very proper topic for the review. A system which seeks to control absolutely everything which is currently not on a controlled list would be unworkable.

Q61 Mr Keetch: Do you think that line is drawn in the correct place?
Mr Hayes: That is a matter for government.

Q62 Mr Keetch: I am asking you. Do you think that line is drawn in the correct place?
Mr Hayes: I think at the moment it is probably approximately in the right place. There will always be hard cases and, as the saying goes, hard cases make bad law.
Mr Fletcher: My concern would be that because the Land Rover case has had a very high profile, but when you actually look at the components that were actually exported they are not dual-use components. Dual-use components, unlike what the NGOs were suggesting, are goods which are under control, which have in their own right significant military application and that is one of the criteria to bring them under control within the Wassenaar arrangement. We are talking here about commercial, not controlled, items. To draw up legislation that would actually suggest listing those things, there are I would suggest thousands of items exported every day from the UK—nuts, bolts and washers—which end up on military equipment. You tell me where you draw the line?

Q63 Chairman: If it were the case that Land Rover knew that the company that had purchased the flat packs was going to transform these into military vehicles and not non-military vehicles, and if Land Rover knew that Turkey had a specific military relationship with Uzbekistan that would mean that should there be civil disturbance these vehicles could be used, would you think it would be a good export control policy for government to seek to control what Land Rover was doing, if they knew that was the chain.
Mr Keetch: After all, it is not unknown for a Land Rover to be used for military purposes. It is hardly a dual-use item that is regarded as not having a military capability.
Mr Hayes: I do not think anyone is arguing that the outcome in this particular case was desirable; no-one would argue that, but whether or not there is a realistic way in which an export control could be drafted which would prevent that sort of export taking place without having a lot of unintended consequences is a very difficult question.

Q64 Judy Mallaber: I have a couple of questions on enforcement. There was a very interesting reply to a parliamentary question a couple of months back, answered by the Financial Secretary of the Treasury. He was asked what percentage of breaches of export control legislation involved goods that would have been granted an export licence if the exporter had got round to applying for one. The answer for the last year that he gave, which was fairly typical of previous years, was 83% which meant that eight out of 10 items seized by customs for breaching export controls could have been exported if the exporter had applied for a licence first. Would you like to comment on that and what implications you would draw from that figure?
Mr Fletcher: We were surprised that the figure was that low. We had expected the figure to be much higher. That is based on the fact of how few licences are actually refused by the DTI.
Mr Salzmann: When you have 17% in that particular case of attempted shipments which were caught which would not have received a licence, that is a very high proportion.

Q65 Judy Mallaber: How much of the issue there is the fact that the companies are not applying for the licences?
Mr Salzmann: The 83% were not aware of export controls sufficiently, but also the level of the 17%, how many of those were a deliberate attempt to evade regulations because they knew they would not get a licence. We are constantly working with the DTI on awareness aspects both with UK regulations and also US regulations, organising workshops and other initiatives. We have an Awareness Outreach Activity Sub-Committee which is looking at initiatives which we can run to try to help with the awareness side.

Q66 Judy Mallaber: Are you aware whether there has been any analysis of that 17%?
Mr Hayes: No, we are only aware of the same figures as you have.

Q67 Judy Mallaber: After you had given evidence last session the Committee put your comments about the lack of checking of goods to Revenue and Customs and Mr Mark Fuchter, Head of Publications and Restrictions Policy Group, said they were very anxious to establish good relations with EGAD; it was a most useful session and they were going to go off and do so. Has anything happened as a result of that?
Mr Salzmann: Yes, there have been a couple of meetings. We have an HM Revenue and Customs Sub-Committee. We had a previous liaison which has been enhanced since then. We have had a couple of meetings since then including one that was held at our request to try to get confirmation from HM Revenue and Customs about how the actual procedures of the new National Clearance Hub in Salford are going to work in practice so that we are then in a better position to give advice to our member companies on what they have to do to comply with the new regulations using the NCH.

Q68 Judy Mallaber: So that has helped to clarify the position so far as you are concerned. Is that now an on-going relationship?
Mr Salzmann: Yes it is.

Q69 Judy Mallaber: What are your views on their level of resources in terms of enforcement? Overall what would your view be on the question of their resources?
Mr Fletcher: I would have thought they were under-resourced but then most government departments are under-resourced these days. It is a horrendous job. You have the officers who are checking the paper work using the new computer systems and such like. The computer systems are supposed to free up customs officers, but actually physical customs officers checking goods—I do not know whether any of you have ever been to the goods sheds at Heathrow and seen the horrendous problems that they have between trucks arriving, goods being packed on pallets and put onto aircraft, you can count in minutes the time they have to check the physical goods against paperwork if they are doing checks—is a horrendous problem. One of the other areas which ties their hands behind their backs is with the potential export of tangible technology using the mail system. My understanding is that under the Telecommunications (Lawful Business Practice) (Interception of Communication) Regulation 2000, unlike a physical good which they can look at and see whether it meets the paperwork, they would have to have a warrant to look to see whether there was controlled technology in mail.

Q70 Malcolm Bruce: In your evidence to us you said that the defence industry is a compliant and easy target for the British Government and you would like to see some other sectors—dual-use sectors and freight forward couriers—receive more attention. You also suggested that more could be done using

UKTI Chambers of Commerce and Business Links and so forth, and people taking responsibility for themselves. In our report we suggested an industrial export control association on the Swedish model; do you think that would help and perhaps take the pressure off you?
Mr Salzmann: Essentially between ECAC (Export Control Advisory Committee) which meets with the DTI and EGAD itself (which represents all the trade bodies you can see on the letter heading) effectively we have already got a similar model.

Q71 Malcolm Bruce: I thought you might say that but you have also acknowledged nevertheless that there is still a lot slipping through. Perhaps I can ask you as a supplementary, what more do you think could be done to reach those companies that are not complying in most cases out of ignorance but also providing cover for those who are not complying but can use the argument that nobody knew (because so many people clearly do not).
Mr Salzmann: Certainly our Awareness Outreach Activity Sub-Committee is looking at that. The Chairman of that is actually from the Export Control Organisation and we are actively looking at initiatives, on how to try to engage with them. With regards to the freight forwarders what we are planning to do is undertake a survey of our members to produce a list of recommended freight forwarders who are aware of export controls.

Q72 Malcolm Bruce: What about non-members?
Mr Salzmann: It will be open on our website to list any freight forwarders that our members can recommend.
Mr Fletcher: It is extremely difficult to try and find out who out there perhaps wants this advice. I have done some research because there is potential business for me to find these people and it is extremely difficult. You do not know until they come out of the woodwork by one means or another and make contact. You cannot force people to look at the DTI website. A good customs case often brings a lot of people out of the woodwork and that can be publicised in the proper manner (which again DTI is trying to do through the website).

Q73 Mr Borrow: It is a few years now since the talks with Congress on the ITAR waiver came to an end and I think the conclusion at the end of that was that the Government needed to work with the US Government on alternative arrangements. Lord Drayson is in the States next week trying to finalise progress on the JSF but I am more interested in the extent to which alternative arrangements have been or are being put in place, not just for the JSF but for the whole of the defence sector in terms of the transfer of intellectual property and technology from the US.
Mr Hayes: It continues to be a very difficult area in which to work. We are coping with the existing systems and that really is the best that we can say at the moment. We have provided briefings to various groups and continue to do so on possible ways forward that we see. Whether or not any of those will be taken up or deemed workable is another question.

Q74 Mr Borrow: Is there no feeling from the US side that some sort of change in arrangements needs to take place?
Mr Salzmann: From the US industry side, yes.

Q75 Mr Borrow: Not from the Hill.
Mr Salzmann: No, not necessarily, but we are waiting to see what happens with the new constituency on Capitol Hill after the mid-term elections.

Q76 Chairman: Thank you very much indeed, not just for this afternoon but also for your memorandum. It was very helpful indeed. It clearly took time to prepare and it was very helpful to us. You know we are reviewing the export control legislation and this process will take a bit of time and if there are any further views that you have please do get in touch with us again.
Mr Hayes: We will certainly get in touch with you with some detailed information from NBC UK.

Thursday 1 March 2007

Members present:

Roger Berry, in the Chair

John Barrett
John Battle
Richard Burden
Mr David Crausby
Mike Gapes
Linda Gilroy
Mr Lindsay Hoyle
Mr Paul Keetch
Peter Luff
Judy Mallaber
Sir John Stanley

Witnesses: **Mr Gareth Thomas MP,** Parliamentary Under-Secretary of State, **Mr Kenny Dick,** Deputy Head (Security and Justice) of Conflict, Humanitarian and Security Department (CHASE), and **Ms Kate Joseph,** Security Policy Adviser, CHASE, Department for International Development, gave evidence.

Q77 Chairman: Minister, welcome. I think this is the first time DFID has given evidence to the Quadripartite Committee. We are very grateful. Thank you for the written answers to various questions we posed before this meeting and I think you may have another answer coming up in a moment. Perhaps for the record, I could ask you to introduce you and your colleagues.

Mr Thomas: Thank you for the words of welcome. Perhaps I could introduce Kenny Dick and Kate Joseph from our Conflict, Humanitarian and Security Department. I would like to take this opportunity, also, to confirm that I can release to the Committee now, in confidence, the methodology that we use for applying Criterion 8 of the guidance.

Chairman: Thank you very much. I am sure we will have questions on the application of Criterion 8 this afternoon, but thank you for the document. We will go away and think about it and I am sure we will have questions that we will want to raise at some stage. We are very grateful to you for the opportunity of seeing the methodology. I know there are some Members of Parliament from Ukraine here this afternoon. You are very welcome. We hope you find our proceedings interesting. On that note, the first question from Sir John Stanley.

Q78 Sir John Stanley: Minister, following the substantial policy change by the British government in the Oslo declaration last weekend on cluster bomb policy, could you clarify for us whether the British Government's position is that there should be a treaty ban on cluster bombs and whether the British Government's position is that that ban should be unqualified or qualified?

Mr Thomas: I do not think there was a substantial change in policy of the British Government last week. We have always made clear that we want progress on the elimination of particularly the so-called "dumb" cluster munitions. We see the convention on certain conventional weapons as the ideal process to make progress but we recognise that the Oslo process offers a way of injecting momentum into that process. That is why we went to Oslo, that is why we engaged in the way that we did and it is why we were happy to sign the declaration. There will be a process of detailed negotiations now to try to reach more detailed agreement. One of the first issues will be to try to agree definitions, which has obviously, as you will be aware, been a significant problem for some time in the events around cluster munitions. But we welcome the Oslo process. We see it as being complementary to the CCW[1] process and we are going to work through both processes to try to move forward.

Q79 Sir John Stanley: That does not answer my question, Minister. Is the British Government's policy objective a total ban on cluster bombs of all types or just a ban on "dumb" cluster bombs?

Mr Thomas: I cannot answer the question you have asked me in the specific way that I suspect you would like because one of the things we have to agree first, in order to arrive, if you like, at an answer to that question, is the definition as to what constitutes a cluster munition. We are clear that the cluster munitions we want to see eliminated within the next decade are so-called "dumb" cluster munitions but even using that phrase we still have to reach a more detailed definition with allies in the Oslo process. Yes, ultimately we would want to sign that treaty, but in order to sign a treaty we have to arrive at agreed definitions with the other potential signatories of such a treaty.

Q80 Sir John Stanley: Do you think everybody understands the definitional distinction between "dumb" cluster bombs and cluster bombs that are not in the "dumb" category? Indeed the definition of that was made by the Foreign Secretary in her statement. Could I ask you again: is the British Government's policy objective to achieve a ban on all types of cluster bombs or is this treaty a ban on "dumb" cluster bombs?

Mr Thomas: Our policy objective is to arrive at a situation where there is the prohibition of the production and the stockpiling and the transfer and the use of those cluster bombs that cause unacceptable humanitarian harm. That is the policy position. As I have said, we want to use the CCW process and the Oslo process to try to reach that end.

[1] UN Convention on Conventional Weapons

Q81 Sir John Stanley: I hope, Minister, the Government will reflect on making that definition in terms of civilian harm. It is all about the use to which cluster bombs are put. Given the fact that operationally it is never possible to determine exactly on who the cluster bomb is going to fall, is it not the case that the Government should be defining their policy objectives in terms of either all cluster bombs or simply, as the Government's wish, "dumb" cluster bombs only?
Mr Thomas: I think I have set out our policy objective. As I say, we do want to make progress on the issue of those cluster munitions that do cause unacceptable humanitarian harm. There are two processes underway and we want to work through both processes to try to make progress. We have a substantial number of allies in that process but there are also governments that remain to be persuaded.

Q82 Chairman: What is the Government going to do with its own cluster bombs?
Mr Thomas: We have said that we want to eliminate from use or to withdraw from use the "dumb" cluster munitions we have by the middle of the next decade.

Q83 Chairman: Why wait until the middle of the next decade?
Mr Thomas: We have thought through the government, across departments. We recognise that cluster munitions have significant military advantages on occasion and we want to make sure that if our forces are not able to take advantage of those cluster munitions that others are similarly not able to exploit those cluster munitions. There are processes under way to move forward. We have demonstrated our commitment to try to make progress by going along to and taking as active a part as we did in the Oslo meeting. We are very committed to move forward on both the CCW process and the Oslo process.

Q84 Chairman: Let us move on. Since 2003, France has refused 42 applications for export licences on the grounds of incompatibility with Criterion 8 and the UK has refused one. What is the reason for this difference?
Mr Thomas: I would suggest that if you compare Britain's record to the record of all other European allies, our process, arrangements and record stacks up very well in comparison to those other countries. There is a difference between the way in which Criterion 8 is interpreted in some countries. It is not a completely harmonised process, as you will be aware, and it is our view that our French colleagues have a slightly different interpretation of Criterion 8 from ours. I would be happy, if the Committee were to go into private session, to give you my view as to what it is that is different about the way in which our allies interpret Criterion 8, but I would say to you that I think if you look at most other European countries they have a similar role to us in terms of the number of licences refused.

Q85 Chairman: If we have time at the end, possibly. If not, as an alternative, would it be possible for you to inform the Committee in writing in the strictest confidence on this disparity? It does seem a little odd. We know that the reasons for refusals are circulated by the European Union. We are supposed to have a common Code. I am not sure why it cannot be in the public domain that there is this difference. We would like to pursue it because it does appear to be of some interest. Since you confirm that there is a DFID approach to applying Criterion 8, we would like to understand that better.
Mr Thomas: I would be very happy to write to you in confidence if that is needed.

Q86 Chairman: Thank you.
Mr Thomas: There is a common Code. However, there are some slight differences. It is not completely harmonised. We are working to get greater clarity, greater harmonisation. That process is perhaps better demonstrated by the fact that we led on the section of the EU Users' Guide which refers to the Criterion 8.

Q87 Peter Luff: Let us turn, Minister, to a practical example of Criterion 8. Its apparent failure leads me to ask what purpose it actually serves. Do you agree with the former Secretary of State, Clare Short, who, a month ago, during a debate on the floor of the House of Commons said about the Tanzanian radar system, "It seems to me . . . that if the contract did not breach Criterion 8, Criterion 8 is not worth having. There is no question but that the decision damaged the development of Tanzania, and if the provision can be read in a way that allows such a decision through, it needs rewriting."?
Mr Thomas: I do not agree with that assessment. If you look at what has happened to the economy in Tanzania and Tanzania's record since the purchase of that particular radar system, the evidence also does not stack up to support that contention. The economy in Tanzania has continued to grow at an average of about 6% a year. The number of children in primary school has virtually doubled since 2000. I do not think the purchase of that particular radar system did seriously undermine the economy of Tanzania. The fact that it is still in use is an indication that it was well-used and it was, as the Tanzanians believe themselves, an appropriate purchase.

Q88 Peter Luff: Despite the recent press publicity about the contract in *The Times* there are no lessons to draw from the case as far as your department is concerned?
Mr Thomas: There were lessons to be drawn and they were drawn at the time. They did lead to the adoption of a methodology by government across the whole of government to interpret Criterion 8. One of the things I would be happy to acknowledge is that it is now some four years since we reviewed and had a detailed look at how the implementation of that methodology is working. As a department, we are going to be shortly reviewing our use and our

implementation of that methodology to see whether there are further improvements we could make to the implementation of that methodology.

Q89 Peter Luff: I am grateful for this document, which I am not allowed to quote from. It does seem a bit odd to me that those wanting to make exports do not know what the tests are they have to meet.
Mr Thomas: I think most arms' exporters do have a pretty good idea of what would constitute a serious threat under the Criterion 8 to the long-term economic prospects of that country.

Q90 Peter Luff: I find it very difficult to understand why the document is not a public document.
Mr Thomas: I am happy to say on the record that I think there is a risk as to how that document would be used.

Q91 Peter Luff: Risk of use by whom?
Mr Thomas: Potentially unscrupulous arms dealers.

Q92 Mr Hoyle: Minister, who do you really think benefited the most: Tanzania or BAE Systems by the delivery of the radar system?
Mr Thomas: I am not in a position to make that judgment. As a department, we were required to assess whether the export was likely to threaten the long-term economic prospects of Tanzania. We took a judgment, as a department, that it was not likely to seriously undermine the economic position of Tanzania and I think the evidence backs up that assessment.

Q93 John Barrett: During that same debate, the Government Minister, Mr Wicks, said that we had to strike a balance between the criteria and the independence of the sovereign nation. He then quoted the Tanzanian President, who said, "it's a bit insulting to suggest that we need to wait for the World Bank to prescribe what's best for us." Is the Tanzanian Government or any other government in the best position to decide whether it has the necessary technical and economic capacity for an export from the United Kingdom or does it need an independent assessment from here, outwith the state the export is going to?
Mr Thomas: I think any country, including developing countries, has the right and should be expected to try to protect their citizens. The sad reality is that on occasions weapons are going to be needed to achieve that purpose. I think developing countries do have the right to try to allow for arms exports into their country. In general, I think it is their sovereign right to determine whether particular arms are imported or not. I think we have a judgment to make about whether there is a serious threat to the long-term development of a country's economy. That is the element of the balance that Mr Wicks referred to in the debate. It must be the sovereign right of a country to import arms, but our responsibility is to make sure that the arms are not going to have a serious impact on the long-term economic prospects of that country. That is under Criterion 8. There is obviously a whole series of other criteria on which we make a judgment about the appropriateness of a potential arms export or not as well.

Q94 John Barrett: Would you accept that the sovereign state has the right to have its view but it does not have the right to have the final say.
Mr Thomas: It certainly has the right to have its view. If an arms export is going to be allowed to go ahead, it would ultimately be up to that country whether or not to go ahead with the purchase but I do think we have a responsibility to check that that particular arms export is not going to seriously undermine the economy of a particular country. That is under Criterion 8 of the judgment.

Q95 John Battle: I sit here representing the International Development Committee. Our job really is to make sure that the whole focus is on poverty reduction, as it is for your department. In the application of Criterion 8 I would like to ask you about the relationship and the conversation with the international financial institutions like the IMF and the World Bank. Criterion 8 says, of course, refer to their sources of information and I am interested to know how you do that. Do you just read the IMF financial statistics year book and the World Bank's indicators, or do you go further than looking at the books and have conversations with personnel at the IMF and the World Bank on particular individual events?
Mr Thomas: It will vary from situation to situation. We do have access in many developing countries to extensive information from the World Bank and IMF because of the various support that they give in those countries, so there is considerable data which we are able to draw from and, if necessary, we can get further information from their personnel as appropriate, but, ultimately, the decision on whether or not to move forward with a particular arms export where there is an issue about a serious threat to the long-term economic prospects of that country is ours. We do not contract out that decision, as such. We will seek to use data from the international financial institutions where it is available but the decision ultimately is ours.

Q96 John Battle: I can understand that you do not ring up the World Bank or the IMF for the sale of every individual washer or nut on the wheel of an aircraft or bullet, for example, but what about contracts over £1 million, a threshold, so that any large-scale contracts should be subject to intense discussions with the international financial institutions so that you get some dialogue and feedback which might also suggest that they take this issue seriously as well.
Mr Thomas: I know they take the issue seriously. We have a methodology which we use which generates a particular value threshold. If that value threshold is exceeded it will trigger concerns. Many of the further indicators raise alarms as well. That will cause us to have a proper look at whether or not the particular export is justified or not. Obviously to help us make

and implement that methodology, we do, as I say, draw on data from the international monetary institutions.

Q97 John Battle: It would involve conversations with them occasionally.
Mr Thomas: On occasion.

Q98 Richard Burden: As I understand it the World Bank's IDA borrowers' list is a pretty important thing you use in order to determine which countries' licences to examine in most detail. Is that right?
Mr Thomas: It is. The International Development Association list is the list of low income countries. It is updated on an annual basis. The World Bank generates it and we think it is the most appropriate guide for us to use.

Q99 Richard Burden: Why is it the most appropriate to use for determining Criterion 8 capability? For example, Guyana has a GDP per capita of $4,700 and it is included on the list. Morocco has a lower GDP than that, $4,400, but Morocco spends around 5% of its total GDP on military expenditure, which ranks it 18th in the world. It would appear that that would be a good one to look at but it does not appear on that list. I am struggling a bit to see why that list should have such significance in your decision as to which licences to examine.
Mr Thomas: That list contains, essentially, the world's poorest countries. It is the list that is updated most frequently and with any list you have to make a decision about where to draw the line on that list. Having looked at the list, we judged that list to be most appropriate of those that are available. I should say as well that we do look at all licence applications for Iraq, Sudan and Nepal where they go beyond the value threshold using the methodology that we produce, and we have recently taken a decision to extend still further the list of countries for which we look at all the licence applications in those circumstances. We do use the IDA list in general terms; we do not use it as a hard and fast rule book on occasion. I do think it is the most appropriate list that is out there of the world's poorest countries and therefore it is appropriate for us to use it to make a judgment on Criterion 8.

Q100 Richard Burden: Do you think the fact that there is reliance on it—and I take the point about those countries where there is conflict is an issue—coming back to Morocco, Morocco has an ongoing issue in Western Sahara and yet it does not appear on the list. Does that indicate that it perhaps means the government departments take their eye off the ball. If it is not on the list, you have to think "Should we look at a particular country?" without having that trigger. In other words, have you reviewed whether that list is the most appropriate one to be using?
Mr Thomas: We have reviewed the list of them and we do believe, on balance, that it is the most appropriate list. Criterion 8 is used to make a judgment specifically about the risk of an economy of a developing country being undermined. Development obviously goes broader than the issue purely of the economy and that is why there are other criteria, such as those around human rights and conflict in the guidance to help make that broader judgment. Criterion 8 is more specific.

Q101 Richard Burden: I might ask you about some of the other criteria in a while, but could I ask you about the numbers of licences that DFID does scrutinise and use its right to comment on. As I understand it, last year 1.5% of standard individual export licences were looked at and examined by DFID and 27% of the open individual export licences. Both of those figures seem small. In relation to SIELs it is very small indeed: 1.5%. Why is that?
Mr Thomas: I think it reflects a number of things. First, that only a relatively small percentage of UK exports are destined for developing countries, possibly under 7%, and I do not think you should, in a sense, make a judgment about the numbers of licences that we can look at to judge whether or not Criterion 8 works. There is a clear methodology in place. When that methodology triggers a value threshold to be breached because of the size of the potential export, then we will look at the licence in detail. But I do come back to the point that that is a methodology shared across government and I would generally remind you of the nature of the arms export market in the UK and the fact that the focus of that market is not towards developing countries in general terms. So I do not think you should read anything into the percentages or numbers of such licences either turned down or looked at specifically.

Q102 Chairman: Minister, I wonder if you might let the Committee have a note about the use of this IDA borrowers' list because it is perfectly clear that the borrowers' list does not correspond to the world's poorest countries as the DFID memorandum states. There are countries with much higher GDP per capita than Morocco that are on the list and Morocco is not. If you line up GDP per capita against the IDA borrowers' list, you simply do not see it as the poorest countries being on the list. Other considerations apply. For example, there may be perfectly good reasons why Cuba is not on the list, I do not know—your guess is as good as mine—but in all seriousness it is not self-evident to me, looking at the data, that the IDA borrowers' list clearly does represent the poorest countries.
Mr Thomas: I am happy to drop you a line.
Chairman: Thank you. That would be helpful.

Q103 Judy Mallaber: As I understand it, the first stage of what DFID does is to look at the list of countries that you will examine, and the second stage is that when you get an application for an export licence you look in a detailed way at the effect of that proposed export on the economy or development of that country. I would like to explore how you carry out that assessment of what the impact is. From paragraph 20 of the Department's evidence, it would appear that the key indicator is a value threshold based on the value of the export as a proportion of health and education spending in that

country. That is the key indicator. What percentage would the export have to be as a proportion of health and education spending to trigger a warning light?
Mr Thomas: 5%.

Q104 Judy Mallaber: Is it the same threshold for all countries?
Mr Thomas: The methodology means that, yes, it would be. When an application is received, the application goes to the DTI. The DTI will use the methodology agreed across government to investigate whether or not the value threshold is exceeded. If the value threshold is exceeded then it comes to the Department for International Development to have an even closer look at the merits of that particular export or not. So, is that 5% figure used for every country? Yes, it is.

Q105 Judy Mallaber: Does the DTI determine their valuation on both the value of the export and also the value of spending on health and education in that country? The DTI determines both those statistics does it?
Mr Thomas: It is not the DTI, as such, that determines those statistics. There is a methodology which we have agreed across government. It is a mathematical process that is used to make assessment as to whether or not DFID needs to have a more detailed look at whether the export is appropriate or not. You rightly highlighted the first element of how that value threshold is drawn up, the relationship between the potential size of the cost of that export and health and education spending, but there is a series of other indicators that also influence the size and value of the threshold and that information is obviously what I have been able to release to you earlier on, at the start of this session.

Q106 Judy Mallaber: How reliable are the statistics from developing countries on the value of health and education spending, which are used in making that assessment?
Mr Thomas: If we have concerns about the reliability of the data, there are international financial institutions that we can go to, to discuss the data set that we have available. There are a number of sources for the data that we would seek to use to help us to make that judgment.

Q107 Judy Mallaber: Is that criterion on the relationship of health and education spending the primary one? Could you summarise briefly which would be the other most important indicators that DFID would look at.
Mr Thomas: I would prefer, in public session, not to go into a lot more detail on that at this stage around the other indicators, but you will see in the information we have given to the Committee what those other indicators are. I would be happy to answer further questions to the Committee about the other indicators that we use.

Q108 Linda Gilroy: Why do the words "corruption", "fraud" and "bribery" not appear in DFID's memorandum to the Committee?
Mr Thomas: I hesitate to give you this answer because I do not wish to be trite but we were asked specific questions and we replied to those questions. In answer to Mr Luff I said we are shortly going to start a review of how the Department implements the methodology. As part of that review, one of the issues we will look at is the issue of corruption.

Q109 Linda Gilroy: The answer is that that does not come into your use of Criterion 8 at all at the moment.
Mr Thomas: I do not think that is an appropriate conclusion to draw. In the economic data and the economic information that you have, both through our conversations with the international financial institutions and through the expertise of our own staff in country, we have access to information which obviously will have a bearing on the levels of corruption in the countries and it is part of the broader picture that is taken into account by that economic data. I am simply saying that one of the things we will look at is whether or not we need to do anything else on that particular question.

Q110 Linda Gilroy: Under question 7 in the memorandum you did respond to "The impact of irresponsible and illegal arms transfers on developing countries". Currently corruption and bribery you would not define under "irresponsible illegal arms transfers".
Mr Thomas: I do not have the memorandum in front of me, but I would say that we do take corruption into account in economic data that we have available to us. We are going to look at whether or not we need to do more.

Q111 Linda Gilroy: You say that in 2004 you commissioned research from Bradford University on the impact of armed violence on poverty. Did that study cover corruption at all?
Ms Joseph: That study did look at a number of different factors and one of those factors was the impact of corruption on arms transfers. The focus of that study was on the legal trade in conventional weapons and what impact that would have on development. That was one of the aspects that were considered. That is why we have been interested in taking it into account further in the way we apply Criterion 8.

Q112 Linda Gilroy: Is that study in the public domain?
Ms Joseph: It is in the public domain. It is on the Bradford University website. I am sure we can make that available to the Committee.

Q113 John Battle: The Department put out an excellent White Paper on governance. There are good chapters and sections on corruption. I cannot recall whether the arms trade and arms industry is referred to at all in that White Paper. Given that DFID has to spend so much time, money and

possibly energy picking up the pieces, whether it is in the clearance of mines in post-conflict resolution work, the collection of goods in Sierra Leone and the Congo, is DFID able to give a stronger, clearer lead on this whole business and suggest this is the way forward in the way that DFID has done in other areas, or are you quietly playing down this area in the hope that people do not notice and in the background the DTI and the Foreign Office are saying, "We have to carry on with this business and really try to do our best to make sure it does not interfere with development"? Or are you positively on the offensive to take arms out of the equation?
Mr Thomas: One of the successful initiatives which Clare Short kick-started was the extractive industries' transparency initiative. As a result of the success of that initiative to date, we have begun to look at whether or not we can apply that model to other sectors. The defence sector is one of those sectors on which we are beginning to have to do some preparatory work with Transparency International. I do not think it would be true to say we have gone quiet on corruption in the arms industry, but we are engaged in some thinking and some work there. Obviously we are happy to keep the Committee informed about the progress of that work.

Q114 Linda Gilroy: How does what you just said fit into the International Development Secretary's appointment following the G8 summit last year as the person to champion tackling corruption across Government?
Mr Thomas: That he is willing, through DFID, to look at whether or not there is more we can do on corruption in the defence industries is, in a sense, a further reason why the Prime Minister wanted him to take a particular lead on corruption in general.

Q115 Linda Gilroy: Presumably what you have just been discussing with us about corruption and defence features within his programme of work.
Mr Thomas: Absolutely. It is work which is taking place with other government departments and with Transparency International. I am not in a position at this stage to give the Committee lots of detail about the nature of that initiative because it is still very much in the early stages but we have some work underway. I hope it will lead to an initiative as successful as the extractive industries' transparency initiative has turned out to be. At the moment, I cannot give you the confidence that that is how it is going to turn out because we are still very much at an early stage.

Q116 Richard Burden: When I was asking you a little earlier about Criterion 8, you explained that the Department will comment on other criteria as well: Criterion 2, human rights; Criterion 3, internal tension or conflict; and Criterion 4, regional peace and security. You mentioned a number of countries you would look at under those kinds of criteria. In your evidence, paragraph 12, you say you have a list and I was wondering if that list is available.
Mr Thomas: Sure. It is Iraq, Sudan, Nepal and we have recently extended it to include Afghanistan, Burma, Burundi, Chad, Cote D'Ivoire, DRC, Ethiopia, Eritrea, Sri Lanka, Somalia and Zimbabwe.

Q117 Richard Burden: In terms of results, reviewing applications in relation to those countries, do you think it does add value to your work in each country?
Mr Thomas: I think it does. Issues around human rights and conflict are part of the broader understanding about development. Therefore, I think we should comment under those criteria and help government as a whole reach a conclusion on whether or not an export is appropriate under those criteria too.

Q118 Richard Burden: Do you know if the Foreign Office is also involved in that level of scrutiny of those countries. After all, the Foreign and Commonwealth Office technically leads on human rights in these countries. It produces a human rights report annually. You have the list. You say they are the countries we look at really clearly. Do you get the impression that FCO are doing the same?
Mr Thomas: Yes, I do. We have a genuine cross-government process. If these are things we look at together, departments have particular strengths by the nature of the type of work they do and we bring the individual strengths to try to get an even stronger process jointly.

Q119 Richard Burden: That list is a government list.
Mr Thomas: That is the list that we will focus on in particular. I think you need to ask questions of other departments about the specific areas they focus on.

Q120 Richard Burden: We will do that. On the number of refusals on the grounds of criteria 2, 3 and 4, are there any more refusals under those criteria than there are under Criterion 8?
Ms Joseph: I do not have information in front of me about the total number of refusals under Criterion 2 or Criterion 3 or Criterion 4, which are the ones in which we are most interested apart from Criterion 8, but I think the Committee is probably aware that there have been many more refusals under those criteria than under Criterion 8.

Q121 Richard Burden: If it is possible, perhaps you would let us have a note of the number of refusals under those criteria and comparing that with Criterion 8.
Mr Thomas: That will be done.

Q122 Mike Gapes: I want to ask you about trafficking and brokering, but, before I do, I have a question following on from what Richard Burden said. How joined up is our work between DFID and the Foreign and Commonwealth Office? I say this in the context that the FCO has been closing a number of posts around the world, whereas DFID has offices in a number of countries where we do not have

diplomatic representation. Do you think that is an anomaly? Is it not time that we had a more integrated way of dealing with individual countries?
Mr Thomas: On the specific issue of arms exports, the reason it is a cross-government process is because individual departments will have strengths in different areas geographically and in thematic areas of expertise too. The purpose of a number of government departments being involved in the process is to bring all that expertise together. In that sense, the process works well. We work closely with other government departments in these areas. The methodology that we use is one that was agreed with other government departments. The DTI, if you like, are the first point of call for that methodology to be implemented. Yes, the process works well. One of the reasons we are conducting a review about how we use the methodology around Criterion 8 is to see whether there is anything else we can do as a department to strengthen still further how we implement that methodology. But that is, in a sense, our contribution to the whole process. Other departments bring other strengths.

Q123 Mike Gapes: You have a DFID office in some countries where you do not have a diplomat, for example, yet you could probably do an assessment on human rights, you could do other things in that country. I wonder whether it works in the way it ought to or if in fact we almost have DFID running its policy, mainly in Africa, and the Foreign and Commonwealth Office working somewhere else.
Mr Thomas: As the Minister responsible for Asia, Latin America and the Caribbean, I slightly resent the suggestion that we do not do things outside of Africa. I do genuinely think the process works well. Where there are countries where we have larger staffs, then we obviously have more expertise to bring to discussions about that particular country. But it is genuinely a cross-government process and we do work well together.

Q124 Mike Gapes: Perhaps we will come back to this another time. Your boss, the Secretary of State Hilary Benn, gave an interview in *The Financial Times* two weeks ago, 14 February. You have alluded to the issue several times in several different answers about the forthcoming review of the Export Control Act. He said it will examine "whether UK controls on international arms brokers, who act as go-betweens in weapons deals, should be extended." Do you want those controls to be extended?
Mr Thomas: The review that I have been referring to is a review we are going to do ourselves of the methodology, the implementation of which we are responsible for leading on. As you say, there is going to be a review more generally of the secondary legislation under the Export Control Act. I think it is pretty clear that the top issue for consideration in that review is going to be the issue of brokers.

Q125 Mike Gapes: Do you want the controls extended?
Mr Thomas: I think there is a good case for the review to look at the question of extension to small arms and light weapons, for example, yes. I think the review is going to look at that issue and I welcome that.

Q126 Mike Gapes: Do you think extending the controls would reduce the supply of those illicit arms?
Mr Thomas: I think to reduce dramatically the flow of illicit small arms and light weapons we are going to need a comprehensive arms trade treaty. Frankly, that is the single biggest priority internationally for making progress on controls of those types of weapons and I am sure the Committee is more than well aware of where we are in that process.

Q127 Mike Gapes: Do you think there is a case for a register of all brokers?
Mr Thomas: Frankly, the system we have at the moment where every application has to be considered on its own merits is arguably stronger than the question of a register, so we have an effective process at the moment.

Q128 Mike Gapes: Could we do both? It is not either/or, is it?
Mr Thomas: You then have to make a judgment about resources and how such a list would work in practice and what the disadvantages might be of having such a list. I understand the Committee is going to be meeting with other ministers who are leading on those particular elements of the review and I suggest that they are the appropriate people to talk to you about this.

Q129 Mike Gapes: Could you give us some sense of the kinds of questions we might ask other ministers? What does DFID want out of this review of the 2002 Act and perhaps then we can press that agenda with other ministers?
Mr Thomas: It is very kind of you to tempt me down that particular route, Mr Gapes, but I would not dream of trying to put questions into your mouth.
Mike Gapes: I am quite happy to take them.
Chairman: Sir John, I think, would like to ask a question. Whether he can tempt you, I am not quite sure.

Q130 Sir John Stanley: In the Westminster Hall debate on our previous report last week I pointed out that this Committee had made a total of 34 recommendations in favour of the extension of extraterritoriality for trafficking and brokering. Some of us take the view that the present review is unnecessary, but, anyway, the Government is going ahead with it. We are very anxious that this particular aspect of the review is concluded in the shortest possible timescale. Minister, can you tell us what is your timetable for concluding the review?
Mr Thomas: I do not have a specific sense of a timetable for the review. As I understand, you are going to be meeting with other ministers who are

leading on the review and I think you would be better placed to ask that particular question about timescale to them.

Q131 Chairman: I think we have come to our allotted time. If you remember, Minister, you kindly offered either through correspondence or a private session to discuss the methodology issue further. I suggested, and my colleagues agree, that we pursue that in writing at this stage. We are all delighted that brokering is the top issue for the review. We are very grateful indeed to you and your colleagues for attending this afternoon and this is the first of what I hope will be a number of occasions when DFID will have the opportunity to give evidence to the Committee. Thank you very much indeed.
Mr Thomas: Thank you.

Witnesses: **Mr Mark Fuchter,** Head of Prohibitions and Restrictions Group, and **Mr Guy Westhead,** Deputy Director of Frontiers and International Directorate, HM Revenue and Customs, **Mr David Richardson,** Head of Division, and **Mr David Green QC,** Director, Revenue and Customs Prosecutions Office, gave evidence.

Q132 Chairman: Gentlemen, good afternoon. You are most welcome. It is good to see you for the second consecutive year. For the record, would you like to introduce yourselves to the Committee?
Mr Westhead: You did not see me last year.

Q133 Chairman: Forgive me.
Mr Westhead: Not at all. I am Guy Westhead, the Deputy Director of Frontiers and International Business Unit at HM Revenue and Customs.
Mr Fuchter: I am Mark Fuchter, Head of Prohibitions and Restrictions Group within HMRC.
Mr Green: I am David Green, Director of Revenue and Customs Prosecutions Office.
Mr Richardson: I am David Richardson, head of one of the prosecutions divisions at HM Revenue and Customs Prosecutions Office.

Q134 Chairman: You are very welcome. Could I start by drawing attention to the fact that when you gave evidence to us last year we raised a number of concerns that the Export Group for Aerospace and Defence, EGAD, put to us and you said that you were going to go and, I think, establish good relations with them, or some phrase to that effect. I understand there has been contact between you and them, and EGAD have been very helpful to this Committee in advising us of their experience about how the export control regime works. I wonder if you could indicate what, perhaps, has happened over the past 12 months in relation to their concerns?
Mr Fuchter: EGAD have a sub-committee they call the HMRC Sub-Committee. We have established with that sub-committee a joint working group and we have met twice so far, once in July last year and once in January, and we intend to keep meeting with them about twice a year. We have worked up a draft of an action plan, which contains actions for us and actions for EGAD members as well, and I have to say so far that co-operation is extremely good, and there is a number of detailed points on that action plan. More specifically, on their point about the concerns that they raised, we have made some progress on those. Whilst I think at the moment our views probably differ from EGAD's to the extent to which there may be widespread non-compliance out there, we have accepted the point, especially the point about the level playing field, and we have put in place two particular courses of action to address that for our own purposes, and I can explain more about those during the hearing.
Chairman: Perhaps we could come back to that if we have time a little later on. I would like to move on to Judy at this stage.

Q135 Judy Mallaber: In your memorandum you point out that as of December you had secured two successful prosecutions, which was one more than the previous year so you are doing quite well. You made the point that the number of prosecutions is not going to be high and should not be taken as an indicator of whether the controls are successful or not. Do you have any thoughts on what might make a better indicator?
Mr Fuchter: Certainly. Looking at it fairly narrowly in terms of export controls rather than the overall indicators of frontier enforcement, if I answer that first of all from the point of view of export controls, and bear in mind there are all sorts of models about how effective frontier controls can be, I would say a number of things. Firstly, preventing exports to a WMD programme, or a similar programme of concern or similar country of concern, either in response to, say, tasking from the Restricted Enforcement Unit that I talked about last time, perhaps based on sensitive intelligence, if we were to take steps to prevent such consignments going through, or through the initiative and skills of our frontline officers in identifying consignments that are subsequently rated as licence-required under the end-use catch-all control, and also I think preventing similar trafficking in conventional arms. So more broadly it is about prevention combined with other departments to ensure that the Government's export controls outcomes are achieved, broadly exporters are aware and incentivised to remain compliant, those considering or behaving in a non-compliant way are deterred from doing so and, to go back to the point I made earlier, that there is a level playing field. Finally, if proliferators and middlemen enter the field, that they are detected quickly and either dissuaded, taken out or denied the goods. That is a sort of broad answer from the point of view of export controls.

Q136 Judy Mallaber: That is a helpful list in terms of what needs to be done. Are any of those areas where you can pin it down, for example, and give us any indication as to how successful you have or have not been, or are they by definition areas you cannot really say you stopped 10 instances of this happening and five of that happening?
Mr Fuchter: Yes, we can broadly talk about outputs achieved. For example, we have published in our annual report the number of times that we have detained goods that has led to the end-use catch-all control being invoked but, of course, we do not have a baseline against which to measure that. The obvious analogy would be in comparing us, say, with police where there is reported crime against which you have a baseline, there is no baseline or report. Smugglers do not report or citizens do not report a successful smuggling has taken place. There is no comparator against that, but we do report our outputs and we assess that against the intelligence received.

Q137 Judy Mallaber: You mentioned middlemen, for example, a subject which has been of some interest to this Committee. How would you make any assessment on whether you are stopping people acting as middlemen or brokers?
Mr Fuchter: It would depend entirely on the intelligence assessment. What we would do is we would expect to tackle any cases like that. It is probably fair to say, if they are working on behalf of a proliferation programme, middlemen are unlikely to be deterred by some of the measures that we are talking about in partnership with EGAD, but we would expect to take on such cases.

Q138 Judy Mallaber: You also said in your memorandum that some cases are abandoned before they are reported to the Revenue and Customs Prosecutions Office "in order to optimise our resources". What types of cases are abandoned and how many are we talking about?
Mr Fuchter: Firstly, I think, on reflection, using the word "abandoned" was probably not a wise move and it may have caused some concern, and I apologise if we have done that. In very simple terms, this is a straightforward process which takes place within our investigation teams. Managers are expected at all stages to critically review each case that is active to determine whether or not it is likely ever to secure sufficient evidence that would support a report to RCPO alleging offences, or whether or not there may be already emerging issues around disclosure of unused material so, in essence, it is an early review of the sorts of issues you have heard us mention to this Committee before. That is business as usual, managers are expected to do that, and if such a case is going nowhere, then managers would be expected, for obvious reasons of efficiency in terms of managing resources, to discontinue cases rather than continue to pour resources into a case.

Q139 Judy Mallaber: At what level is the decision taken not to proceed?
Mr Fuchter: Most regularly at team leader level, there are additional layers of supervision at the management tiers above that. I have to say, there are cases that are discontinued because there is insufficient evidence where subsequent evidence emerges and the case is re-activated, so it is a dynamic process.

Q140 Judy Mallaber: So you do not completely archive the cases, they are still there and can be brought out?
Mr Fuchter: They can be. I might be misleading you in generalising, it does depend entirely on the case in hand.

Q141 Judy Mallaber: The two cases you did prosecute, how much did that cost?
Mr Fuchter: The two cases for HMRC, based on the investigators' time, our costs each came to around about £3,000 with possibly some fingers and toes on top of that.

Q142 Judy Mallaber: What did the £3,000 cover?
Mr Fuchter: That would be salary costs. These were very short duration cases, we only took about 10 days of investigation time in each case. That is on the low side and that is quite efficient; very efficient in fact.
Judy Mallaber: I was expecting it to be a much bigger figure than that.

Q143 Chairman: Mr Green was going to add to the costs, I fear!
Mr Green: In relation to the two cases from September 2006 we worked out that it cost some £18,700 to prosecute and then fines, costs, were imposed by the courts to the tune of just over £20,000 in those cases taken together.

Q144 Judy Mallaber: What was the value of the potential contract?
Mr Richardson: The value of goods was not high, those two cases were body armour. I do not know the value of the body armour, but it was a relatively small amount.
Chairman: We can pursue this through further written questions later. Let us move on.

Q145 John Battle: In one of the pieces of written evidence the Committee got, a background paper, it was suggested that given the low level of prosecutions there needed perhaps to be a bit of a shake-up really and there was a suggestion that there should be a single compliance agency drawing together the DTI and Revenue and Customs just focusing exclusively on implementing export controls. I wonder what would your view be of that? Do you think there would be advantages, because I have to say, as a minister, I have served both in the DTI for a while and the Foreign Office, and despite all the efforts, I know there are real, serious efforts of co-ordination on working groups, exporters can still bypass the whole procedure, and do, or really flout one department to play one off against another.

What is your view of setting up a compliance agency to really get a grip on this issue and implement prosecution?

Mr Westhead: I will take that one, if I may, initially. Clearly, it is not something we have been formally consulted on before and the DTI would have a strong lead interest in this, but looking at it purely in terms of the implementation from a customs point of view, looking at the advantages and disadvantages. I think it is quite easy to get carried away, I am not suggesting any one of the Committee is doing, but in any area of operational difficulties that Departments face, to suggest "Let's have an agency to solve that problem". You have to look quite critically at what setting up an agency would do differently and how it could be made to be more effective compared with the status quo because, on the face of it, creating an agency does not itself create any additional resources. Indeed, it makes it quite difficult to get even the existing level of resources you have got because you have got to denude large multifaceted teams, particularly in Revenue and Customs, which are working together across a number of issues at the same time because it makes sense to do so. You have to take the resources out of that and get the central overheads for the agency.

Q146 John Battle: Forgive me, have you not done that in proceeds from fraud crime, for example? Has exactly that not applied there?

Mr Westhead: Clearly, it has been done in particular areas and it has been done in the Serious Organised Crime Agency, for example. If we found that there was evidence of real benefit that could be brought about through some further work then it is clearly something we would be prepared to look at. One of our particular concerns, though, is that without having a multifaceted team you have not got quite the same ability to react quickly. I think we have made the point before that though we only have a certain level of resources on strategic exports we can bring in much larger amounts of resources very quickly if there is a problem, in the same way the Department has done with MTIC[2] fraud and avian flu to some extent. The ability to bring in large amounts of officers quickly to flood a particular issue would be more difficult, you would then be reliant on cross-agency co-operation with another department rather than within a large amount of resource that is already there.

Q147 John Battle: You do not experience, for example, the frustration, to draw an analogy, that sometimes happens, say, in local crime where we go to the police station and say, "Yes, we picked him up but went down to the Crown Prosecution Service and they haven't got enough gear on them to get them and we are caught between departments"? You do not experience that frustration in dealing with people breaking the export credit rules? You are not saying, "It is the other department", are you, occasionally?

Mr Westhead: I could not comment on the prosecution angle and, clearly, it would give an extra focus to the task in hand. I do not know if any of my colleagues want to add anything?

Mr Richardson: I can perhaps help on that. Because of the way that we work with HMRC in this area, if the investigators refer a case to us then we look at it very closely and whatever the disposal is going to be, whether it is a prosecution or a lower level disposal within HMRC's powers, then we will operate very much by consensus so you do not have the position of the policeman arresting somebody and the CPS just saying "No", there is much more of a reasoned discussion about it.

Chairman: I think expecting you to agree on that proposal without ministerial clearance was a bit optimistic by my colleague, but the issues were discussed.

Q148 John Barrett: I was somewhat bemused and surprised to discover that in the percentage of breaches of export control legislation the estimates of those people who had been prosecuted, had the very same people applied for export control licences, the vast majority of whom would have been granted the licences. Over the last five years between 80% and 92% of Customs seizures were, in fact, for goods that would have been granted licences had people bothered to apply for them in the first place, so that prompts a few questions. One is, is this not a huge waste of resources, chasing about after people who effectively would not have broken the law had they bothered to apply for licences? Noting that the percentages have not really changed over five years, is there not some basic failure in the system to let people know when they should be applying for licences?

Mr Fuchter: Firstly, if I can take the point about waste of resources, I do not think so. Let me first say that those percentages we came up with were estimates, and they were estimates made in the time available to answer a parliamentary question, which is quite limited, and it was the best judgment of officials on my team. In fact, if anything, those figures might be slightly overstated, because where we were unsure from the information available to us as to the rating which might have been applied we erred on the side of assuming a licence would have been granted. To take the point about waste of resources, I think I would link that to the point that EGAD are making and the military and dual-use sectors are making to us that there needs to be a level playing field and we need to be seen to be enforcing controls. If we discover export control breaches, such is the general complexity that we will not necessarily know at the time as to whether such goods would be rated licence-required. Sometimes we might find in some cases that the decision which emerges from the DTI ratings people does not follow what we expected. If we were to pull back from these cases you might be criticising us for paying less attention to enforcing this area.

[2] Missing Trader Intra-Community

Q149 John Barrett: Even if the figures are slightly over-optimistic here, in each year it is clear well over 50% of the cases had they applied probably would have been granted, so can I ask you, what needs to be put in place now to make sure that these figures, even, as you say, if they are high, are not continued for the next five years because it does seem to be madness?
Mr Fuchter: I think I would dispute that it is madness, we are here to enforce export control breaches, and you probably expect me to dispute that, nor do I think it is a failure of the system. One of the steps that we have already put in place is a profiling exercise using our automated freight control systems to get behind what is going on in terms of the use of OGELs and we need to understand the outcomes from that exercise. It has been running almost a year now and we have had, I think, almost 500 checks as a result of that exercise. In fairness, they have not discovered any discrepancies and, in fact, the emerging picture—and I would stress it is an emerging picture—is that goods tend to be going where an OGEL is quoted because the goods are going, as you would expect, to a non-sensitive destination or the goods are less sensitive. If you are saying to us that because there is a large amount of compliance out there we should pull back, I am not sure we are satisfied as to the evidence either way in terms of degree of compliance.

Q150 John Barrett: Could I ask what penalties are imposed on exporters, because the madness to me is the fact on behalf of the exporters, if individuals are being stopped and eight out of the 10 times they themselves discover that had they applied for a licence they would not have fallen foul of the rules. Could you indicate what the penalties are, because it may well be that penalties are fairly mild and they say, "It does not matter either way"?
Mr Fuchter: I should have answered the earlier question by putting it in the context of the DTI's Export Control Organisation's efforts. We work with them very closely in terms of awareness-raising and all the other things going on of which we are part but, to turn to your question, as you know, we have only had a limited number of cases concluded by prosecution and you can add up for yourselves the number of breaches and you can see only a very small number were concluded by prosecution. I would like to add to my earlier answer that although we had two cases concluded by a conviction in a court we have also settled two cases by compound penalty as a result of a criminal investigation, so we have had four of the cases in the last year concluded in that way. Below criminal investigation and prosecution, what I can say about those breaches is that each case would have been closed in a way, quite often just with a warning letter or an oral warning depending on the case concerned. Some of those do involve exports of perfectly legally-owned personal use firearms, so the figures—they are high level figures themselves—do not paint a true picture, but again if we find someone exporting a firearm and if they have not got a licence, if we do not take action then I think we are undermining compliance in the longer term.

Q151 Linda Gilroy: Just a couple of questions about relations with academic research institutes. HM Revenue and Customs is the enforcement authority for breaches involving intangible transfer of technology from the UK and for the overseas transfer of WMD-related technology. We have had some evidence which, I suppose, could be summarised as follows: scientific research has been unaffected by the UK's export controls because few scientists are aware of the 2002 Export Control Act and its implications for research and those who are aware do not alter their research programmes to take the Act into account. Do you accept that description?
Mr Fuchter: I have to say that is, in a sense, news to us. We are quite surprised, given the extent of the awareness-raising effort that has been led by the Export Control Organisation and supported by us, but if that is the case then that is something we need to look into to try and have dialogue with whoever might be able to give us some more information on that.

Q152 Linda Gilroy: I think we raised this last year, perhaps you have been doing something about that since. Can you tell us a bit more about the awareness-raising?
Mr Fuchter: I will have to write to the Committee on that in detail, it is very much led by the Export Control Organisation. In terms of academics themselves, we will respond to intangible transfers on the basis that it is intelligence led. We have to work on the basis of intelligence, but we are prepared to do so and we will.

Q153 Linda Gilroy: Have you done so? Are there any occasions where you can quote to us to say that you have investigated an academic institution?
Mr Fuchter: In our past cases, none of the cases concluded either by warning letter or prosecution has involved an academic. I am afraid I must adhere to the department's policy and not say anything about who we may or may not be prosecuting or investigating.

Q154 Linda Gilroy: Can you not even say without naming anybody as to whether you have investigated any academic institutions?
Mr Fuchter: We have not concluded any investigations against academics. I am aware of past instances where we have intercepted academics at outward controls at London Airport on the basis of intelligence. I can also say that we are investigating a case not involving an academic but involving intangible transfers of technology.

Q155 Mike Gapes: Can I ask you some questions about compounding penalties? Mr Fuchter, you mentioned two cases which have been settled by compounding. Last year, Mr Green explained to us the basis of this alternative to prosecution, to

compound offences and accept a monetary amount in lieu of pursuing a criminal proceeding. That assumes that there is evidence to a criminal standard that you might have been able to prosecute to but you have chosen not to.
Mr Fuchter: Yes.

Q156 Mike Gapes: Can you explain why you would do that rather than prosecuting?
Mr Fuchter: Only in certain cases. In this area, our starting point would be to report a case for prosecution because of the greater deterrent effect, we think, and the overriding ground for deterrence. The two cases we concluded by compounding contained factors which we felt added up to a lower degree of seriousness and exceptional mitigating factors. I can say a bit more about that if you wish.

Q157 Mike Gapes: I would be grateful if you would.
Mr Fuchter: Both cases that were settled by compounded penalty involved limited companies and in one case the employee who had committed the wrongful acts had left the company. For reasons which I cannot recall, the person who would have ended up being arraigned as a representative of the company in the magistrates' court would have been the person who was actually working with us to put things right within the company's export control systems. With that and the fact that the company was prepared to work with us to put things right, we felt that added up to a case where we would offer a compound penalty. These are exceptional circumstances. The second case had different factors again. In this case, the company brought this matter to our attention voluntarily before either receiving an audit from ourselves or from the DTI Compliance Unit. The factors were fairly straightforward and, to be honest, we want to encourage companies apart from anything else, if they discover matters like this going on, to report them to us. Those two added up to a decision on balance to offer a compound penalty.

Q158 Mike Gapes: Do you believe that section 152 of the 1979 Act which allows compounding is compliant with the Human Rights Act?
Mr Fuchter: Yes, we do. It was tested at the time that the Human Rights Act was implemented. We applied compounding in a way, on legal advice, that is compliant. Perhaps I can explain that a little—on the following principles. Equality of treatment; the opportunity to compound—it is an opportunity that is offered to a company and there is no duress—has to be available to everyone in a similar position. That is an approach we take in compounding. Secondly, it must be truly voluntary. There must be no improper pressure by way of threat of prosecution. Thirdly, we must already have had confirmation from Revenue and Customs Prosecutions Office that there is sufficient evidence to justify prosecution and, secondly, that if we were to report the case for prosecution the public interest criteria would still justify a prosecution.

Q159 Mike Gapes: Would you not accept that when you do this process of compounding you are treating people in a different way than they would have been treated if they had been prosecuted? Whoever comes along to you, whether voluntarily or because you have discovered something and you choose to go down that route, does not end up with a criminal record; they do not risk going to prison. They simply pay a fine. Do you think it is right that there is not equitable treatment in that sense?
Mr Fuchter: It is equitable for the reasons I have already given. The overriding point for me and our area of policy at the moment is that we do not seek to assume to conclude cases by compounding them. We are extremely sensitive, with the various examinations we have had, as to the need to deter. As we said to this Committee last time, the whole point of prosecuting under section 68(1) of the Act has had quite a considerable deterrent effect when it is publicised amongst the export community, so our assumption is towards prosecution.

Q160 Mike Gapes: Would it not be helpful to publish the names of those who have paid the compounding penalties? That would act as even more of a deterrent.
Mr Fuchter: HM Customs and Excise of old did used to publish names in certain cases that were laid down by Peter Lilley when he was the Paymaster in 1989. Events have overtaken us. The Commissioners for Revenue and Customs Act prevents us from doing so. We have clear legal advice that we cannot publish the names. What we still do—and in these two cases—we are publicising details without the names, so we are publicising in general terms that there has been a case concluded involving these factors and this sort of behaviour but we are still looking to publish information on that basis. One of the two has yet to be publicised.

Q161 Judy Mallaber: Mr Fuchter, you mentioned warning letters earlier and, as we understand it from evidence from the Foreign and Commonwealth Office, that is the sanction you use most frequently. In 2005 and 2006 nearly 50 were issued. Coming back to this question of publication, you have explained you cannot provide full details in some cases because publication might identify the persons concerned and so breach your requirement on confidentiality, but as I understand it you are satisfied that these people who you have warned have breached the Export Control Act 2002 and are therefore liable for criminal prosecution. You may say to me you are not allowed legally to publish that but why should their names be withheld?
Mr Fuchter: They are not at the stage where there is sufficient evidence for anyone to conclude that they have committed an offence. In the warning letter process, we do use the words "you may have". We cannot say that you have because, as you say, they would have committed an offence. This is an efficient and effective way of concluding cases where it is not clear whether or not an offence has been established and there are insufficient grounds to say either way.

Q162 Judy Mallaber: Your argument on not publishing would just be that it is not clear they have committed an offence?
Mr Fuchter: They have not been arraigned for anything. They are not subject to criminal prosecution. They are just under the broader umbrella of taxpayer confidentiality in that sense.

Q163 Judy Mallaber: Where you do send someone a warning letter, what happens after? Do you check up on whether they have mended their ways and are better people in future?
Mr Fuchter: Yes, we do. There are two angles on this. Firstly, we conclude a lot of cases by warning letter but I want to emphasise we feel the warning letter is quite a powerful tool if it goes to a company—it may be quite a large company—with an export control department. It may not achieve much in terms of deterring others and we do not think it does; it is really about preventing and deterring and perhaps steering that company and its employees towards improved compliance.

Q164 Judy Mallaber: You say you are not clear at that stage whether you have sufficient evidence for a criminal prosecution. How serious does their offence have to be? Would it be helpful to find some way of publicising the circumstances in which letters are issued in order to act as a deterrent to others?
Mr Fuchter: On the first point, I am sure it will vary across the cases that I am aware of. The weight of evidence will vary. In some cases where we have not been able to proceed with a prosecution—we have discontinued it, for example—if we really feel that there is no chance ever of sufficient evidence emerging or there is a fatal flaw in the potential evidence, we would conclude that case by a warning letter. The advantage for us operationally in terms of enforcement is that we have then made clear to the company the details of the law and that should help assist our enforcement approach next time.

Q165 Judy Mallaber: Do you require them to report back to you on what they do as a result of getting your letter?
Mr Fuchter: Only as part of the follow-up approach. I have not answered the second part of your question: do we take any follow-up action? All warning letters will be referred to our local inland audit staff in one or other of our operational directorates. They will pursue any potential breaches or any issues arising from that warning letter in their follow-up audit of that company's books and records.
Mr Westhead: Maybe this is in keeping with the direction in which you would like us to travel: we could consider carrying out some further publicity, either local or national, which would focus on the type of offences that are being carried out and that generate the warning letter and therefore provide some further publicity of the types of things that exporters are doing that are clearly potentially in breach of the Export Control Act. Exporters need to take that on board and learn lessons from it.
Judy Mallaber: That would be very helpful as part of what the Committee has found, that very often exporters are not aware of the rules. I am not sure if that is something that you would wish to pursue further after the meeting, Chair.
Chairman: I think so, yes.

Q166 John Battle: I am increasingly not comfortable with this because, as far as I understand it, if people break the rules on this they can be criminally liable. Is that right?
Mr Fuchter: Yes.

Q167 John Battle: As my colleague reminds me, if a person does not fill their tax form in on time, the Inland Revenue gets quite heavy with posters everywhere. If you get an ASBO your picture is in the paper, but are we going pretty soft really and pussy footing around companies that ought to know what the rules are and that, if they break them, it should be transparent and publicly known that they are stepping over that line. Otherwise, if I am not clear that it is a criminal act, you might think it is a bit of corporate irresponsibility and not really a criminal act. What we are talking about is weapons being sold to places. We have said it is out of order. If they get there and cause an amazing amount of damage, I just wonder whether we are tough enough in our insistence on compliance.
Mr Fuchter: In terms of enforcement, I do not consider that we are going soft. The matters under which we operate are criminal. There are no civil offences under which we can proceed. There are in other Revenue and Customs regimes and that is a separate issue. We can act and we do act. I do not think we are going soft. We have something like nine active cases on the stocks at the moment in our criminal investigation department and we have already concluded four last year. We do have to secure enough evidence to a sufficient standard and that is the bottom line.
Mr Richardson: The point I would make about the suggestion of going soft is that when a case is referred to the Revenue and Customs Prosecutions Office, after we have gone through the evidential test, is there sufficient evidence, the next part of the test is the public interest. If you have a weapons case, the public interest is very high. If you have sensitive goods that are WMD end-user, the public interest is very high and quite rightly so. If you have legitimate goods to a legitimate destination but the issue is one of regulation and licensing, the public interest maybe is not so high and it may be more appropriate for HMRC to consider a compound or a warning letter or some other disposal. Your concern is an entirely legitimate concern about the nature of the goods and the harm they do. It is a key part of the public interest test that we will always take into account.

Q168 Chairman: The Committee has raised the question in the past about how Revenue and Customs exchange information with other EU countries with an experience of prosecuting export control breaches. During a recent debate in the House, the Minister said that the Revenue and

Customs Prosecutions Office has recently met with Eurojust colleagues and other EU prosecutors. What has been the outcome?

Mr Green: As Mr Richardson went, I will let him answer that.

Mr Richardson: We did go and have a meeting, hosted by Eurojust, last month. We had prosecutors and investigators from the Netherlands, France, Spain and Germany there. They are all key countries in terms of export control. One of the concerns of this Committee last year was, if I can put it crudely, that other countries find this easier and we find it difficult. The conclusion that we took away from the meeting with our colleagues was that, although other people face different challenges, they find it difficult as well. They still have to deal with intelligence material forming the basis of these investigations. They still have to deal with issues of licensing and what is the appropriate licensing regime. They still have to deal with getting sufficient evidence from jurisdictions where it may be less easy to get evidence from. Some of those countries will put their focus on civil or administrative penalties or on having a particularly onerous and bureaucratic licensing regime to stop people wanting to apply. Other countries do not have the same disclosure regime that we do. When asked the question, "What do you do when there is exculpatory material sitting in the background?" I have to say they were scratching their heads a bit and not quite sure what they would do with it. One of the advantages of the system that we have and that we have talked to the Committee about before in relation to the disclosure regime is that we do have quite a clear and well practised regime where prosecutors and judges know and understand the issues that are in play and can deal with them.

Q169 Chairman: Is there anything that we have learned from other EU countries where you think we could do that and that would be an improvement in the UK system or is it just recognising that different countries do things differently and we do not see any need to change in the light of that exchange? That may be the right answer, of course.

Mr Richardson: It may well be.

Q170 Chairman: Is that the gist of it? We all do things a bit differently. We have had an exchange but as a result of that we have no suggestions to make for doing things differently.

Mr Richardson: I need some time to digest the notes we made of the session in The Hague. The suggestion I have is that one of the most powerful things is knowing who your opposite numbers are in the other countries and being able to talk to them. I know that in some cases we have made extensive use of Crown Prosecution Service liaison magistrates in Paris and in Madrid. They have been extremely helpful by putting us in touch with the right people. The main benefit of a session like the one we had is knowing who our opposite numbers are and understanding their understanding of our regime so that we can better explain to them when we make mutual legal assistance requests.

Q171 Mike Gapes: Can I ask about the catch-all provisions for non-listed goods with regard to weapons of mass destruction. In your memorandum you said that when you detect non-listed goods going to end-users of concern you normally cannot seize these goods unless there is evidence that the exporter has grounds to suspect that there is an end-use which is weapons of mass destruction. Instead, you often just get the goods withdrawn from export or brought into the licensing system. Can you clarify that for us?

Mr Fuchter: Apologies for drafting which, on reflection, probably looked a bit garbled. That certainly was not the intention. We were trying to explain how goods were dealt with once we had detained them. I think we said last time that we will target non-listed goods in this area because the catch-all is a very important provision and works well. It is a question of our powers, that we cannot seize goods without evidence that the exporter was aware of the intended use. In many cases the exporter genuinely is not aware, but it is fair to say of those numbers that we reported in our annual report, 38 occasions in one year and 42 in the other, those are cases where the DTI has subsequently rated the goods in that consignment as licence required. On the point about coming into the licensing system, the exporter may have applied for a licence and may even have been given one. We think that is a success from our point of view because it has given the Government the chance to consider whether or not those goods should be permitted to go forward.

Q172 Mike Gapes: Do you assess that the current law is strong enough to deal with this area?

Mr Fuchter: We think it is, yes. The point for HM Revenue and Customs is that, where we report our seizure statistics, cases like this will not appear on them so we have started to include these figures just as a sentence in our annual reports to reflect that this is activity going on that we think is valuable, but that is a minor point, I accept.

Q173 Mike Gapes: Do you sometimes give the exporter the impression that you might be taking legal action just to force them to apply for a licence?

Mr Fuchter: That is certainly not our intention, no. It works on the basis of our understanding of the intelligence assessment, in terms of what non-listed goods might be moving through export control. We are coming at it from that point of view. Officers are then detaining goods and contacting the DTI who then consider whether the goods should be subject to licence.

Q174 Mike Gapes: We heard evidence from the UK Working Group who asked for a change in the current regulations to have a new catch-all requirement and they gave us the example of the Predator unmanned aerial vehicles which use civilian technologies and which are not subject to control, but which can clearly have a serious military use. Do you see any practical problems with their proposal about bringing in a new requirement?

Mr Fuchter: That control is part of an EU regulation. The lead departments would need to establish whether or not there is a question of EU competence to be resolved. The UK may not be able to go it alone. It may be that we do not know exactly where the Working Group is coming from, but some of these goods might be already controlled by the existing military end-use if they are going to an embargoed destination. The main point in terms of the practical problems would be that any extension of the military end-use control, either to extend its breadth to cover more countries or to extend the list of goods, would obviously raise questions on the impact of the vast majority of trade that is going through export controls, in particular if it led to us detaining more goods which were then held up whilst the DTI rating unit had to examine them and conclude whether or not the catch-all should be invoked. If lots of goods were subsequently released on that basis, traders might legitimately challenge us. The flip side of that would be the enforcement costs for ourselves and other departments in policing such a scheme. We certainly can see the potential in the point you are making to extend the military end-use control in the way you have described. I understand that issue will be part of the up and coming review of export controls and that is the sort of issue we would expect to debate in some detail with our colleagues in DTI.

Q175 Sir John Stanley: Mr Fuchter, when you came in front of this Committee last year you put into the public domain for the first time that you were considering a prosecution of a weapons of mass destruction trafficking and brokering case. Can you tell us whether any charges have been made and, if not, why not?
Mr Green: I can assist there. The case is still open. It is a complex matter covering several jurisdictions. Treasury Counsel is advising on evidence and we are examining the disclosure position very closely. The case is still with us.

Q176 Sir John Stanley: Does the case involve UK individuals who are citizens or residents?
Mr Green: I am sorry, I cannot answer that question.

Q177 Sir John Stanley: You cannot answer because you do not know the answer or you do not want to disclose the answer?
Mr Green: I do know the answer but I cannot give you it because of the confidentiality provisions of the Commissioners for Revenue and Customs Act.

Q178 Sir John Stanley: Can you confirm that these offences, if they are offences, have been committed overseas, in the UK or a combination of both?
Mr Green: I would have to give the same answer.

Q179 Sir John Stanley: Can you tell us whether your existing powers enable you to prosecute for trafficking and brokering overseas by UK citizens or residence? This is without regard to the case. Do your powers enable you to prosecute actions committed overseas by UK citizens which, if committed in the UK, would be criminal offences?
Mr Richardson: Yes. There is a number of extraterritorial controls in the orders made under the Export Control Act 2002 which contain offences relating to acts done by individuals in the UK or by UK persons, whether they are natural persons or companies, who are outside the UK. Provided the evidence exists and effectively hits the targets in the orders in that they are moving around restricted or prohibited items, yes, the powers exist to prosecute those individuals.

Q180 Sir John Stanley: I have one quite important point which I find difficulty finding the answer to in the context of last week's debate. Your powers when you refer to UK persons: is the definition of UK persons a UK resident or the much narrower definition of a UK citizen?
Mr Richardson: The orders are rather like sanctions orders. If we are thinking about trafficking and brokering of goods from one overseas country to another so that the goods do not touch the UK, to be guilty of an offence you can be anybody in the UK, regardless or your nationality or indeed regardless of your residence. You can just happen to be in the UK while you do the act, or you can be a UK person, whether you are a person with two legs or a corporate person, anywhere in the world.

Q181 Chairman: Does that mean you have to be a UK citizen?
Mr Richardson: No. For example, if there was an American citizen, if they happen to be in the UK—

Q182 Chairman: Yes, but if they are not in the UK?
Mr Richardson: No, we do not have jurisdiction on the extraterritorial offence.

Q183 Chairman: It has to be a UK citizen?
Mr Richardson: Yes, or a UK person which encompasses a UK citizen or a UK company.

Q184 Judy Mallaber: Does that include somebody who is not a UK citizen but is acting from this country?
Mr Richardson: If they are in this country while they do the act, yes.

Q185 Sir John Stanley: I thought I had the answer first time but now on that second answer I am not sure. If you are somebody who has UK residents' rights but is not a UK citizen and carries out a WMD traffic and brokering overseas, is that person still subject to a criminal prosecution in the UK?
Mr Richardson: Probably not. If they come into the UK to do the act, then yes.

Q186 Sir John Stanley: No; outside.
Mr Richardson: If they are outside, then no. If they just have a right to reside in the UK but they are not a UK citizen, I would not have thought they would come within that provision.

Q187 Sir John Stanley: There is some doubt in your voice. I am not being critical. Could you give us a definitive answer on that question in writing?
Mr Richardson: Yes. Can I just be clear? It is somebody who is not a UK citizen but does have UK residency entitlement?

Q188 Sir John Stanley: Yes. There are plenty of such people.
Mr Richardson: But they are not in the UK while they do the act.

Q189 Chairman: The act is outside. Hence, the extraterritoriality.
Mr Richardson: I will do my best to find a definitive answer.

Q190 Sir John Stanley: Your extraterritorial powers, as I understand it, rest on primary legislation. Does the work you do on extraterritoriality on trafficking and brokering in relation to WMD bring you within the ambit of the review of secondary legislation which is being carried on effectively government wide? Are you within that review or not?
Mr Richardson: I simply do not know. I am sorry.
Mr Fuchter: My understanding is that we are. I understand that to be part of the review.

Q191 Sir John Stanley: This is a very important point for us. Could you confirm that?
Mr Fuchter: I would have to confirm, yes.

Q192 Sir John Stanley: You may want to reflect on this and give it to us in writing but this is very helpful and material to us: do you have any concerns about the adequacy of your existing powers to deal by way of UK prosecution with UK persons, as you have defined them, who commit WMD trafficking and brokering offences overseas? Do you have any suggestions? Do you have gaps in your powers or shortcomings? Are there any proposals you want to ask us to consider as to how your powers might be necessarily strengthened to enable necessary prosecutions to be carried out in this crucially important and hugely potentially life saving area?
Mr Green: That is an area I would like to reflect on, if I may.

Q193 Judy Mallaber: Have you any indication when we are likely to know more about this apparently extremely interesting case that has now been raised over the last two years by Sir John?
Mr Green: I believe on the last occasion you received a ministerial communication about this. I would be happy to arrange for a further update.
Chairman: That is extremely kind. Thank you.

Q194 Sir John Stanley: Can you tell us whether you have any similar such cases to add to the one we know about, WMD trafficking and brokering?
Mr Green: No.

Q195 John Barrett: There is a large number of arms coming to the UK from the Balkans. In 2005 there were about 200,000 assault rifles and machine guns imported from Bosnia and Croatia. Am I right in thinking that the Revenue and Customs have responsibility for imports? How thorough is the checking of these imports on the numbers of guns getting into the country?
Mr Fuchter: There is a 100% check on commercial imports of firearms and these are the sorts of cases to which you are referring. Officers have some discretion over how they execute that. If they regard the importer as a well known, regular shipper through their port, they may confine that to a documentary check, but they have the discretion to physically examine the goods and to count them. Supplementing that we have a small team of officers who work throughout the UK called Firearms and Explosives Officers whose job is to audit the books of registered firearms dealers with particular regard to declared imports. We have the frontier control backed up by a deeper audit that takes place of all registered firearms dealers, registered to hold section five firearms, which is exactly what these assault rifles would be. They undertake a number of audit checks. They check that all imported goods have been entered into the firearms register. They work alongside the police who have broader responsibilities across dealer to dealer transactions within the UK, whilst our audit actions are confined to imports. Those firearms and explosives officers' audits will also include where firearms are subsequently re-exported, but the only way we are looking at firearms coming into the UK and moving out for re-export is very much at dealer level.

Q196 John Barrett: Is there a clear number of how many guns, assault rifles, machine guns, are then left in the country? Out of these 200,000 that came in in 2005, is anyone counting the numbers that went back out? What would we think are the numbers left in the UK?
Mr Fuchter: No one in my organisation is doing so. I understand that to be a responsibility of the DTI's import licensing branch. I would have to stress that all of these transactions were given an import licence because in each case it involved a registered and approved firearms dealer.

Q197 John Barrett: Do you know if anybody in the DTI is counting the numbers?
Mr Fuchter: I do not know that for sure, no.

Q198 Chairman: Would it be fair to say that the control exists in relation to importation and the control exists for those who apply for a licence to export, but it is not entirely clear, like the number of parliamentarians, who is asking the question? A massive number of assault rifles come to this country in 2005 from the Balkans. What happens to them?
Mr Fuchter: The original question would have been asked at the time the import licences were applied for because there would have been import licence

coverage for that quantity of firearms. That is not something that Revenue and Customs are involved in at all. That takes place prior to the point you are making. Our FExOs, certainly for the registered firearms dealers concerned, will be looking at the stock levels and disposal. They are doing a number of detailed audit checks. In essence we are there to prevent any leakage of imported firearms onto the illicit UK market.

Q199 Chairman: Presumably, if a substantial number of assault rifles *et cetera* come into the UK, you know who the end user is going to be in the UK. We know from documentation where they go?
Mr Fuchter: Not necessarily. When they are imported, they are imported by an importing firearms dealer and it would be that person whose details appear on the import declaration. These are completely declared, legitimate imports so we know where they will have gone to.

Q200 Chairman: If we are talking about 200,000 assault rifles, who is it who goes to the dealer and says, "Oi, mate, what are you going to do with these then?"?—

Q201 John Barrett: It is not yourselves.
Mr Fuchter: It would be our firearms and explosives officers in the context of imports. I should stress that we are not talking about one consignment here of 200,000 weapons. 90% of the consignments are of 100 or fewer. The point you are making is probably more addressed by the overview taken by the licensing police who deal with the totality of registered firearms dealers' status and registration *et cetera*.

Q202 John Barrett: It is a bit of a pressure for joined up government in this sense: I would like to imagine that a quarter of a million assault rifles coming in from Croatia and Bosnia were brought in to be melted down and got rid of because they do not have facilities there to do it; in the same way as we provided facilities in Sierra Leone to melt down weapons where the collections had been organised. I would not like to think that they had leaked on to the streets of my constituency in Leeds, Manchester or London. I would like to know if they have been sold back out from Bosnia to another country. What we are saying is that we do not have an end-use check in Britain and, at the same time, we are putting pressure on the Home Office to cut down the number of guns in Britain.
Mr Fuchter: Some of the questions you are looking to be addressed would be addressed by the police licensing officer. Our powers stop at dealing with imports. Future sales on are dealt with by the police licensing officer.

Q203 John Barrett: In the Home Office?
Mr Fuchter: Under Home Office supervision, yes, very much so. I would like to assure the Committee that there is more joined up government going on than I am painting as a picture but once again I am constrained by the Commissioners for Revenue and Customs Act in my ability to talk about individual cases.

Q204 John Barrett: Could we ask a question of the Home Office about their monitoring of the end-use? Would that be the appropriate route for us as parliamentarians to go down?
Mr Fuchter: That is very likely. It is an issue I would like to talk to the Home Office about certainly at enforcement policy level.
Chairman: Thank you very much indeed, gentlemen. We are very grateful. There may be a few other questions that we want to write to you about but we do not want to overburden you. You have already kindly offered to write to us about a number of issues. Thank you again and if there are further questions we will write to you immediately and hopefully deal with them.

Thursday 15 March 2007

Members present:

Roger Berry, in the Chair

Mr David S Borrow
Malcolm Bruce
Richard Burden
Linda Gilroy
Mr David Heathcoat-Amory
Robert Key
Peter Luff
Judy Mallaber
Sir John Stanley

Witnesses: **Rt Hon Margaret Beckett MP**, Secretary of State for Foreign and Commonwealth Affairs, **Mr Paul Arkwright**, Head of the Counter Proliferation Department, and **Ms Mariot Leslie**, Director for Defence and Strategic Threats, Foreign and Commonwealth Office, gave evidence.

Q205 Chairman: Secretary of State, you are most welcome. May I ask your colleagues to introduce themselves?
Ms Leslie: I am the Director for Defence and Strategic Threats with, among other things, responsibility for arms control.
Mr Arkwright: I am Head of the Counter Proliferation Department in the Foreign Office.

Q206 Chairman: May I start with an issue where the Committee has expressed great appreciation for what the Government has done, namely in leading on seeking to secure an international arms trade treaty, and could I ask you at the outset what you feel the prospects are and, indeed, what are the prospects that not only conventional arms but dual-use goods and equipment might be covered as well? I know it is a bit of a crystal ball-gazing question but it is an issue that we are very interested in, like yourself.
Margaret Beckett: First, it is, as you say, really quite hard to be confident at what the prospects are. I think we can take a certain amount of encouragement from the fact that we got a more favourable response than we were anticipating. I do not think any of us really imagined that we would get 153, I think it was, states voting in favour. A number obviously of key players abstained; that is clearly not surprising but not as encouraging, but only one, unfortunately the United States, voted against, and all of that, I think, is better than we could have anticipated in terms of a mood to make progress. As to how fast we can proceed that is something of another matter. We are now, I believe, moving towards the area where experts will begin to be engaged, and I suspect that like a lot of these things there will turn out to have been more support for the general principle of trying to make progress of this kind than there will be for the detail when we come to contemplate that.

Q207 Chairman: What about the EU's position? Given that the EU has not been able to transform the code of conduct into a legally binding common position for reasons we all know, or at least think we know, does that indicate a rather weak EU position in trying to promote a legally binding international arms trade treaty?
Margaret Beckett: I do not think there is necessarily an automatic read-through. I can see why it raises that question but I do not think there is necessarily a read-through because there are specific difficulties in terms of linking of issues and so on within the EU which do not necessarily really arise if you are talking about a global treaty, so I do not think one can necessarily assume that, because we have not managed to make as much progress as we would like on the one, it automatically indicates there will be more problems with another.

Q208 Judy Mallaber: We recently met a delegation of Ukrainian parliamentarians seeking to set up their own monitoring committee systems, and we also visited the Export Control Organisation which brought home to us the complexity of managing to monitor and control arms exports controls. If there were an international arms trade treaty we would clearly need to give considerable assistance to developing countries to be able to implement the sort of systems we have been discussing that would enable the treaty to mean anything at all in practical terms. Maybe you could say something about how the UK would respond to that and what resources you would be able to put into assisting other countries if we did get an arms trade treaty to be able to monitor it?
Margaret Beckett: Particularly given the fact that it is likely to be quite some time before we make substantive progress on detail in moving towards a kind of endgame, first it is too early really to assess what the shape might be of proposed control or monitoring or enforcement regimes, but certainly we are not proposing to wait until we have nearly got a treaty and then say: What can we do to help people? What we are trying to do is work with people now and in the future to build up understanding and acceptance of the kind of standards that might be useful, to learn from best practice and so on. So I do anticipate that we will do what we can to assist others with the process of enforcement, compliance and so on, but I am not envisaging there will be some kind of big push as we come towards a point of a treaty being considered; more that we will try and help people to build up their capacity in the interim, which would be better anyway because it means that over the whole period you are gradually raising standards in a way which, apart from anything else,

could have a knock-on effect on what people find acceptable in a treaty. If they do not feel there is a bigger gap between what they are able to do now and what might be in a treaty, that is helpful in getting acceptance.

Q209 Judy Mallaber: We know there are obviously relationships with other countries and exchanges of practice and so on. Is it possible to describe a little bit more about how extensive that is, how it works, which countries you do exchange that with, and who you give assistance to in developing their systems?
Ms Leslie: We already have some capacity building and assistance programmes under a number of the other regimes. To take just one example, the Proliferation Security Initiative comes together with quite a lot of workshops, practical exercises, group and regional seminars, and also bilateral assistance that we give from the Foreign Office with the help of partners from the Ministry of Defence and the Department of Trade & Industry, so we have things like workshops for customs officials showing them how to inspect consignments and findings; we have help with legislation and legal frameworks for controlling armaments; we have a small budget already that we have within the Foreign Office that we use for that. There are similar things going on in some of the other weapons regimes, chemical weapons and so on, so as we move towards the point where a treaty might be ratified and implemented, we would have quite a lot of experience to build on and we could be gradually moving towards what the provisions of the treaty were.

Q210 Linda Gilroy: On future trends and strategic export controls, the 5 February *Defence News* reported European and US government and industry officials as concluding that defence export regimes on both sides of the Atlantic are bankrupt due to their "rigidity, their backward-looking Cold War foundations and the global outsourcing and transfers of intangible know-how in the defence sector". Is that the way you look at things? Is it an accurate summary of where export control is in 2007?
Margaret Beckett: No, you may be relieved to hear! I have to admit I am conscious of the fact that a report along those lines appeared but no, we do not take the view that that is an appropriate criticism. We do, in fact, as you know, and I believe I have heard the Committee complaining about this in the past, tend to say that everything is dealt with on a case-by-case basis and so on, and whatever the weaknesses or whatever the concerns the Committee may have about such an approach it does give you a degree of flexibility to respond to a changing situation, and I would not say I have ever really detected, having been at the other end of some of this process a few years ago, a kind of Cold War mindset that does not understand that there may be different dangers in today's and tomorrow's world.

Q211 Linda Gilroy: Except that arguably things have got a great deal more complicated and have moved from being territorial to being one of end-use; the types of items are much more difficult to determine and therefore to control with intangible technology and dual-use—
Margaret Beckett: Certainly.

Q212 Linda Gilroy:—and you have also got many more potential suppliers and the trade patterns have changed; there are all the issues to do with intra company exchanges with subsidiary companies in different countries, so does this maybe argue for a framework, a formal system of end-use monitoring?
Margaret Beckett: I am not sure that it does, to be honest—insofar as one can. But I think that all the points you make are well taken about how much more difficult and complex and varied the situation is now, but it seems to me that that argues for continuation of the case-by-case and "What is the equipment that we are talking about?" kind of approach, as opposed to a more rigid—and I suspect in fact, that this is the reverse of the accusation that was being made—formulation, which was looking backwards to the days of the Cold War and which might perhaps ignore some of these complexities. I have great sympathy with Committees' concerns about end-use monitoring, diversion and so on but, as I think the Committee will appreciate, these are genuinely extremely difficult areas. We do what we can, but I do think that to adopt the approach which we have done of putting the emphasis rather on pre licence scrutiny and thinking through these things and what the possibilities are and trying to take them as realistically as one can into account, is the answer. Of course, if you took them into account to the extreme degree you would probably never sell anything to anybody—which some people might prefer, of course.

Q213 Linda Gilroy: Indeed. One of the things the Committee has been particularly concerned about is the position of the overseas subsidiaries of UK companies and making sure they do not export arms manufactured under UK licence to destinations to which the UK would not allow direct arms exports.
Margaret Beckett: Well, the Committee will, I am sure, know that there is a review going on, and that is definitely one of the issues that people will be considering as that review proceeds but, again, that is really quite a complex area and one where it is quite hard to see that one can simply oversee and supervise.

Q214 Linda Gilroy: It certainly is hard but, on the other hand, it sort of illustrates what I have just been saying about the complexity of things in general and the need for maybe moving towards some sort of end-use monitoring.
Margaret Beckett: Yes, but let's take it out of this context. If the suggestion was made that we as the British Government should be trying to supervise the activities of companies who are producing elsewhere in the world perhaps, you know, under some kind of franchise and so on, I think there are a

lot of people who would have concerns about whether that was possible or, indeed, whether it was viable, whether it was something that could be achieved. I completely understand and sympathise that in this context there will be people who feel we should be trying to do that, but you only have to think of it outside this context to realise it is really not that easy.

Chairman: As you say, Secretary of State, it is an issue that will come up frequently, I am sure, during the review, and hopefully the Committee might have something to say on it as well. David?

Q215 Mr Borrow: Can we move on to the sorry saga of the difficulties in the ITAR process for getting arms exports from the US. Dennis Burnett, who is vice-president of the trade and export controls at EADS North America is quoted on 5 February as stating: "Everyone agrees that the ITAR process [of vetting US defence goods and services for export] is broken". Would you agree with that analysis and, if so, what do you think should be done to change the situation?

Margaret Beckett: I am cautious about agreeing with it, not least because I am not as steeped in the detail of it as perhaps he is, or maybe even you are, Mr Borrow, but certainly my understanding is that there is reconsideration being undertaken as to whether that process is being run as well as it should. That is not really a matter for us: it is a matter for the Government of the United States, but certainly we are trying, as we always do on these issues, to encourage as much co-operation and understanding as possible in order to try to ensure that what we can get is a flow of information and a co-operative approach and something that allows us, if the argument is that the present system is broken, under any new system to have the right kind of co-operative and constructive relationship that will work to the benefit of our industry and, hopefully, to our mutual benefit.

Q216 Mr Heathcoat-Amory: Secretary of State, on this question of the waiver which would have granted this country a privilege from the need to license American exports to this country, this Committee urged you to pursue this pointing out that it would help British companies, and in the Government's reply it said it put a high priority on the importance of US/UK defence industrial co-operation and trade. How do you square that, though, with the United Kingdom participation in the European Defence Agency which was set up in 2004 to share European technology and research? How can one expect the Americans to grant us a favour if we are going into a separate agency in competition with the Americans?

Margaret Beckett: I am not sure I would regard it as being directly in competition. There are different roles and different responsibilities. I think it would be strange if we said we wanted nothing to do with the European Defence Agency and not particularly productive and I think, too, that there are particular links and co-operative programmes with the United States, and the Joint Strike Fighter is one, I think. So it seems to me that, as in much of our foreign policy, what we are striving to do is keep open relationships which are both trans-Atlantic and also European.

Q217 Mr Heathcoat-Amory: The aim of the European Defence Agency is explicitly to promote research aimed at creating a leadership in strategic technologies and strengthening Europe's industrial potential in this domain. Now, if you are an American congressman you must wonder why this country should be exempted from licensing requirements if we are going into an organisation to share that technology with a European agency in competition with the United States. Surely we have to choose here, and you are trying to have it both ways?

Margaret Beckett: Is trying to have it both ways a bad thing automatically, do you think? Of course, any co-operation we have with the United States would be bound to be on the basis that it is not disadvantageous to the United States; there is no dispute about that and I am sure that has always been the basis of the understanding in the past and is likely to be in the future, but I would not wish myself to forego either opportunity to co-operate and it seems to me that is to the advantage of British industry.

Q218 Mr Heathcoat-Amory: Of course you want to co-operate with everybody but how can you express surprise at the action of the American Congress when simultaneously with saying we want to co-operate with the United States we are actually co-operating with industrial rivals in the European Union? Surely there is a problem here? Can you not see the politics of it? The American Congress cannot be expected to grant us a favour in the light of what we did with the European Defence Agency? Do you not acknowledge a choice that has to be made here?

Margaret Beckett: Of course I recognise that there will be individual congressmen or women who take such a point of view and are bound to raise it but, if I may say so, with deep respect, I find it difficult enough always to analyse the actions and thoughts of members of this House without trying to do them in a different legislature. All I would say to you is that successive American governments have reached agreements of that kind with us and successive American governments, as I understand it, have also urged the European Union to take greater defence responsibilities and, indeed, to be more active in such a field. So I can see why particularly perhaps individual Congress people might raise concerns; I think, however, our goal should be not to exacerbate them but to reassure them.

Q219 Robert Key: Secretary of State, can you confirm that nearly half of our defence attachés are to be withdrawn next year as part of a cost-cutting excise?

Margaret Beckett: No, because I am not sure that any such decision has yet been made. Certainly there are changes likely to be made and I believe the

Ministry of Defence is considering the impact of those changes at this time, but I am not aware of any decisions having been made.

Q220 Robert Key: Do you know when those decisions will be made?
Margaret Beckett: Because it is an MoD review I do not really. I would have thought in the not-too-distant future but I do not have a timeline, I am afraid.

Q221 Robert Key: Our understanding is that there is a dispute about the cost of this. It is about £11 million a year for services—
Margaret Beckett: I am not sure there is a dispute about the cost; there may be a dispute about who pays.

Q222 Robert Key: But you are not going to pay, is that right? It would fall on the defence budget?
Margaret Beckett: I am not sure how much of this is in the public domain—

Q223 Chairman: I think we are drawing rather heavily on the *Daily Telegraph*. I must be transparent about this.
Margaret Beckett: All I am able to say at this moment in time is, I am sure everybody realises, it is going to be a stretching public spending round and in the FCO we have to look very carefully at what are going to be very limited resources and make the best possible use we can of them.

Q224 Robert Key: What effect would any cut, but certainly one as great as half, have on the Foreign Office's ability to properly scrutinise licences for the export of arms and sensitive goods?
Margaret Beckett: That is exactly the kind of issue that I am sure Ministry of Defence will be taking into account. What is the role, the scope, for their network and consequently perhaps considering, although as you say all we have is the *Telegraph* report at present, what that means, but my understanding is what the Ministry of Defence is looking at is the tasking of their defence attaché, and it may even lead to a greater clarity about what that tasking is, and it would certainly be more within Ministry of Defence's own remit. But areas which would be of concern for us in this matter will obviously also be of concern to Ministry of Defence, I would have thought.

Q225 Peter Luff: Foreign Secretary, I suppose my concern is I understand the financial pressures you are under, and Ministry of Defence and DTI, but I see our foreign posts apparently are a coalition of at least three departments, possibly more, all of whom are taking individual decisions to cut posts which could have a cumulative impact on the issues we are discussing in this Committee today, because I know UKTI are withdrawing posts from very important places as well. It worries me that the sum total could be very great as individual departments decide to do things for their own personal reasons. Can you reassure me there is oversight of the total impact of our representation in the individual posts?
Margaret Beckett: You are making a very strong point, Mr Luff. I think there is not any doubt that, whichever the department, the Government as a whole has come to the view that we need to have a keener sense of where our major priorities lie. We are, for example, in our own department very much reprioritising, beefing-up our posts in areas where we believe the challenge and need will be greater in the future and in consequence reducing areas where it would be enjoyable, comfortable, to continue to maintain posts at the level we do. But given that resources are limited, recognising we may have to reduce some where there is perhaps a less pressing need in order to put resources where there is definitely a need and where I am sure in this House and across the board people would want us to put those resources.

Q226 Peter Luff: "We" as a corporate "we", not as an FCO "we"?
Margaret Beckett: Yes—well, perhaps I ought to say at the FCO that that is definitely what we are doing. My understanding is that is what my colleagues are also seeking to do; I am not trying to speak on behalf of my colleagues' departments.

Q227 Chairman: The Committee absolutely recognises that the scrutiny of individual licence applications on a case-by-case basis is the foundation of the export control regime, and it is critical and of supreme importance. However, do you not agree that the only thing that really matters in relation to arms exports is end-use? End-use is the be-all and end-all of the control regime, and whilst the scrutiny of the original licence application is central to trying to assure appropriate end-use and not inappropriate end-use, the value of overseas posts is in being able to spot, and this has happened in the past as we all know, circumstances where UK arms are in the wrong place—perhaps even, as we suggested, a more proactive scrutiny of exports to particular destinations. Do you appreciate, Foreign Secretary, our concern that that part of the exercise should not, in our view, be diminished? Indeed we really feel that the opposite could be justified?
Margaret Beckett: Yes, of course, I appreciate your concern, and if you want to make a case to me that the FCO ought to maintain and expand its posts anywhere in the world I would be very happy to take delivery of it, and urge you to raise it in other quarters!
Chairman: I did not quite say that. Robert?

Q228 Robert Key: The arms market is growing and over the past decade about a third of UK arms exports went to regions of instability, to Saudi Arabia, Oman, India. Are UK exports adding to regional tensions?
Margaret Beckett: No, I do not believe so. That is obviously one of the areas we look at very carefully bearing in mind, of course, that even in regions where there is instability and there are difficulties,

people have a legitimate right to self-defence, which indeed might be even more urgent if they are in regions of instability, but it is one of the things that people do look at very carefully, as to whether or not we might be—inadvertently no doubt—exacerbating a situation.

Q229 Robert Key: How does that interface with criterion 4 of the EU code about preserving regional security? It seems to me there is contradiction here, that that particular criterion is ineffectual?
Margaret Beckett: No, I would not say that. I would strongly urge on the Committee the fact that that is very much something we do take into account. Obviously we assess any proposals against all the criteria, and we recognise that as being one of the important ones.

Q230 Robert Key: The market is growing fastest in those nations which are increasing their military capability and modernising their Armed Forces, like India, for example, so will we be exporting more to, for example, India and other countries, just because they are growing faster and they are going to get more of our arms exports, and will that not exacerbate instability in these regions?
Margaret Beckett: We look very carefully at applications in those circumstances precisely to weigh whether or not these are applications for things which might cause difficulty in times of instability, and, indeed, there are applications which are rejected on very similar grounds.

Q231 Robert Key: Could you give us an example of that?
Margaret Beckett: Can I send you a note about it?
Robert Key: Thank you.

Q232 Mr Heathcoat-Amory: Secretary of State, could I ask you about the end-use of particular aircraft? There was a recent case of maritime-patrol aircraft sold to the Indian government which now wants to supply Burma with them, and there is no explicit ban on that in the original contract. Do you think there should have been?
Margaret Beckett: With the benefit of hindsight I suppose one could say it might have been desirable but I think the original contract would have been rather a long time ago, possibly even decades, I am not quite sure, because we are talking about quite elderly aircraft, but certainly obviously that is something that if a similar export took place today one would consider. We have been in touch with the Government of India to express our concern and they have assured us that these are unarmed aircraft and it is thought that that will remain the position, and obviously we would look very carefully to see whether any requests that were being made for military components in the future might be relevant to these aircraft because, exactly as you say, there was nothing in the original contract. Does anybody know how long ago that contract was?
Ms Leslie: The 1980s.

Q233 Mr Heathcoat-Amory: Could I ask you about an allied issue of surplus military equipment? I have asked a series of Parliamentary Questions about the disposal of equipment to non governmental purchasers. The regulations are quite good about supplying governments with this but I was very surprised to be told by the Department of Defence that there is no register of non-governmental buyers and no single set of general rules relating to the disposal of equipment to non-governmental purchasers. As a lot of the threats we face are non-governmental, do you think there is a problem here? This is perhaps a slightly detailed question.
Ms Leslie: I think all four of the departments would apply the same criteria to non-governmental purchasers as they would to governmental ones so in that sense all of us including the Ministry of Defence would have a stake in it, but in looking at a non-governmental purchaser we would want to look at all the criteria in the export control regime and look at it particularly carefully, because we would want knowledge about a non-governmental purchaser and it might be more difficult to come by than for a governmental one.

Q234 Mr Heathcoat-Amory: Could I suggest that in an age where non-state actors, as the vogue phrase has it, are becoming more important this might be revisited? Particularly I am really quite disturbed that there is no list of them and no general rules so I think we ought to extend, as it were, to private purchasers of these weapons really the same controls. Could I suggest that perhaps we follow that one up?
Margaret Beckett: I think we can follow it up during the review of the Export Control Act, because it is a valid point.

Q235 Sir John Stanley: Foreign Secretary, paragraph 1(i) of the Oslo Declaration on the International Instruments to prohibit cluster bombs that was promulgated on 23 February says that this international agreement is going to, "prohibit the use, production, transfer and stockpiling of those cluster munitions that cause unacceptable harm to civilians". Can you tell us, Foreign Secretary, which categories of cluster bombs in the British Government's view do not have the capacity of causing "unacceptable harm to civilians"?
Margaret Beckett: Obviously cluster bombs are designed for inflicting injury on the battlefield but they do have a potential also for causing harm to civilians, so it is not so much that we think there is a category that could not potentially cause harm; it is the distinction, as I am sure you are well aware, Sir John, between so-called dumb and smart weapons; that there are some which have perhaps a greater capacity to be used in a more targeted way, or which lose their capacity perhaps after time to inflict that kind of injury, and others which do not, which having been dropped just stay there as a potential lethal weapon under all circumstances, and it is the distinction between the one and the other, where one

has an even greater capacity to cause harm to civilians, that is intended, I believe, in the wording of the Oslo Declaration.

Q236 Sir John Stanley: But, Foreign Secretary, does not that distinction fall wholly to the ground depending on the use which is made of cluster bombs, and it is immaterial whether a cluster bomb is a smart cluster bomb or a dumb cluster bomb if it is dropped on an area which is populated by civilians? Is it not the case that it is bound to cause civilian casualties?
Margaret Beckett: I think there are two distinctions here. One is whether or not there is a proper use of weapons, and any weapon can on occasion be misused; the other is perhaps the general point about the use of cluster weapons as against alternatives which are not cluster weapons at all, and you will be much more familiar with this than me, Sir John, from your experience in the Department of Defence but it is my understanding that the military argue that, if one did not have the opportunity to use cluster weapons, then in order to achieve the same goal in a conflict situation it is likely you would have to use much more substantial and heavier and much less well-targeted munitions, which would be even more likely to cause even greater damage to civilians. That is the military case, as I understand it, for continued deployment of cluster weapons.

Q237 Sir John Stanley: So are we right in concluding that the British Government's objective in this forthcoming treaty will be to apply the treaty to dumb cluster bombs only?
Margaret Beckett: We are happy to work with the Oslo Declaration but our objective is to work through the CCW process to try to get agreement. There is nothing wrong with the Oslo process and that is why we were happy to go along and to be part of it and encourage it, but engaging those countries who are producers and users of cluster bombs seems to us to be a more productive way forward and that is why we are seeking in parallel to work through the CCW process. That does not envisage, however, as you quite rightly identify, asserting that there should be a ban on the use of cluster weapons at all, for exactly the reasons I have just given.

Q238 Sir John Stanley: So can you then confirm that the British Government's objective is to apply the treaty provisions to dumb cluster bombs only?
Margaret Beckett: Our objective is to phase out the use of such bombs and to encourage others to phase them out and to get a treaty that bans them, yes.

Q239 Sir John Stanley: Thank you. One other aspect on the use of cluster bombs, if I may. As I am sure you are aware, Foreign Secretary, in the conflict in the Lebanon last year the UN reports estimate that there were approximately four million bomblets dropped in the course of that conflict, and the UN also estimates that 90% of those four million bomblets were dropped in the 72-hour period between the adoption of United Nations Security Council Resolution 1701 on 11 August and the coming into effect of the ceasefire on 14 August, and those four million bomblets were dropped over an area approximately one and a half times the area of Greater London. Do you not agree, from a humanitarian point of view, that to drop that number in that particular timescale after the UN Resolution had been adopted was an utterly indefensible action by the Israeli Government, and can you point to one single public statement of condemnation by the British Government in relation to the dropping of 90% of the cluster munitions in that particular time period?
Margaret Beckett: First, I am not familiar with the figure of four million that you give but I do know there were very substantial cluster munitions used. I do not know what the proportions are as between what was used in the previous period and what was used in the last 72 hours, but I have been into Lebanon and seen the work which we are substantially funding and which is being done also by very many extraordinarily courageous Britons involved in the relevant charities and groups and so on there in order to try to clear up this whole area and to try to remove all the remaining munitions. Obviously that will take a period of some time. We have urged the Israeli government, and continue to urge the Israeli Government, to issue to the United Nations maps of where they believe any of this material could have been distributed at whatever time in the conflict. I certainly share the view, and I believe indeed the Israeli Government expressed concern when these allegations were first made, that there had been a misuse against regulations of some of this material and are themselves I believe holding an inquiry, which I do not think has yet reported. So certainly we share the concern that you have expressed if events of the kind that are being suggested took place. As to the issue of the final 72 hours, I think it is a fairly open secret that we were among those who would have liked, once the resolution was carried, the resolution to come into effect at once, and put such an argument. It was not our decision that there was a time delay between the resolution being carried at the United Nations and it being implemented and brought into effect.

Q240 Sir John Stanley: As you know, Foreign Secretary, the present Government to its credit has a very creditable record in relation to antipersonnel land mines. Is it not surprising and, I would say, most regrettable that given the stance which the British Government has taken on antipersonnel land mines it has not, to my knowledge, on the record made a single public denunciation of the sowing of what are effectively antipersonnel land mines, those that do not detonate, over this hugely wide area of southern Lebanon, and can I say to you, Foreign Secretary, in terms of chapter and verse the UN Secretary General's report on Resolution 1701 of 12 September last year says that according to the United Nations Mine Action Co-ordinating Centre, "an estimated 90% of all cluster bombs were discharged between the time of the adoption of Security Council Resolution 1701/2006 on 11 August and the actual cessation of hostilities on 14

August". Surely that statement from the UN should be the subject of a significant public condemnation of the sowing over a huge area of what are effectively anti personnel land mines in southern Lebanon?
Margaret Beckett: We certainly are extremely concerned at the overall impact of the conflict in Lebanon, including the activities to which you refer and the remaining munitions and the problems with which the Government of Lebanon has been left to grapple. We continually throughout the period of the conflict sought ways which we judged would be most effective to maintain pressure on all of those involved in the combat, from whichever quarter, to bring it to an end as soon as possible, to minimise all the humanitarian damage, and to act in accordance with international law. We made those statements repeatedly and in public and maintained that pressure all the way through and we maintain it today.

Q241 Chairman: May I ask, Foreign Secretary, why it should take the UK until 2015 to withdraw cluster bombs from use by British forces? Why cannot we do it immediately?
Margaret Beckett: It is not really a question for me but I believe we are hoping to try to do it earlier.
Ms Leslie: I think the Ministry of Defence keeps it under review all the time, and it is very much a question for them.

Q242 Richard Burden: We have been trying for some time to understand how our export policy works in respect of arms exports to Israel and our report asked for some further information about this because Britain's policy for some time has been not to export arms, including weapons equipment or components which could be used aggressively in the Occupied Territories. Now, when we have asked what that means what we have been told, and it is a formulation that is used in reply to us and in reply to Parliamentary Questions and so on: "All applications are considered on a case by case basis against the Consolidated EU and National Export Licensing Criteria. Any licence which we assess is inconsistent with the Criteria will be refused. This includes taking into account Criterion 4, the preservation of peace, security and stability." We still do not understand what that means in the context of Israel.
Margaret Beckett: I am not sure what you believe we sell to Israel by way of arms, Mr Burden, but first of all there is a small amount of trade. I believe something like 0.1% of Israel's total arms imports comes from the United Kingdom and we have not sold main equipment like tanks or artillery or warships to Israel since 1997, so it seems to me we are visibly taking Criterion 4 into account.

Q243 Richard Burden: Are we saying that "deployed aggressively" is synonymous with Criterion 4?
Margaret Beckett: Well, we do not sell them anything particularly. We just do not have a ban on sales.

Q244 Richard Burden: I have not got the figures to hand but I think you will find that arms exports to Israel have been going up in recent years.
Margaret Beckett: The figure I have is it is 0.1% of their total arms imports. It is miniscule. We do not sell them anything major, as I say, precisely because we do take account of Criterion 4, as you would wish us to do.

Q245 Richard Burden: So do you see the Occupied Territories as a separate country from Israel?
Margaret Beckett: We are extremely mindful of all the political connotations of the relationship between Israel and the Occupied Territories but I repeat, we look very carefully at these issues, we take the Criteria into account, and we make almost no sales to Israel.

Q246 Richard Burden: You see, there have been a number of questions put down from myself and others about this and this is the first time I have actually been told that the application of Criterion 4 is something to do with the amount of arms we export to Israel—
Margaret Beckett: I am not saying that.

Q247 Richard Burden: Before that what was said was that cases are assessed on a case-by-case basis and that there is regular monitoring of uses to which arms exports from the UK, directly or indirectly, are being or could be put. In fact going back to your predecessor's time one of the reasons why that monitoring was meant to be going on was because it had been discovered some years ago that goods that had been exported from this country with an assurance from Israel that they would not be used aggressively on the Occupied Territories and they were being so used. Now, presumably some of those goods could still be there, so what monitoring does take place?
Margaret Beckett: I would make two points. First, I am not saying that Criterion 4 is judged in terms of quantities; I am simply saying that the facts as we understand them as to the quantities of sales are evidence that we are not ignoring Criterion 4 which, if I understood it, was your original assertion. Secondly, on monitoring, this goes back to the question we were discussing before about how we carry out monitoring. Our Embassy keeps a very close eye on these things; they are extremely conscious of the interest, the concern and the political sensitivity of these matters, and if there are any reports that indicate that there is misuse of material that might have been exported many years ago then clearly they look at it and draw it to the attention of the relevant authorities. So we monitor to the greatest degree we can but we go back again to the other question I was asked earlier by Mrs Gilroy of the difficulty of detailed end-use monitoring.

Q248 Richard Burden: If it was discovered, theoretically, that there were arms or components exported from the UK that were being used by Israel in attacks such as the one embarked on against

Lebanon last year, would those, if they were discovered, be regarded as being in breach of Criterion 4?
Margaret Beckett: Well, they might be in breach of a number of the criteria. If we discovered that equipment had been sold to Israel on the basis of it not being used and, inconsistent with the Criteria, was being so used then we would regard that with grave concern and we would make sure we did not issue licences for such equipment in the future.

Q249 Richard Burden: Is there any reason why, if the attack on Lebanon would have been regarded as in breach of Criterion 4 and if there were arms being used for that, the Government did not impose an arms embargo on Israel when it attacked Lebanon?
Margaret Beckett: Well, we are drifting rather into the territory of a discussion about the conflict in Lebanon last summer, which I did not think was the purpose of this inquiry—

Q250 Chairman: It is Mr Burden's last question on this.
Margaret Beckett: Obviously we looked at all the implications but, as I say, our arms involvement with Israel is so small that it was really not particularly relevant to the conflict. Our concern was much more to do everything we could in the way we judged to be likely to be most effective to bring that conflict to an end as early as possible and it was to that that we devoted our efforts.

Q251 Malcolm Bruce: I was one of a number of MPs who gave evidence to the OECD Peer Review on Britain's performance on anticorruption and bribery—
Margaret Beckett: Supportively, I am sure, Mr Bruce!

Q252 Malcolm Bruce: Not entirely but then nor were the OECD entirely impressed, not least because the then Chairman of the Defence Select Committee said that everybody knew that arms sales were corrupt and he would be very surprised if British arms contracts were not secured without bribery and corruption, which possibly did not help the outcome. But can I say that we have seen that the OECD have now returned to this and their Anti Bribery Group has met this week and has expressed serious concerns on the fact that the BAE al-Yamamah investigation has been halted and are sending examiners next year to review Britain's performance on corruption. How do you react to that proposal from the OECD?
Margaret Beckett: Calmly, Mr Bruce. We were due to have our performance on corruption reviewed in any event so all they are saying is they will continue to do what they were already going to do.

Q253 Malcolm Bruce: I do not think that is the case. What they said was, and I quote from the *Financial Times* and Mark Peith, the Chairman of the Anti Bribery Group: "The action on the UK was very, very tough and reflected anxiety that the BAE case highlighted more general concerns about Britain's failure successfully to investigate and prosecute alleged foreign bribery", and, indeed, these are not just external suggestions. The largest pension fund in the city, Hermes, says that this decision has deeply damaged the City of London and Britain's reputation as a financial centre. So can you say in the light of the OECD's reaction what credibility this leaves the United Kingdom with in the international fight against bribery and corruption? Can I also say as Chairman of the International Development Committee, where governance and anti corruption is the hallmark and the touchstone of the Department for International Development's White Paper, that it is not a very helpful backdrop with which to be trying to engage developing countries on integrity and anti corruption, if we are being investigated in this way by the OECD?
Margaret Beckett: I repeat that my understanding is that the OECD was due to look at it. I am aware that the Working Group has published a report. I have not had the opportunity to look at it, other matters have been taking my time over the last 24 hours, but I would simply make two points. First, the Chairman of the Working Group is entitled to say what he chooses. I reject utterly any suggestion that this Government has behaved in any way which was less than honourable or that this casts any doubt, and I am surprised if somebody in the City is so foolish as to have said so, on the determination of our Government to deal with corruption and those policies, which as you quite correctly say is in many ways the work and the responsibility of my colleague in DFID, and responsibilities which are discharged very honourably. But I think there are many who it suits to disregard the clear advice of the Attorney General, that having looked carefully and in-depth at the cases being considered he had come to the conclusion that it was unlikely, even after substantial further investigation, to reach fruition, and that was the precisely the nature of the decisions that the Attorney General and the Serious Fraud Office have to take. I am mindful of the fact that the predecessor of the present Director General of the SFO, Rosalind Wright, interestingly volunteered on to the public record both that it was not at all unusual in the work of the SFO for detailed cases of this kind—and I do not mean in this area but cases of this detail and complexity—to be pursued through investigation for a considerable period of time and then for it to be found that they could no longer be pursued because it simply was not going anywhere, that there was nothing at all unusual about this, and she also went out of her way—which I thought was very helpful considering the tone of some of the media comment on anything he does at present—to say how impressed she had always been with the meticulous, thorough and entirely scrupulous and honourable conduct of the Attorney General in dealing with all these cases.

Q254 Malcolm Bruce: I can understand, and it is quite normal, that public prosecution cases are abandoned because of disproportionate time and effort but that is not what the Attorney General said

when the announcement was made. What he said was that it was to safeguard national and international security.

Margaret Beckett: No, with respect, Mr Bruce. It depends on what coverage you read, I know. I recognise that most of the media concentrated on the issues of national and security interest but I assure you the Attorney General was very clear, particularly in his earlier statements, where he stressed—and I remember very distinctly seeing comments in which he made this plain—that he had spent not hours but a considerable amount of time, days at least, going through the material in-depth and had come to the view that this was a potential prosecution that was not going anywhere—

Q255 Malcolm Bruce: Finally—

Margaret Beckett:—and he laid initially all his emphasis on that, but of course it was the other that was more interesting to people.

Q256 Malcolm Bruce: Finally, and shortly, then, is it not still a matter of concern that since we passed the law in 2001 we have not been able to bring any prosecutions in this situation, and therefore that argument may be valid but at some point or other we do need to have a successful prosecution to reassure people we mean to do it?

Margaret Beckett: There is other work continuing, as you know, and other investigation, and there is no suggestion that it should not continue. It will be within your memory, I know—and I am not in any sense criticising the SFO—that there is a concern about whether we are getting as much success, and this is nothing to do with the bribery and corruption now, in this considerably difficult area.

Q257 Peter Luff: The FCO's Human Rights Annual Report is an extremely valuable document, obviously, and of use to this Committee in particular, and by definition when a country is listed as being a "major country of concern" in that Report it is going to have a bad human rights record. What I want to try and tease out is how explicit the link has to be between an export and the risk of its use for internal repression before an export licence is refused, and being a practical person can I use two hypothetical examples? It is quite obvious that any application to export riot control equipment to Zimbabwe would clearly be completely unacceptable at present, and would have been for a long time, but what about armoured trucks for the Vietnamese Army which could be used to defend Vietnam but also used to repress public demonstrations?

Margaret Beckett: I do not know whether what I am about to say will help your query or not, Mr Luff. Obviously we take a certain amount of account of the country—for example, if it were Burma then we just would not be selling anything—but the emphasis on scrutinising and taking human rights issues into account is more on the basis of what is the equipment rather than the top of the list being what is the country, so that is always what you would look at. First, is this equipment that could be misused in this way, and then one would look at whether these are circumstances in which one might anticipate it would be safe to let such equipment go, or not so safe. I think I have that right.

Q258 Peter Luff: But equipment can have a dual use in the sense it can be used for strictly defensive purposes or purposes of repression.

Margaret Beckett: This is why this is such an interesting and complex area of work, and I have great sympathy with those who engage in it day-to-day. I am happy to say it is something that does not cross ministers' desks all that often.

Q259 Peter Luff: Would it not simplify your job immensely to have a presumption of denial for countries on the list?

Ms Leslie: Possibly. If I may remind the Committee of Criterion 2 which is about human rights, it says in that: "The Government considers that in some cases the use of force by a government within its own borders, for example, to preserve law and order against terrorists or other criminals, is legitimate and does not constitute internal repression". I can think of a number of countries where we might have serious concerns about human rights but rather good co-operation on counter narcotics, for instance, and there might be occasions in which we wanted to give potential dual-use equipment to a counter narcotics force provided we were very satisfied with all the measures we would take to assure ourselves we could be satisfied that we could give or sell material to a counter narcotics force and work with it in the mutual interests of dealing with crime, for instance. So I think a blanket criterion that removed the ability to take a case-by-case approach to this would not necessarily be in our interests.

Q260 Peter Luff: I do not want to sound pejorative but you are saying: "Trust us, we can do this on a case-by-case basis", but it is difficult for us to know whether or not the criteria have been applied in a consistent manner. It is a dilemma.

Margaret Beckett: Well, you know what those criteria are; we report to the Committee on a fairly regular basis; there is a good deal of transparency; and there is scope for the Committee to explore some of these things if it is felt that is not the case.

Mr Arkwright: Every export licence application we receive is sent to the Foreign Office's Human Rights Group, as I think you are aware. They are responsible for consistent application of the human rights criteria in each of the cases, so we do have a team responsible for applying that criterion and looking very carefully at it across the board in each of these cases, and that is one way we try to ensure consistency.[1]

[1] *Note by witness:* The Foreign and Commonwealth Office would like to clarify this point. In responding to the Committee's question about how many licences are sent to HRDGG, it regrets the impression may have been given that every licence received in the Foreign Office is sent to HRDGG. In fact, only those licences where there is a concern on the grounds of Criterion 2 are sent to HRDGG. In 2006, this was the case in a total of 631 licences.

Q261 Chairman: One of the countries highlighted in your annual report is Uzbekistan. Following the Andijan massacre the EU did then impose an arms embargo and the premise of that must have been it is not the actual equipment, it is not whether it is a military vehicle or whether it is an electro shock baton for torturing but that this is a regime whose human rights record is such that we do not feel safe in selling any military equipment to their armed forces or their security services or whatever, so I had always thought that the end-use, as in the people using the kit, was as important a part of the considerations as whether it was a vehicle or a stun gun or a baton, and I am confused if I have misunderstood for so many years.
Margaret Beckett: I am not sure that I was in post when that decision was taken, but two points strike me. First, there are points where people decide that there are some countries, as with Burma and Zimbabwe, where you just do not engage. Secondly, I think I am right in saying that there was a concern that some material which had been legitimately exported to Uzbekistan in the past might have been used during these events.

Q262 Chairman: The issue was about flat pack Land Rovers being exported to Turkey and Turkey then converting them into military vehicles and exporting them to Uzbekistan. This Committee raised the issue at the time and were reminded that obviously a civilian export in a flat pack to Turkey was not subject to UK arms export controls, but I thought we had the assurance that if there had been a direct military export to Uzbekistan in those circumstances it was extremely unlikely, if not impossible, that a licence would have been granted.
Margaret Beckett: Absolutely.

Q263 Chairman: My point then is that it was the end user, not the nature of the piece of equipment that was the cause for concern. We export military Land Rovers—no problem. The concern was it was going to Uzbekistan which, according to the Foreign Office and to everybody else, has a human rights record that needs to be questioned. So it is the end-user, the country of end-use, that does matter, which brings me back to Peter's point, which is why he was raising it, I think.
Peter Luff: Exactly.
Margaret Beckett: Yes. There is a limit to how effective one can be in this respect. You are correct, of course, it does go back to the whole issue of dual use which is so difficult, and we do try—probably more rigorously than most other governments, if I can say so without being critical of them—to be rigorous in our controls about material that can be misused. But let's be quite blunt about it; if you want to, you can go on a bike and massacre somebody with a Kalashnikov or something, you do not have to have a British exported Land Rover. There is a limit to how far one can take some of it. But when we make the judgments we make about issuing an export licence we do try to envisage all of these worse case scenarios, and if it were the case that any of us were so preoccupied as to forget some of these human rights issues I can assure you the relevant section in the Foreign Office would make sure we did not.

Q264 Robert Key: And that assessment would be done in post, presumably?
Margaret Beckett: In part.

Q265 Robert Key: And what role would defence attachés play in that assessment?
Margaret Beckett: Well, it depends really on whether we are now talking about dual-use or specifically military equipment. I would have thought under present circumstances not necessarily all that much. It is a general political assessment in a case like Uzbekistan.

Q266 Richard Burden: On a similar theme could I perhaps explore a little bit about the role of the Human Rights, Democracy and Good Governance Group and the role they play in the assessment of licences?
Margaret Beckett: This is the group Paul was talking to you about? It all goes to them first.

Q267 Richard Burden: If there is a licence application for export to a country where the UK has concerns about human rights abuses, would that automatically go to that Group?
Margaret Beckett: They all automatically go to that Group, I think—
Mr Arkwright: Exactly, yes.[2]
Margaret Beckett:—because almost anywhere can suddenly become a cause for concern and because, not to put too fine a point on it, I have always assumed they have their finger on these human rights issues—for obvious reasons in that this is their bread and butter—in a way that not everybody else has to that same degree. So they would be likely to be more sensitive to some whiff of something changing.
Mr Arkwright: The post is very closely involved in the human rights aspects as well, so any export licence application will be sent to the post and they will be asked, alongside the Human Rights Group, to consider the human rights aspects of any particular application and answer any questions that we may have centrally in London.

Q268 Richard Burden: When in a Parliamentary Answer about the work of the Group it was noted that there were 7,381 standard individual export licence applications referred to the Foreign Office in 2005, and in that answer it was saying that where there are specific human rights concerns that arise ministerial decisions are sought for finely balanced cases, do you have any idea about roughly how many are referred to ministers?
Margaret Beckett: I do not have the figures for 2005. I have the figures for 2006.

[2] See footnote 1, page 28

Q269 Richard Burden: That is rather better.
Margaret Beckett: In 2006 there were 54 submissions that went to ministers and, of those 54, 47 of them were on the basis of human rights concerns.

Q270 Mr Borrow: Article 296 of the Treaty of Amsterdam makes it clear that issues around security and defence are very much for Member States and not within the competence of the European Union, but the Commission has estimated that it costs defence companies in the EU on internal trading somewhere in the region of 3 billion euros a year and have been looking at ways of seeking to streamline intra Union exports. What is the UK Government's position? Are we on "Let's stick strictly to the letter of the terms of Article 296", or do we take the sympathetic approach?
Margaret Beckett: We are cautious about this sort of area but I would make two points. One is that at the moment the Commission is mulling over something like a three-stage process, and we have been engaged in discussions with them to try to shape it in the direction we would hope for. Secondly, they have not made any formal proposals yet; I think we think they might by the end of the year. Anyway, they are working on some proposals and have not put them forward yet, but the Commission already has the power to regulate public procurement, so while we are keeping an eye and are conscious of the issue you raise and the question about competences, given what we understand informally of the nature of what the Commission is envisaging we do not think it will encroach on existing Member State competences.

Q271 Mr Borrow: Outside the EU part of this, the Letter of Intent Group—which is the UK, France, German, Italy, Spain, Sweden, the six largest defence manufacturing states within the EU—have been working for some time to seek to reduce barriers to intra trade between those six countries. Why do you think there has been very little progress in doing anything concrete?
Margaret Beckett: I think it is just that it does take time. As I understand it, industry has for some reason, and it is not quite clear to me why, not been keen on using the procedures that are in place and so what we have we begun to do, particularly lately, is to try to see whether there are obstacles or barriers that can be removed that will encourage the industry to use these procedures or something very like them, and I believe we are working on some pilot projects to try to work with the industry to try to move this forward, and I think also there is a working group looking at some aspects of it at Brussels so people are trying to move it forward.

Q272 Chairman: Foreign Secretary, could we turn to the issue of extraterritorial controls, an issue that, as you know, the Committee has exercised its collective mind about for some time. In a recent interview on 14 February the Secretary of State for International Development said: "[that the] forthcoming review of the Export Control Act would examine whether UK controls on international arms brokers, who act as go-betweens in weapons deals, should be extended". Do you want to see controls on traffickers and brokers extended?
Margaret Beckett: Certainly, we recognise that this is a very difficult area but also it is an area of considerable concern and one which a lot of people have looked at and felt ought to be opted. As far as we are concerned, basically we would say that it is something we would like to see re-examined in the review process, it does seem very much to fit into that overall process of review and re-consideration. I will not disguise from the Committee that I think it does present particular difficulties, but we are willing to look at it again in the course of that review.

Q273 Chairman: Good. There are extraterritorial controls at present in relation to long-range missiles to embargoed destinations, torture groups and so on and yet, as many people point out, the weapons of mass destruction today are the small arms, are they not? It is the small arms and light weapons which are killing most people in the conflicts that we are all familiar with so consideration, at least active sympathetic consideration, of extending extraterritoriality to those would be part of the review as the Government would see it?
Margaret Beckett: Not only do we anticipate it as part of the review, but we held a workshop not long ago with the industry and NGOs and it was explicitly discussed at that workshop as a means of feeding into the review, so I can assure the Committee that the concerns are not going to be ignored.

Q274 Chairman: I hate to miss any further elaboration on this!
Ms Leslie: I was observing that in the much longer term, of course, the Arms Trade Treaty would also help in this area.
Chairman: Yes, but the Committee does not want to wait quite that long, if at all possible.

Q275 Sir John Stanley: Foreign Secretary, you referred in reply to the Chairman to difficulties unspecified. I wonder whether these difficulties are more perhaps in the bureaucratic mind than in reality and to try to test this one out, I asked the Library to provide me with a complete list of the legislation already on the statute book regarding offences which, when they are committed overseas by a UK person, would be offences in the UK and can result in criminal prosecution in the UK of the person concerned. The list which the Library has provided me with—if this helps your officials it has arrived from Archibald's Criminal Proceeding Evidence and Practice 2007—actually to my surprise is as long as your arm. It covers a total of 24 separate pieces of legislation already on the statute book under which offences can be prosecuted in the UK under criminal proceedings when they are committed overseas. Given the fact that the Government has already conceded the principle of extraterritoriality in relation—regrettably only—to instruments of torture, however defined, and long-range missiles in excess of 300 kilometres with everything else excluded in between, which is where

all the trafficking takes place, given the fact the principles have been already been conceded, given the fact that there are 24 separate pieces of legislation already on the statute book in which extraterritoriality applies, I hope, Foreign Secretary, you could assure us that the difficulties you foresee are of a minimal nature. I hope that in policy terms also ministers will drive ahead and accept the unanimous recommendation of these four select committees, that extraterritoriality should be applied to all types of weapons when they are trafficked and brokered overseas.

Margaret Beckett: If I may make three points to you, Sir John. First of all, I am never entirely sure among those who should be governing rather than those who are, whether it is the House of Commons Library or London taxi drivers, who have pride of place, but certainly the Library is always brilliant at finding easy answers to knotty problems which, sadly, governments do not always feel able to implement. Secondly, without having read what sounds like a comprehensive list I know you are very well aware, and I think the Committee will be well aware, that it is one thing to put something into legislation and it is another thing for it to be effective. One of the sad responsibilities which we place on our bureaucrats is to advise us—of course, you can put something into legislation, but will it have the effect you desire—and to counsel as to whether or not that is always the case. That is why I do not think it is just a matter of the bureaucratic mind finding difficulty, I think it is because one of the responsibilities with which we charge our bureaucrats is giving us practical advice about how effective things might be. The third point I would make to you is that you do make an important point and we will, indeed, look at it in the review but one of the bodies whose views and responsibilities are particularly pertinent is, in fact, Revenue and Customs and it is they too who would have to be involved and consulted.

Chairman: There are clearly issues of enforcement with all of these items. I think this may well appear in the appendix on extraterritoriality, I would be very surprised if it does not. I think there are enforcement issues.

Judy Mallaber: If I could make a point. When we discussed this previously, one of the examples that was given was that we do not say that we will not have extraterritoriality in legislation saying that child abusers should not be prosecuted if they engage in child abuse in other countries because we are not sure that we are going to be able to implement it very easily, it does not affect whether we reach legislation.

Chairman: I will take that as a comment. Sir John has a final question on this.

Q276 Sir John Stanley: Foreign Secretary, I do hope that you will not dismiss the House of Commons Library. The House of Commons Library has simply prepared as an issue of fact the 24 items of legislation where extraterritoriality applies and I hope you may wish to consult that list. You will see, for example, included on it are issues like the safety of Channel Tunnel trains, bribery and corruption, but we are talking here about massive life and death issues about weapons running overseas into, say, areas of conflict where thousands or tens of thousands, or more, people can lose their lives. This is a life and death issue and I hope the Government will reflect as to whether it is acceptable that UK persons should be able to carry out these activities overseas completely immune to prosecution under UK criminal law when those offences most certainly would face a criminal prosecution if committed in the UK. I hope ministers will reflect on that.

Margaret Beckett: I do not take it lightly and, indeed, I intended to cast no aspersion whatever on the House of Commons Library, which is an excellent body of people and whose work is always invaluable to all Members of Parliament. I believe I sought to make a light reference to the speed and skill to which they can find the answer to any question.

Q277 Linda Gilroy: What impact has the recent shooting down of a satellite by a missile by China got on strategic exports to China? Does it strengthen the hand of those who want to maintain the arms embargo?

Margaret Beckett: As far as I am aware, it has not been explicitly discussed in quite those terms because, of course, we are maintaining the arms embargo and so it is not an issue that has come up in the context of should we do anything other than maintain it but, in a more general approach to your question, I think it has raised a lot of concerns in many quarters, and the UK is researching those.

Q278 Linda Gilroy: The UK position on that has been stronger than EU partners, do you think it has altered their perspective at all?

Margaret Beckett: Well, as I say, it has not been discussed in those terms. I think it will have had an effect on everyone because it is a clear demonstration of a capacity which has a lot of implications.

Q279 Linda Gilroy: There was an answer to a written parliamentary question on 22 January, the Minister for Trade and Investment said, "The Foreign Secretary, ministers and officials held regular discussions with the Chinese Government on a wide range of international issues including the arms trade". What have been the results of that dialogue and what, for instance, are the prospects of engaging them in the Arms Trade Treaty?

Margaret Beckett: I think China was one of the countries who abstained from the Arms Trade Treaty. I suppose one could say, being realistic, that the major arms producers and traders on balance are probably the ones who have abstained and, as I say, China was one. We do continue to engage them in discussion and conversation and to attempt to convince them that this is, in fact, the right path to tread and we are not unhopeful of making some progress, although, of course, it will take time.

Q280 Linda Gilroy: Are there any results you can point to at this stage?

Margaret Beckett: It is a little early. At the moment we have got through the first committee. I take some minor encouragement from the fact that countries like China did not vote against, which they very easily could have done, and that suggests that they do not have closed minds on the issue but obviously we have just dealt with those issues in the first committee, now the preparatory work is taking place to prepare for it to go to the group of experts and it is only when we have those aspirations we will have a clear idea of where governments like China stand.

Q281 Linda Gilroy: Apart from the Arms Trade Treaty, have there been any signs that China is changing its way as far as arms exports are concerned?
Margaret Beckett: Not particularly on arms exports, I do not think. There are areas of policy where we engage with China, for example in relationship to Africa, some of the international problems like Sudan and so on.

Q282 Linda Gilroy: Governments in developing countries where there have been concerns.
Margaret Beckett: There is evidence of engagement with China beginning to make a difference to some of the approaches that they take but not so far in this particular area as far as I am aware.
Mr Arkwright: On China there is an EU pilot project aimed at consulting with the Chinese and improving our own exports controls and the deputy of my department was in China recently talking to the Chinese, both the industry and the officials concerned, about export controls and China represents a very large part of our outreach effort so we are talking directly about export controls and the way we do things, but, as the Foreign Secretary has said, this is a long process which is going to take some time to bear fruit.

Q283 Judy Mallaber: Romania and Bulgaria have just joined the EU and Saferworld published reports on their arms export systems at accession and in both countries they found lack of transparency and they doubted they were applying the EU Code of Conduct. Do you agree with that assessment, that we are concerned about their transparency and whether they are abiding by that and, if so, is there any action that will be taken on that?
Margaret Beckett: We did work bilaterally both in Bulgaria and Romania in the run up to their accession and, of course, now they are members they will be regularly assessed through the peer review process. We share the view that there is more work that can be done with them and clearly we are continuing to do that work and I believe that Saferworld are conducting a further assessment and they are implementing the Code of Conduct. We regard this as ongoing work, not work that is completed.

Q284 Judy Mallaber: Having been in the Congo last year I am very conscious of the research instituted by the All-Party Group on Great Lakes that a large number of weapons are getting into the Eastern Congo and into that region which originated from Eastern European countries, not necessarily Bulgaria but from that part of the world, and we are going to be doing some more research on that. Do you have any concerns, specifically in relation to Bulgaria and Romania, as EU countries that UK origin items are being shipped out via those countries to undesirable destinations because these Eastern European countries clearly are amongst those who are engaged in weapons being transferred?
Margaret Beckett: We do look very carefully at any applications to export from this country at all to anywhere against the consolidated criteria and one of the things that we take into account, wherever it is, including Bulgaria or Romania, are the risks of diversion, and as you said there are suggestions of problems of diversion into the Great Lakes. Like you, I am not aware of a suggestion that comes specifically from those countries, but we would look at it from anywhere.

Q285 Chairman: Thank you. Foreign Secretary, it is 4.30pm. Can I thank you and your colleagues for coming this afternoon. Also, thank you to the Department for the answers to the questions that we raised. It is a very complicated area in the sense that it is a complex area and we have some quite strong views about things, but we do appreciate very much the effort that your colleagues put into answering our questions and we are very grateful for that. Thank you, again.
Margaret Beckett: Thank you on behalf of the Department for those words of appreciation.

Written evidence

Asterisks in the written evidence denotes that part or all of a document has not been reported at the request of witnesses and the agreement of the Committee.

Memorandum from the UK Working Group on Arms[1]

A. Background

1. The Export Control Act (ECA) 2002 and the contingent secondary legislation are a considerable improvement over the legislative framework they replaced, for example through the introduction of new powers to control arms brokering and intangible transfers of technology. However, three years on from its entry into force, there are concerns that the new regime is struggling to address the increasingly globalised nature of arms production and the arms trade. It is clear there are a number of areas where further change is necessary.

2. We are therefore asking for the following to be considered:

- More parliamentary oversight of changes to Guidance;
- Inclusion of sustainable development in the table of Relevant Consequences contained in the Schedule to the Act;
- An extension of the extraterritorial controls on arms brokers;
- Greater controls placed on providers of ancillary services, such as transportation and finance;
- More effective control on the transfer of production capacity, be it through the establishment of licensed production facilities, subsidiaries, joint-ventures or other means;
- Examination of possibility of developing a military end-use catch-all clause;
- Further extension of end-use controls to prevent undesirable activities such as torture and terrorist acts;
- Clarification and tightening of rules governing transit and transhipment;
- Stricter controls on government-to-government transfers;
- Greater specificity regarding transparency and reporting obligations;
- Introduction of post-export controls;
- An increase in resources for and more strenuous efforts in terms of implementation and enforcement.

3. While the UK Working Group on Arms (UKWG) is anxious to provide as much detail as possible regarding the shortfalls in the current system and ideas for how to address them, it should be noted that the formal review process is not due to commence until May 2007. With this timeline in mind, the UKWG is still formulating its proposals for amendments to the existing legislation, and the submission that follows should therefore be regarded as a work in progress. It is the intention of the UKWG that as we approach the review proper, the ideas contained herein will be refined. On this basis, the UKWG will be happy to provide supplementary memoranda to the Committee in the months to come.

4. The UKWG notes that the terms of reference for the review provided by the Export Control Organisation focus on reviewing the control orders issued under the enabling ECA, rather than the primary legislation *per se*. While this may be a useful place to start the review, the UKWG believes that where an examination of the control orders point to a problem with the primary legislation, this too should be addressed by the review. Similarly, the review process should not shy away from recommending changes to the primary legislation where weaknesses are identified which fall outside the scope of the existing ECA.

5. Included in this submission are certain recommendations for changes at the level of secondary legislation which the Government may argue can be accommodated without reference to the control orders, for example regarding post-export controls. However, the UKWG believes that in some circumstances there is value in setting out minimum standards in the control orders, so as to underline and clarify the Government's commitments to certain principles.

6. There is an additional external factor that the review should take into account. EU member states have at the technical level agreed a draft Common Position Defining Common Rules Governing the Control of Exports of Military Technology and Equipment which will, when formally adopted, replace the EU Code of Conduct on Arms Exports. National legislation in the member states will then be required to be compliant with the new Common Position. There is no dispute among EU member states regarding the content of the draft Common Position. It would therefore be sensible for the Government to use the review as an opportunity to adapt the Act and relevant control orders to ensure this compliance.

[1] For the purpose of this submission, the UK Working Group on Arms comprises Amnesty UK, BASIC, Oxfam GB and Saferworld.

B. Guidance

7. At the level of the Export Control Act, the UKWG recalls the debates which took place in 2001 and 2002 around the powers of the Secretary of State of Trade and Industry to issue Guidance (section 9). The concern was raised that the legislation gave the Secretary of State excessive discretion to change the guidance and that Parliament's role in this process was unduly limited, ie Parliament would merely be informed of the guidance, potentially retrospectively. Critics were informed, however, that the Government would exercise this power with care, and that significant changes to the guidance would not be introduced without due consideration being paid to the concerns of Parliament.

8. On 8 July 2002, the Government announced that new guidance had been given on the subject of considering applications for export licences for the supply of military equipment for incorporation into final products for possible onward export. In the same announcement, it was revealed that export licenses had already been issued under this licence, specifically for the export of Heads-Up-Display Units for use in the cockpits of F-16 aircraft to the US, for onward export to Israel.[2] This would appear to have confirmed the fears of those opposed to the way section 9 of the Export Control Act was formulated. The UKWG recommends that the Government revisits this part of the Act so as to limit the power of the Secretary of State to make changes to guidance without independent oversight.

C. Sustainable Development

9. Another issue relating to section 9 of the primary legislation relates to sustainable development. Excessive or inappropriate arms purchases are a drain on social and economic resources that developing countries cannot afford. To this end the inclusion of sustainable development in the Export Control Act of 2002 was a welcome recognition of the fundamental importance of the issue. However, the UKWG has concerns with the way that sustainable development has been included in the ECA.

10. First, despite the best efforts of NGOs, the criterion on sustainable development was omitted from the table of "Relevant consequences" contained in the Schedule to the Export Control Act, thereby giving the sense they are of secondary importance. Second, the inclusion of the bracketed phrase "if any" in the reference to sustainable development in section 9 (guidance) of the Act, whereby "[t]he guidance required . . . must include guidance about the consideration (if any) to be given, when exercising such powers, to . . . issues relating to sustainable development" is unwelcome. It allows the Secretary of State excessive discretion to remove sustainable development from the licence decision-making process, and consigns the issue to second-class status, thus further undermining the importance of this issue.

11. Sustainable development should be included in the table of Relevant Consequences contained in the Schedule to the Act in order that this criterion has equivalence with other consequences, and is treated in a way that is commensurate with the damaging affects of transfers that undermine development.

D. Controlling Arms Brokers

12. The UKWG maintains that exterritorial controls on UK arms brokers should be the rule rather than the exception. Therefore, rather than structuring the control orders so that extraterritorial control of UK arms brokers is limited to a few special categories of goods or destinations, the Government should honour its manifesto pledge and start from the premise that all arms brokering activities of UK passport-holders should be controlled, wherever they are located.

13. However, with regard to the nature of the extraterritorial controls, there may be a case for classifying certain types of equipment which although sensitive have legitimate uses (eg unmanned aerial vehicles—UAVs) as separate from other goods which can never be classed as legitimate (eg torture equipment). Consideration has been given to the possibility that for items which fall into the former classification a distinct category of goods could be created within the Trade in Goods (Control) Order. For these goods, ie equipment which is particularly sensitive but for which legitimate uses exist, extraterritorial controls would still apply, but no licence would be required for activities such as general advertising or promotion. This would, for example, avoid the need for defence publications to obtain licences to carry advertisements for UAVs. SALW would logically fall into this category. The UKWG is interested to engage in this debate in a constructive manner, however any steps in this direction must be very carefully thought through to ensure that they do not have a negative impact on the general standards of transfer controls in the UK.

14. The UKWG continues to see registration as a valuable additional tool in the battle against irresponsible arms brokers. This position would seem to be reflected in the EU Common Position, which encourages member states to have a system of registration in addition to case-by-case licensing of individual transactions. The arguments advanced by the Government against registration (ie it suggests active support of those registered and it introduces an additional and unwelcome level of complexity to the system) seem inconsistent with its general approach to registration in other fields (eg financial services, the medical profession).

[2] *Hansard*, 8 July 2002, col 650W.

15. As another way of enhancing existing controls on arms brokers, registration would provide a useful entry point for ensuring that brokers have a good knowledge of the law (this could be one of the criteria for being admitted to the register) and related to this would assist in dissemination of information regarding changes to control lists, open licences, embargoed destinations etc. The ability to refuse entry to or to strike off from the register is very useful in terms of sending a signal to governments with whom the UK is willing to exchange such information. This would also have value in terms of alerting other brokers, defence manufacturers, transporters, freight-forwarders and the financial and insurance industries that they should be extremely cautious in their dealings with intermediaries who are not on the register.

E. Controlling Ancillary Services

16. There is an urgent need to bring those involved in the transportation or financing of the defence transfers more into the transfer control process. There are several reasons for this. As more jurisdictions introduce controls on arms traffickers, brokers are tending to "reinvent" themselves as transporters, and thereby to once more step beyond the law. These brokers are typically adept at creating vastly complicated deal structures involving myriad participants, whereby isolating brokering responsibilities becomes increasingly difficult for authorities. Regulating the activities of the transporters would help to address this problem. Furthermore, tracing transportation is more straightforward than tracing brokering paperwork. There is also the possibility of seizing the means of transportation, which would create an incentive for those who would stand to lose their plane or vessel to ensure that they were not involved in an illicit transfer.

17. Tighter regulation of the transportation and financial industries would also provide an opportunity to alert manufacturers who are in breach of transfer controls through ignorance or laziness of their obligations. Creating obligations for these types of business, for whom dealing with regulatory and administrative regimes is fundamental but for whom any single shipment would be peripheral, could be away of enlisting them as allies in the battle to reduce the incidence of licensable trades that are taking place without licences being applied for. The number of companies likely to be involved in these supporting activities is likely to be substantially fewer than the number of manufacturing companies that should be but are not observing transfer control rules, so they are thus a potential point of leverage. By creating obligations on transporters and freight forwarders and on financial and insurance companies, and then providing for serious penalties in the event that these intermediaries do not fulfil those obligations as well as arranging for periodic compliance visits, this may be an effective way of bringing a greater number of inadvertent law-breakers within the transfer control-conscious community.

F. Globalisation of Production—Challenges of Control

18. Last year, the UKWG highlighted a number of cases which clearly demonstrate the particular challenges thrown up by the globalisation of arms production. These relate to issues of licensed production or other joint venture agreements resulting in offshore manufacture of defence goods; the role of foreign subsidiaries; and the related issues of non-listed dual-use components utilised in military production for which no license is required—often referred to as NLR (no licence required items) or COTS (civilian off-the-shelf technologies). We are pleased that the Government, in light of such evidence, is looking again at the legislation and associated control systems to see whether such aspects can be brought more fully within the transfer control system. The UKWG accepts these are challenging and complicated areas, nevertheless if the purpose of the transfer control system is to prevent the supply of arms to where they can be misused, it is incumbent on the control systems to attempt to meet these challenges.

19. *Licensed production overseas*

The role of Turkish -supplied and -built Landrover Defender vehicles in the Andijan massacre in May 2005 graphically demonstrates the particular challenges thrown up by inadequately regulated licensed production agreements. It is very unlikely that Landrover Defender vehicles to this specification would have been licensed for direct export to Uzbekistan from the UK. It seems that the current practice of only licensing the technology associated with production or specific military components supplied as a result of the deal is not sufficient to regulate such re-exports. Controls need to be applied to the licensed production agreement itself, placing clear and binding contractual obligations on production ceilings and permitted export markets. Production or export over and above terms specified in the original licensed production agreement should require an additional licence from the UK. Such a system already operates in the US and the recent production agreement to produce Kalashnikov rifles in Venezuela under licence from Russia also contains limits on production and tight restrictions on exports. If Russia and US can do it, why not the UK?

20. *Overseas subsidiary companies*

The issue of foreign subsidiary companies also presents a challenge for the UK export control system, not least because subsidiaries are operating within the legal frameworks of the countries where they are based. However, the case of Askok Leyland and its negotiations to supply military trucks to Sudan announced at IDEX defence exhibition in February 2005 shows the pitfalls of not applying controls to overseas

subsidiaries. The supply of such vehicles would be illegal from the UK under the current EU embargo legislation, but this does not apply to subsidiaries of UK companies. Other examples presented last year show how subsidiaries of UK companies can supply military vehicles to a range of destinations where it would be highly unlikely that an export license would have been approved if the equipment had been sourced direct from the UK. While clearly a complex legal area, at the very minimum, embargo legislation should be amended to include transfers from subsidiary companies. If it would be illegal to supply the equipment from the UK, it is clearly a loophole to allow UK-owned companies to bypass embargo legislation via the activities of their overseas subsidiaries.

21. The UKWG would also urge the Government to look again at whether re-export controls can be applied in these cases. It is clear that overseas subsidiary companies have and are likely to continue to supply military equipment to a variety of destinations in cases where the UK parent would not receive an export licence to export similar equipment directly from the UK.

G. Dual-use Items for Incorporation into Military Systems

22. In January 2006, a US Predator unmanned aerial vehicle (UAV) reportedly fired a Hellfire missile seven kilometres across the Afghan border into Pakistan. Eighteen local villagers, alongside four suspected al-Qaeda members were killed.[3] The Pakistan government protested to the US over the violation of its territory, and the deaths of civilians. But others have also questioned the legality of such unlawful killings. A similar Predator attack in 2002 killed six men reported to be al-Qaeda members in Yemen. Amnesty International concluded that, because "the US authorities deliberately decided to kill, rather than attempt to arrest these men, their killing would amount to extra-judicial executions."[4] The Predator is manufactured in the US by General Atomics Aeronautical Systems, but contains key electronic computer systems manufactured by UK-based Radstone Technology. Radstone's Managing Director, Charles Peterson, has said, "the Predator wouldn't fly without Radstone technology."[5]

23. It appears the Department of Trade & Industry has classified the "electronic" brain of the Predator UAV as COTS technology, and thus not a licensable product (so not subject to export controls), despite the fact that the end product (a UAV) is subject to some of the most restrictive controls under the Act.

24. A similar problem exists with the Landrover parts exported to Turkey making up the vehicles used in the Andijan massacre. As the components (which comprised approximately 70% of the finished military vehicle) were not specifically adapted military components, they were classified as NLR, notwithstanding the fact that they are clearly sold as military vehicle kits.

25. Given the trends towards globalisation and the increasing importance of dual-use and COTS goods in the development of modern weapons systems, it would appear that more and more goods critical to the operation of these systems will bypass the licensing system as they do not fall within the definitions or specification of the control lists.

26. One way to regulate this trade is to expand the concept of military end-use catch-all clauses to capture such goods and technologies. Any such system must clearly be able to differentiate between "mission critical" components and mundane goods like nuts and washers, wiper blades and fan belts. This is not without its complications. However, it must be possible to develop either threshold systems (as happens in the US) or significance criteria for the role of the component in the finished item. For example, it should be possible to create a military end-use catch all that covers significant items such as vehicle chassis, engines, transmission systems, or components used for weapons management, navigation or guidance systems.

H. Extended Use of End-use or Catch-all Controls to Prevent "Undesirable Activity"

27. Where the Government has determined that the UK should never be involved in supplying equipment in support of specified activities, it should use end-use controls to avoid the loophole whereby items not included on control lists are beyond regulatory reach. While a system of controlling goods contained within specific military and dual-use lists is the cornerstone of many export control systems, the ultimate purpose of export controls is to prevent certain types of activity or consequences. The challenges posed by technological advancement, the development of new products and the adaptability of certain dual-use goods and technologies all pose problems for a system that operates purely on the basis that only what is on the list gets controlled.

[3] "Pakistan rally against US strike", *BBC News*, 15 January 2006, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/south_asia/4614486.stm; and "Pakistan probes al-Qaeda deaths", *BBC News*, 19 January 2006, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/south_asia/4626684.stm.

[4] "The Threat of a Bad Example—undermining international standards as 'war on terror' detentions continue", *Amnesty International*, AI Index: AMR51/114/2003.

[5] "CIA's Killer Drone Livens Profits", *Birmingham Post*, 7 November 2002.

28. Catch-all clauses exist with regard to chemical, biological or nuclear weapons programmes and regarding military end-use to embargoed destinations. Most stakeholders appear to see value in extending this approach to items which will be used in torture, degrading treatment or executions, or in connection with terrorist acts.[6]

29. The purpose of such a clause would be to state that "if" the exporter is aware, or ought to be aware, that the intended use of items is to facilitate such prohibited acts, irrespective of whether the item was on a control list, the transfer would be prohibited without the express permission of the Government in the form of an export licence. It should be noted that while acts of terrorism and international crime and the development of WMD are included in the relevant consequences section of the 2002 Export Control Act, the facilitation of torture or other forms of cruel or degrading treatment are not. It is clear that such acts do fall within the definitions of internal repression and human rights violations, but it would seem sensible at this juncture to update the primary legislation to specifically include acts of torture under the relevant consequences section to bring the Act in line with existing UK Government and EU policy in this area.

30. It would seem that competence to institute such controls rests with the European Commission rather than EU member states, and so it may not be feasible to introduce these changes directly upon conclusion of this review. However, the review could make recommendations to this effect that can then be carried forward in discussions with EU partners with a view to extending catch-all provisions.

I. Clarification of the Rules on Transit/Transhipment

31. The issue of transhipment and transit became a focal point during the conflict in Lebanon in August 2006, when it emerged that US aircraft containing munitions bound for Israel for probable use in Lebanon had transited through the UK.[7] It is highly unlikely, given the clear risks that such munitions would be used in indiscriminate and disproportionate attacks in and around civilian areas, that the UK government would have authorised such transfers from the UK.

32. The current licensing requirements regarding transit and transhipment of controlled goods are extremely confusing, to the point where industry itself is not clear as to its obligations. Even the use of the terms "transit" and "transhipment" is confusing, and may not tally with usage by the World Customs Organisation, of which the UK is a member.

33. As things stand, it would seem that the standard approach of industry (apart from where the goods concerned are of a particularly sensitive nature, eg when the goods are anti-personnel landmines or may be subject to end-use control) is to assume that possible regulatory obligations relating to a transit or transhipment can be ignored, as in most circumstances:

- a licence will most probably not be required;
- if a licence is required, it will most probably be the Open General Transhipment Licence, for the use of which registration is not required and no records need be kept, so it is in effect irrelevant;
- in the event that the Government decided that other authorisation should have been sought, the confusion surrounding the rules would make it virtually impossible to have any realistic expectation of a successful prosecution.

34. The Export Control Act suggests that most transit and transhipment via the UK is permitted as long as certain conditions are met, yet it fails to specify what these conditions are. The Open General Transhipment Licence (OGTL) currently available for use seems to contradict this. For most items on the military list, the OGTL lists a variety of destinations in an annexed Schedule for which individual approval is required. This implies that for sensitive destinations listed on the Schedule, a licence is required in advance to bring these goods through the UK. Since the UK is a major transportation hub and there is confusion amongst all relevant parties (including exporters themselves), amendments to the legislation and/or clear guidance on the rules and procedures for transit should be prioritised.

J. Government-to-government Transfers

35. The Government should apply and should be seen to apply the same transfer criteria when involved as a principal in a strategic transfer. However, currently, the Government is not obliged when involved as a principal in an arms transfer to apply the licensing process as it would for a sale by a defence manufacturing or trading company. Section 7 of the Export Control Act states that an order under the Act "*may* make provision binding the Crown" (emphasis added). However, our understanding is that this power was established to ensure the UK can comply with international legal commitments, for example EU Dual-Use regulations. Where only national laws apply, the Government has not used this power.

[6] The term "terrorist attacks" should be understood generally in this context to mean acts which are prohibited under international law, such as deliberate attacks on civilians, indiscriminate attacks, hostage taking, torture or deliberate and arbitrary killings, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act. There are some continuing disagreements around the use and definition of the term "terrorism", particularly regarding the question of intent and whether states can commit acts of terrorism.

[7] "Airport curb on US "bomb flights'," *BBC News*, 1 August 2006, http://news.bbc.co.uk/1/hi/uk_politics/5235192.stm.

36. The Government sought to justify this approach during the House of Commons Committee Stage hearings on the Bill. Nigel Griffiths, the then Trade and Industry Minister in charge of the Bill, stated:

> Our exports (ie Government to Government transfers) tend to be items of essential equipment used by our armed forces or in connection with important international collaborative defence projects such as peacekeeping and projects in Kosovo and Macedonia. Items are also exported for international development purposes such as mine clearance.[8]

37. The UKWG acknowledged this argument at the time, and proposed that the power to bind the Crown could be subject to certain exceptions, but maintained and still maintains that there are many circumstances where the Crown must be bound, eg government-to-government sales, disposal sales and gifts, and for which a strict application of the Consolidated Criteria is essential. Most obvious of these have been the Al Yamamah contracts for sales to Saudi Arabia, which are now in the process of being supplemented by the sale of a further 72 "Typhoon" aircraft. Other government-to-government transfers of note include the transfer of 226 Challenger battle tanks to Jordan between 2002 and 2004, and the gifting to Nepal of two Mi17 helicopters in 2002 and of two STOL aircraft in 2004.

38. We are told that the Government does in effect apply the same standards to government-to-government transfers as to commercial transactions, in which case we can see no reason why it refuses to allow the use of the same formal process. Changing the legislation so that it *must* bind the Crown (allowing for some exceptions) would simply *guarantee* that, at both the contract-negotiation stage and in terms of public and parliamentary scrutiny, the same standards are and will continue to be applied across the board (the current arrangement is at the sufferance of the Government and it would seem to be subject to change on a governmental whim). With regard to transparency, reporting on commercial transfers, which is centred on licences (both awarded and refused), is more revealing of government policy than reporting on government dealings. The specific information contained in the annual reports on government-to government transfers relates only to physical transfers, not to the amount that the Government was *willing* to transfer or to deals the Government refused.

39. The Scott Report recommended the list of international organisations and Crown agencies exempt from export controls should be abolished, while in its 2001 report on the draft Bill the Quadripartite Committee suggested that "consideration be given to the desirability of ending the blanket exemption from controls of Government and its agencies as exporters of licensable goods and technology".[9] The UKWG believes that the original arguments raised before the Export Control Act was passed retain their validity, and the Government should move to amend the legislation accordingly.

K. Annual Reporting and Transparency

40. The UKWG is aware that the Government does not wish to include reporting and transparency within the review process. However UKWG believes it is a weakness of the current legislation that the Act contains only a simple requirement for the Secretary of State to produce "a report on . . . matters [other than the export of objects of cultural interest] relating to the operation of the Act (and any order made under it) during the year" (section 10).

41. The Government has repeatedly claimed that the information contained in its Annual Reports on Strategic Export Controls has made the UK's export control system one of the most transparent in the world. While the current system is undoubtedly an improvement on the information provided by previous administrations and contains data not previously in the public domain, data is not equivalent to information.

42. For effective parliamentary and public scrutiny to take place in this area, information covering all forms of UK transfers is required and the information needs to be current, precise, and comprehensive. The Annual Reports still contain significant omissions. The Scott Report still stands testament to the dangers of a culture of secrecy:

> "Without the provision of full information it is not possible for parliament, or for that matter the public, to assess what consequences, in the form of attribution of responsibility or blame, ought to follow. A denial of information to the public denies the public the ability to make an informed judgement on the Government's record. *A failure by Ministers to meet the obligations of Ministerial accountability by providing information on their departments undermines, in my opinion, the democratic process*." [Scott K8.3; emphasis added]

43. The UKWG urges the Select Committee to encourage the Government to consider the issues of public reporting and transparency as part of the review process.

---

[8] House of Commons, Standing Committee B, 16 October 2001 (afternoon session), column 130, http://www.publications.parliament.uk/pa/cm200102/cmstand/b/st011016/pm/11016s03.htm.

[9] Quadripartite Select Committee's Joint Report on the "Draft Export Control and Non-Proliferation Bill 2001", 1 May 2001, para. 53, http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmdfence/445/44508.htm.

L. Post-transfer Controls

44. The Government has long maintained that there is no substitute for a rigorous assessment of any proposed export at the time of application, and has argued that "the introduction of a process that allows for the issue of licenses based on future end use monitoring militates against the effective application of the criteria at the licensing stage."[10] The Government also states that "[i]t is not the case that the Government issues licences where it has identified some degree of risk: if the issue of a licence is assessed to be inconsistent with the Consolidated Criteria then it will not be granted."[11]

45. The UKWG strenuously disagrees with this assertion. The UKWG fully appreciates that these are sometimes complicated judgements, and therefore welcomes the Government's commitment to thorough pre-licensing assessments. However, there is *always* some risk that equipment or technology exported will be misused or diverted, even when it stays in UK hands (eg there have been recent reports of UK soldiers smuggling guns out of Iraq to be sold in the UK[12]). The task of the Government is to assess the *level* of risk; the licensing process by its very nature means that there will be marginal cases where difficult decisions have to be made. It therefore remains incumbent upon the Government to mitigate the effects of possible errors of judgement or higher risks.

46. The additional procedures that the UKWG is calling for are:

- specific restrictions to be included in the contract and/or the licence on use or retransfer, for example the prohibition of re-export without permission;
- the licence and/or contract to state that the UK Government reserves the right to conduct end-use checks;
- the licence to make clear what the implications of breaching end-use undertakings would involve, ie that all licences connected to the equipment or technology in question would be revoked, and that future licensing decisions would take any breaches into account (the Government may claim that breaches are already treated in this way, in which case it is not clear what objection they would have to making these consequences clearly understood on the licence).

47. This would not be a *substitute* for rigorous pre-licensing assessments, it would involve additional measures. Nor should it be seen as an opportunity to redraw the margins between awarding and refusing licences so that a less stringent pre-licensing test is applied, but as an additional safeguard.

48. An example of the benefit of making these conditions explicit in advance of a transfer can be seen in connection with a recent decision by the Indian Government to sell Islander maritime-patrol aircraft, originally supplied by the UK, to Burma/Myanmar. It is reported that the UK Government has made representations to the Indian Government opposing the transfer, but according to *The Hindu*, the Indian Defence Ministry feels that the curb is unfair in the absence of a resale clause in the contract. An unnamed senior naval officer is quoted as saying "we should tell [the UK] where to get off."[13]

M. Implementation and Enforcement

49. While this is not an issue that necessarily requires legislative change, it is critical to the effectiveness of the Act and the contingent control orders. The UKWG has serious concerns that not enough resources are being allocated to the implementation of the existing regime. On a number of occasions where there has been evidence of breaches of controls, the response of Government has been inadequate.

50. In terms of resources, there are several issues that give us cause for concern, such as:

- cuts in staff numbers at the Export Control Organisation;
- the failure to include arms transfers among the subjects listed on the "Customs Confidential" website until alerted by the Quadripartite Committee;
- the possible lack of capacity and inclination of HMRC to deal with transfer control issues (as according to the evidence provided by the defence industry to the Quadripartite Committee in January 2006[14]).

51. The UKWG also has significant concerns regarding a possible lack of inclination to enforce the controls where evidence comes to light that companies or individuals may be in breach. There have been some prosecutions under the Act, but these have for the most part been for relatively minor and on occasion procedural offences, and subject to minimal penalty. The most significant prosecution was in relation to

[10] Response of the Secretaries of State for Defence, Foreign and Commonwealth Affairs, InternationalDevelopment and Trade and Industry to the Report from the Quadripartite Committee on Strategic Export Controls: HMG's Annual Report for 2004, Quarterly Reports for 2005, Licensing Policy and Parliamentary Scrutiny, October 2006, Cm 6954, para. 40, http://www.official-documents.gov.uk/document/cm69/6954/6954.pdf.

[11] Ibid.

[12] Daniel McGrory and Dominic Kennedy, "Troops accused of gun-running for cocaine and cash," *The Times*, 13 October 2006, http://www.timesonline.co.uk/article/0,,29389-2401628.html.

[13] Sandeep Dikshit, "Curbs apply only to aircraft spares: UK," *The Hindu*, 4 February 2006, http://www.hindu.com/2006/02/04/stories/2006020403311300.htm.

[14] Minutes of oral evidence to the Quadripartite Committee, 31 January 2006, qu 32–50, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmquad/873/6013101.htm.

systematic efforts by the company Multicore to procure and smuggle components for the Iranian military, yet the punishment was limited to one individual receiving an 18 months' prison sentence suspended for two years, a ban from being a company director for 10 years, and an order for seizure of assets of approximately £70,000.[15]

52. In addition, there are cases where the authorities have failed to launch or even pursue prosecutions when there would appear to be strong grounds for doing so. For example, evidence has previously been provided to the Committee by Mark Thomas regarding the promotion of torture equipment at the DSEi arms fair in 2005 and on the websites of UK-based companies.[16] When these cases were brought to the attention of the authorities, the offending stands were closed down and the information on the websites was removed, but to the knowledge of the UKWG no efforts were made to bring forward prosecutions.

53. In written evidence presented by the UKWG to the Committee in January 2006, two cases were referred to whereby:

— a UK newspaper reported that it had obtained documents showing that arms brokers based in the United Kingdom had been involved in negotiations for arms deals to supply £2.25 million worth of arms to Sudan; and

— Amnesty International documented the role of three British-based companies involved in the supply of over 240 metric tonnes of arms and ammunition from Albania to Rwanda for onward shipment to armed opposition groups in the eastern DRC.[17]

54. In both instances it seemed there was a strong *prima facie* case meriting serious investigation by the authorities. To the knowledge of the UKWG, no serious investigation ensued.

55. There has been a suggestion that the preferred response of the Government to cases of this type is to work behind the scenes to ensure that the trade does not take place. While this is useful in its own right, the UKWG contends that it is an insufficient response.

56. For anybody making a risk-reward calculation, the clear message is that the downside to participating in such activity is minimal, and thus the legislation is undermined.

November 2006

Memorandum from Saferworld

A. Summary

This submission highlights some examples of UK export licences of concern during 2005 and 2006. In addition it examines the quality of the UK's reporting on strategic transfer controls. As part of this examination, it considers the claim that the UK has the best or one of the best reporting regimes in the world, specifically by comparing the UK reports to best practice in the EU. The results of this comparison reveal that in a number of areas, other EU member states are providing information that the UK is not.

B. Export Licensing Decisions in 2005 and 2006

Licences for UK exports are assessed in line with the Consolidated EU National Arms Export Licensing Criteria (26 October 2000—HC 199–203W). The criteria state that the Government will not issue an export licence which *inter alia* "would provoke or prolong armed conflicts or aggravate existing tensions or conflicts" or "if there is a clear risk that the proposed equipment might be used for internal repression." During 2005 and 2006 however, the UK Government authorised export licences for military equipment to countries or regions which raise concerns under these categories.

Listed below are some of the most worrying licences granted during the period between July 2005 and June 2006, and some background information to explain the basis of such concerns. This list should be regarded as indicative, and is not intended to suggest that these are the only licences that may have been of concern. The evidence and quotes are drawn from the quarterly reports on strategic exports and the UK Foreign and Commonwealth Office Human Rights Report Annual Report 2006.[18]

---

[15] As previously detailed in the First joint Report of the Quadripartite Committee, Strategic Export Controls: Annual Report for 2004, Quarterly Reports for 2005, Licensing Policy and Parliamentary Scrutiny, HC 873, 3 August 2006, paras 120-122, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmquad/873/87308.htm.

[16] Ibid.

[17] Memorandum from the UKWG on Arms to the Quadripartite Committee, January 2006, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmquad/873/873we07.htm.

[18] UK Foreign and Commonwealth Office Human Rights Report Annual Report 2006 (2006 Human Rights Report), October 2006; Strategic Export Controls Quarterly Report, January—March 2006; Strategic Export Controls Quarterly Report, April—June 2006; Strategic Export Controls Quarterly Report, July—September 2005; Strategic Export Controls Quarterly Report, October–December 2005.

Recommendations

As a consequence of the licences about which concerns are raised below, Saferworld recommends that:

— **The Government should introduce a "presumption of denial" for arms exports towards an agreed list of countries which raise *prima facie* concerns against the Consolidated Criteria;**

— **The UK should do more to control the risk of "downstream" proliferation, by improving post-export controls and controls on the transfer of production capacity off-shore (eg via licensed production agreements).**

The 2006 UK Human Rights Report and Licences of Concern

During 2005 and 2006,[19] exports of equipment were approved to 19 of the 20 countries identified by the FCO in the Human Rights Report as "countries of concern" regarding human rights abuses. Included among these were:

China

The Human Rights Report states: *"The Chinese authorities continue to violate a range of basic human rights. The use of the death penalty remains extensive and non-transparent; torture is widespread".*

Despite an EU arms embargo on China, standard individual export licences (SIELs)[20] were granted to the value of **£68.5 million** for inter alia: technology for the production of combat aircraft, components for tanks and military communications equipment. Open individual export licences (OIELs)[21] were granted for inter alia: components for radar equipment, and components for military training aircraft.

Colombia

The Human Rights Report states: *"Serious human rights abuse remain a tragically common occurrence in Colombia . . . Illegal armed groups continue to carry out attacks on both military forces and the civilian population, and the incidence of murders, forced disappearances and kidnappings remains high."*

SIELs to the value of **£4.5 million** were granted for inter alia: armoured all wheel drive vehicles and military communications equipment.

Israel

The Human Rights Report states: *"Progress on improving the human rights situation in Israel and the Occupied Territories has been limited . . . the UK remains concerned about Israel's failure to respect the human rights of Palestinians in the Occupied Territories."*

Despite an escalation in violence in the Middle East in the summer of 2006, the UK Government continued to authorise licences to Israel. SIELs to the value of **£15.5 million** were granted for inter alia: armoured all wheel drive vehicles, components for military utility helicopters, components for military training aircraft, components for submarines, components for unmanned air vehicle control equipment, components for air-to-surface missiles, components for airborne electronic warfare equipment and technology for use of combat aircraft. OIELs were granted for inter alia: components for combat helicopters and components for electronic warfare equipment.

Russia

The Human Rights Report states: *"human rights defenders continue to be gravely concerned by actions taken by authorities . . . The North Caucasus . . . remains one of Europe's most serious human rights issues."*

SIELs to the value of **£10 million** were granted for inter alia: military cargo vehicles, military utility vehicles, sniper rifles, gun silencers, shot guns, components for military aircraft navigation equipment and technology for the use of military aircraft navigation.

---

[19] Note that for the states listed in the 2006 UK Human Rights Report the information on the value and nature of licences granted is for the period covered by the 2006 Human Rights Report, ie July 2005 to June 2006. Also note that the value figure refers only to standard individual export licences (SIELs). For each of the countries profiled herein the UK Government also authorised exports under open licences (which typically place no upper limits on quantities, values of number of deliveries and hence on values), so the value figures here are not truly representative of UK Government policy.

[20] A SIEL allows for a single delivery to a named end-user, up to a stated maximum quantity and value.

[21] It is not possible to include a value figure for OIELs (see footnote 19 above).

Saudi Arabia

The Human Rights Report states: *"there is still cause for serious concern about human rights in Saudi Arabia."*

SIELs to the value of **£26 million** were granted for inter alia: combat shotguns, sniper rifles, grenade launchers, heavy machine guns, military helmets, night vision goggles, body armour, tear gas/riot control agents, components for sniper rifles, components for submachine guns, components for heavy machine guns, components for anti-aircraft guns and components for body armour. OIELs were granted for inter alia pistols, rifles, semi-automatic pistols, submachine guns, armoured plate, ballistic shields, body armour, components for pistols, components for rifles, components for semi-automatic pistols, components for submachine guns, and components for combat aircraft.

Other Licences of Concern

In addition to the transfers authorised to states included as "countries of concern" in the 2006 Human Rights Report, there were transfers to other destinations which Saferworld considers to be of concern.[22] These include:

Nigeria

Human Rights Watch states: *"Nigeria's most serious human rights problems remain unresolved."*

SIELs to the value of **£32 million** were granted for inter alia: armoured all wheel drive vehicles, components for armoured fighting vehicles, and components for combat helicopters. OIELs were granted for inter alia: sniper rifles, components for sniper rifles, shotguns, components for shotguns and small arms ammunition.

Pakistan

Human Rights Watch states: *"President Pervez Musharraf's military-backed government did little in 2005 to address ongoing human rights concerns".*

SIELs to the value of **£17 million** were granted for inter alia: equipment for operation of military aircraft in confined areas, components for combat helicopters, components for combat aircraft, components, sniper rifles and heavy machine guns small arms ammunition, sniper rifles, heavy machine guns, military aircraft head-up displays, components for air-to-air missiles, and components for combat aircraft. OIELs were granted for inter alia: components for military aircraft head-down displays, components for military aircraft head-up displays, general military aircraft components, components for combat aircraft, components for combat helicopters, naval radars, components for military training aircraft.

Turkey

Amnesty International states: "*Human rights deteriorated in the eastern and south-eastern provinces in the context of a rise in armed clashes between the Turkish security services and the armed opposition Kurdistan Workers' Party (PKK).*"

SIELs to the value of **£61.5 million** were granted for inter alia: components for tanks, components for heavy machine guns, components for surface-to-air missiles, components for armoured personnel carriers, general military aircraft components, and shotguns. OIELs were granted for inter alia: components for combat aircraft, components for ground-based radars, armoured plate, assault rifles, machine pistols, pistols, rifles, semi-automatic pistols, submachine guns, and unmanned air vehicles.

Diversion and Misuse of UK Exports

In the case of several of the countries identified above, the risk of diversion is also a concern. The UK Government does little to check what happens to arms exports once they leave the country. It is difficult to determine whether the arms find their way to other users, such as criminal gangs, pariah states, terrorists, paramilitaries or warlords or other rebel forces. A number of states to which the UK authorises the transfer of controlled goods have reputations as conduits of arms to other irresponsible parties. For example, concerns have long been held over the links between the Colombian Government and right-wing paramilitary forces within the country. Israel has in the past failed to honour explicit end-use undertakings and has, along with China and Pakistan, been identified as a serial proliferator of military equipment or technologies.

[22] Note that as these destinations are not linked to the 2006 UK Human Rights Report, the figures and items referred to in this section of the analysis are for calendar year 2005. As the UK Government authorised exports to all three of these countries under open licences, once again the value figures are not truly representative of UK Government policy.

Incorporation

Also of concern has been the willingness of the Government to issue export licences for equipment for "incorporation" (ie components that will be incorporated into weapons systems in the recipient country for onward export). Over **£6 million** worth of incorporation licences were granted to the **United States**, including components for combat aircraft and components for military aircraft Heads-Up display units. The US has previously incorporated UK-made Heads-Up Display units into F-16 fighter jets, which have been subsequently exported to Israel. Under current UK law, such equipment would be denied a direct transfer to Israel.

Incorporating countries also include **China, Israel, Russia** and **Turkey** none of which would be regarded as having export control standards equivalent to that of the UK. To make matters worse, UK reporting on incorporation licences is woefully inadequate; not all incorporation licences are reported as such, and in no circumstances is information provided on the anticipated final destination of goods transferred for incorporation purposes (see section C).

C. The Format and Content of the Annual Report

The UK Government has been among the forefront of developments in national reporting of strategic export controls. The annual hard-copy report and the recent introduction of the quarterly reporting system (available online in pdf documents) are both welcome components of the UK strategic export control regime. The quality of information, however, remains inadequate for external observers to determine whether the Government is meeting its commitments, and there are still a number of measures the Government could take to improve transparency in the UK.

Recommendations

The UK system of reporting can be improved as follows:

- **With the publication of statistical information in the quarterly reports, the Government should do more to adapt the annual report so that it better serves to explicate trends and policies, for example by providing:**
  - **statements on the general arms transfer control approach or policy toward recipient states, along with any policy changes that have occurred over the year;**
  - **summary information on the types of transfer authorised during the reporting period and explanations of how these reflect the Government's stated commitments;**
  - **an analysis of any trends in UK arms licences and exports globally and to each recipient state;**
- **More use should be made of the possibilities created by online data-management systems. The Government should maintain online a fully searchable, periodically-updated database of all transfer licensing decisions.**
- **Information available on individual licences granted or refused should contain more detailed descriptions of the goods considered for transfer, and their quantities and end-use and end-users.**
- **The system for reporting on licences for incorporation is fundamentally failing and needs to be revisited.**
- **UK reporting practice should be brought into line with best-practice from around the EU, for example by providing:**
  - **for each licence the specified end-user by category, for example: armed forces, government, defence related industry, industry, international organisation, trader, or private;**
  - **information on denial notifications that includes: the country of final destination; a summary description of the goods; the monetary value for the licence application; and the reason behind the denial;**
  - **information on the values of actual exports to individual states;**
  - **data on exports of dual-use goods, including identifying the recipient country, the value of the export and the type of goods;**
  - **information on all legal proceedings regarding breaches of export laws;**
  - **details on the Government's outreach activities including the targets and purposes of the outreach, and which ministries were involved;**
  - **information on the number of catch-all procedures initiated for the reporting year;**
  - **information on the quantities of equipment licensed;**
  - **information on transfers of manufacturing rights and joint ventures.**

Since the introduction of the quarterly reports, the Government has looked at how annual reports can function as complementary to rather than as a reformatting of the information contained in the quarterly reports. The 2005 Annual Report was described by the Government, with some justification, as

"[representing] a departure from previous publications."[23] This is welcome, however so far not enough has been done to reform the content of the annual report. So while the Annual Report for 2005 lists for the first time the number of seizures of controlled goods by Her Majesty's Revenue & Customs (HMRC) and successful prosecutions under the Export Control Act during the year, there are many things it could do but does not.

Saferworld continues to support the recommendations contained in the UK Working Group on Arms January 2006 submission to the Quadripartite Committee, which called for the annual report to include:

- an explanation of the Government's export licensing practice for sensitive destinations (including reference to any changes during the year);
- information on the ECO compliance process (number of visits; results of visits; remedial measures in the event of poor compliance, etc);
- in addition to a list of successful prosecutions, summary information on the number of ongoing investigations, failed prosecutions, investigations that did not lead to prosecutions, etc;
- details of all existing and new licensed production agreements.[24]

Saferworld is also concerned that some attempts to summarise the information included in the quarterly reports have resulted in a slight reduction in the user-friendliness of the annual report. Table 3.1 of the 2005 Annual Report (Information on OIELS and SIELS issued in 2005) lists the total number of standard individual export licences (SIELs) and open individual export licences (OIELs) issued for each recipient state. While at first glance this is helpful, there is no global total for number of SIELs and OIELs issued; for SIELs this can be (laboriously) calculated independently, but it cannot be done for OIELs due to the nature of this type of licence (multiple destinations can be covered by a single OIEL). It may be the case that this lack is merely an oversight. If so, this would give weight to the argument that the Government should "road test" any changes to the report with interested external observers.

While the shift to quarterly reporting has without doubt been a significant step forward for transparency in the UK, it has also had a (probably unanticipated) negative consequence. As the new arrangement involves producing an increased number of discrete reports—each covering a shorter time period—without providing a simple way of collating data from more than one report, it becomes more complicated to analyse UK strategic licensing decisions over time. It is incumbent upon the Government to ensure that as more data is made available, the tools are provided to ensure that this results in more effective transparency. At the moment this is not in all ways the case.

There are at least two ways the Government can work to address this weakness. First, as proposed by the UKWG in January 2006 and as a matter of priority, the Government should develop a fully searchable, periodically-updated database of all licensing decisions.[25] This should ultimately include all such decisions made under the reporting regime introduced by the current Government since the late 1990s. Second, it should include in the annual report its own summary analysis of the trends in licensing, going back over several years.

Open Licences

Reporting on open licences continues to be problematic. There is still nothing in the quarterly or annual reports on the quantities or values of equipment transferred under such licences. At the very least, the Government should revise the system of open licensing to stipulate maximum quantities and values deliverable under any one licence, and these should be reported upon.

For open general export licences (OGELS) the lack of transparency is even more marked. At present the national reports contain no data on the type of equipment, value or volume of goods being transferred under any OGEL, nor whether such items are destined for "incorporation" and re-export (for more on this, see below).

Incorporation

UK reporting on incorporation licences is fundamentally inadequate. Guidelines introduced in 2002 on awarding incorporation licences effectively handed over responsibility for the analysis of the risk that the eventual end-product might be misused or diverted to the country in receipt of the items to be incorporated.[26] It would seem appropriate in these circumstances for the Government to be as transparent as possible about incorporation licences, so as to maximise the opportunity for interested parties to evaluate the impact of this policy shift. Unfortunately, the Government has taken a different approach.

[23] United Kingdom Strategic Export Controls Annual Report 2005, Cm 6882, July 2006, http://www.fco.gov.uk/Files/kfile/FCO-Annual%20Report%202005.LR.pdf.

[24] Memorandum from the UKWG on Arms to the Quadripartite Committee, January 2006, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmquad/873/873we07.htm.

[25] Ibid.

[26] *Hansard*, House of Commons, Parliamentary Questions, col 650W, 8 July 2002.

For SIELs, the Government does not report on the final destination of goods which are known to be intended for incorporation and onward export. For OIELs, the situation is even worse, in that there is absolutely no information published on whether equipment authorised for transfer under an OIEL is for incorporation. Saferworld understands that the Government is not always aware of the expected final destinations of incorporated goods; at the very least the electorate should be informed when this is the case.

Reporting on the UK Government as Principal

One of the consequences of not requiring a transfer licence when the Government is itself involved as a party to a deal, eg for government-to-government sales or where the Government gifts controlled goods, is that information on these transfers is missing from the quarterly reports, which deal only with *licensed* transactions. The information is available in the annual reports, where such transfers are reported on specifically, however it is not clear why reporting on these deals should take place on a less timely basis than commercial sales (for more on Government-as-principal arrangements, see the November 2006 UK Working Group on Arms submission to the Quadripartite Committee on the Review of export control legislation).

Replicating Best-Practice in the EU

The UK Government has for several years claimed, with some justification, that its reports on strategic export controls are among the best in the world. However in absolute terms UK reporting is still inadequate, while in relative terms the UK is in danger of being overtaken by other states. In the last few years, improvements in reporting around the EU mean that the UK is now being outshone by other member states in some areas. The Government should be careful to ensure that it is aware of and is at least matching emerging practice in other states.

Examples of Better Practice in Other EU Member States

Actual exports

Many other EU states publish data on the values of actual exports of military list items, eg **Austria, Finland, France** and **Sweden**. Others, such as **Denmark** and **Estonia**, provide data on exports of dual-use goods, including identifying the recipient country, the value of the export and the type of goods. Despite operative provision 8 of the 1998 EU Code stating that: "Member States have identified the following priority guidelines for the near future . . . harmonisation of national reports in order to promote more homogeneous statistical data . . . with a special focus on data relating to the value of actual exports" and reiteration of this in the 8th EU Consolidated Report (October 2006)[27] the UK Annual Report does not provide this information.

Quantity of equipment

The annual and quarterly reports could be improved by identifying the quantity of equipment licensed, as is done in **Finland** and **Portugal.**

Information on end-use

In the Flanders region of **Belgium,** specific end-users are identified by the following categories: armed forces, government, defence related industry, industry, international organisation, trader, or private.

Denial notifications

In both **Germany** and the **Netherlands,** information on denials includes the country of final destination, a summary description of the goods, the monetary value of the proposed transfer, and the reason for the denial. Furthermore, the **Netherlands** identifies the recipient and final end-user.

Manufacturing rights and joint ventures

The annual report from **Sweden** includes information on transfers of manufacturing rights and joint ventures. Specifically it identifies how many licences for manufacturing rights were issued in the reporting year and the country of permitted production.

[27] "Eighth annual report according to operative provision 8 of the European Union Code of Conduct on Arms Exports" (8th EU Consolidated Report), Official Journal of the European Union, C250/3, 16 October 2006, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_250/c_25020061016en00010346.pdf.

Legal proceedings

Germany reports not only on actual prosecutions in the year, but also on the number of investigations of breaches of export legislation, including the number of suspects, the country of destination, and the equipment involved.

Outreach

The **German** Government reports on all its outreach work over the year, listing: the target countries; the month in which the activity occurs; the type of event organised; and the subject matter. The UK is among the most active of EU member states in terms of outreach activities, both with near-neighbourhood states and countries further afield such as China and South Africa, but in its annual report only lists the outreach target countries.

Historical analysis

In **France** a comparison is made of the number of exports, negotiations, and temporary exports for the previous seven years, as well as a comparison of the numbers of refusals over the past seven years. A specific comparison of the criteria used for the refusal and the geographic distribution between the current and previous year is also provided.

November 2006

Memorandum from the Export Group for Aerospace and Defence (EGAD)

AIMS OF THE LEGISLATION

Have the Government's stated aims, purposes and policy objectives for the Export Control Act 2002 and orders made under the Act achieved their desired effect? More particularly:

Has the legislation ensured that the UK is maintaining an effective system of export controls to make sure that UK involvement in arms exports does not contribute to regional instability, internal repression or external aggression whilst supporting a strong defence industry and defence exports?

Following the introduction of the Export Control Act 2002 (ECA) in 2004, the UK now has, undoubtedly, one of the best and most comprehensive export control systems in the World, despite some very public criticisms and comments to the contrary from certain quarters.

Many of these criticisms from other quarters stem from disagreements over some of the individual licensing decisions which have been made by HMG since the adoption of the new regulations, but it must be recognized that such criticisms are totally unavoidable and, as with any area of Government decision making (be it housing development schemes, road building programmes, airport development projects, wind farm location planning, or decisions on individual asylum status, etc, etc) some contentious decisions, one way or the other, will always arise, no matter what the regulations are.

The fundamental core of the legislation under the ECA is good and has worked reasonably well in practice—Industry has managed to cope with the introduction of the new controls associated with the ECA, despite some aspects which have caused not inconsiderable problems and uncertainty. We have to admit openly that very many of Industry's previously stated direst fears and predictions have not, in fact, arisen, especially in the area of intangible transfers of technology. Industry has, for the most part, coped alright with the controls thanks to the compromise reached between Industry and Government, associated with the adoption of the "functional approach". So, in general, the introduction of the ECA has gone pretty well.

However, it must also be remembered that the introduction of the regulations in 2004 has cost compliant companies a lot of money, resource and effort, which they have had to absorb.

Those problems that have arisen have come from the control measures introduced in some areas on the periphery of this core, where HMG has sought to give itself extremely broad powers to control activities which have been deemed to be of particular concern. This includes, especially, the CBRN sector, and the "restricted goods" and embargoed destinations trade controls, etc, where some feel that a lot of disproportionate effort, pain and uncertainty has been caused in relation to perceived gains—we strongly believe that the controls in these areas need to be comprehensively reviewed in 2007.

Has the legislation reduced trade in military goods and technology where it is undesirable without also discouraging trade that the Government wishes to promote?

The UK Defence Industry is not clear as to how effective the regulations have been, in practice, in curtailing the sorts of proliferation trade which the Government regards as being undesirable. However, we

believe that HMG now has at its disposal, through the ECA, a legislative tool which should enable it to act against those activities which it does wish to control and prevent from happening, and that some fine tuning of this under the 2007 Review may further enhance its effectiveness in this regard.

Whilst there are some concerns in certain areas (eg the CBRN sector) that the impact on their export, and even non-export related, trade activities has positively discouraged potential customers from seeking to do business with UK companies, we are still seeking to ascertain the basis for this view and how widespread it is.

The trade controls which encompass an extraterritorial dimension do, in our view, act as a potential discriminator against the employment of UK nationals by firms overseas, and, indeed, for the only UK person employed overseas whom we know of who has actually applied for trade control licences, we understand that his employers (a perfectly legitimate and responsible Government-owned company overseas) quickly reached the conclusion, soon after the introduction of the new UK regulations, that his continued future employment was no longer desirable.

The baffling inclusion of long-range missiles and UAVs in the "restricted goods" category under the trade controls is having an impact on projects in these areas, which will, almost invariably, involve international, globalised supply chains. Certainly MBDA UK Ltd, which is the UK arm of a multinational (UK/France/Italy) company involved, through its Storm Shadow and Scalp EG missile systems, in this area has experienced some particular practical difficulties at the working level.

Has the legislation impeded the illicit or irresponsible transfer of technologies to states or organisations intent on creating weapons of mass destruction?

We are unaware of any such evidence, although it may well be that HMG is in a much better position to be aware of such circumstances when this has arisen. However, in global terms, it must be pointed out that no matter how effective the UK's own regulations are in this, or any other sector, unless they are matched by similarly effective regulations in other nations, then the likes of North Korea will continue to be able to develop their illicit WMD programmes, and to help others with theirs.

Has the legislation helped to strengthen international regulation of the arms trade?

In the UK, yes, but globally no, due to the sheer diversity of export control policies, systems and procedures which are in place around the World, and which have been developed entirely egocentrically by each nation.

Has the legislation prevented the proliferation of weapons of mass destruction?

We have no evidence of this, although HMG may know of instances in which UK involvement in WMD programmes has been prevented.

Does the legislation meet the requirements of European and international obligations such as UN Security Resolution 1540 (2004)?

We believe that the UK's regulations do meet these obligations.

How does British legislation and enforcement of the legislation compare with that of other Member States of the EU?

We believe that the UK's export control legislation and enforcement are at least comparable with those of other EU Member States, and are probably amongst the most effective in the World.

Is the licensing system accountable and transparent?

We believe that this is the case and that, certainly, the level of transparency available through the Annual and Quarterly Reports is considerable, and possibly the most open in the World. We have to confess to being more than a little disturbed by the changes to the ECO's website (http://www.dti.gov.uk/europeandtrade/strategic-export-control/index.html) which occurred earlier this year, and which, in our view, make this essential informational tool far less user-friendly and accessible, especially for uninitiated enquirers. Whilst the ECO's website used to be, in our view, amongst the best in the World, invaluable, full of easily-accessible information about our export control system and highly user-friendly, this is, sadly, no longer the case, and much searching is now required to find the documents which are needed, which are all still there, but not easy to find (especially for the uninitiated). This retrograde step, which represents a triumph of corporate branding over functionality, is deeply regrettable.

Meanwhile the development and introduction of the new Goods Checker and OGEL Checker compliance tools by the ECO is to be applauded and welcomed, as was the publication earlier this year of a new "Beginners Guide to Export Controls" and "Compliance visits explained" manual.

The Committee would also welcome views on how the effects of the legislation can be measured and whether there are reliable methods of distinguishing between the "legitimate" and "illegitimate" trade in arms and technologies.

The system works when it prevents exporters or traders from carrying out commercial activities which HMG does not wish to go ahead, and does not work when it fails to do so. Exports which are undertaken within the regulatory framework, legally, and with the necessary licences (and other documentation) are legitimate, whilst those which are outside of the regulatory framework are illegitimate.

Whilst much of the focus of NGOs and media is on the overall strategic policy of what UK companies (or individuals) should be allowed to export and to whom, and cases will arise which can result in criticism of the Government's policy of allowing a particular export to take place, there will always be debatable individual cases, one way or the other, and in these instances this is merely innate criticism of the Government's licensing policy in approving (or refusing) a particular licence, and does not represent "an illegitimate export". If there is an undesirable export which does take place which, for whatever reason, HMG is unable to prevent or subsequently pursue those responsible (eg the Mil Tech case of brokering military equipment to Rwanda back in 1994), then the legislation, and its systems and procedures need to be reviewed to enhance their effectiveness and ascertain whether it is possible and practical to close any such exploited loopholes, which can be identified.

Impact on Policy in Other Areas

Does the legislation complement or conflict with defence, defence procurement, anti-terrorist or human rights policies and legislation?

We believe that the UK's export control legislation should complement HMG policies in all of the above areas, and not conflict with them. However, UK companies involved in the CBRN sector certainly believe that our own procurement activities, to meet the needs of our own armed forces (and also the blue light emergency services), in this increasingly important area have been adversely affected by the very tight regulatory framework in which they now have to operate.

There is inherent and fundamental conflict on very many occasions between the US export control system (especially under ITAR) and UK/EU legislation in a number of areas, arising especially from the USA's "deemed export" regulatory requirements. The UK is not alone in this, and there has been much Canadian media coverage this year (for instance see *Toronto Globe & Mail* article "*US Rules Snag Military Equipment Deals—Ottawa facing 'unmanageable problem,' senior procurement official declares*" of 6 October 2006) of US export control demands conflicting with the Canadian constitution. This is an illustration of the jurisdictional conflicts that can all too easily occur when nations start to impose extraterritoriality in their own regulations which are in conflict with the laws of other countries.

Is there any evidence that the granting or withholding of licences for the export of goods or technologies subject to control is being used as an instrument of foreign policy?

There has always been an innate link between foreign policy and sales of defence and other strategic goods, and always will be—whilst Lord Justice Scott stated in his famous 1996 report that this should not happen, this is unavoidable. Thus, arms embargoes are imposed on countries for which no UK defence companies have any commercial interests or perceptions of prospective business (eg Cote d'Ivoire), for political and foreign policy reasons, rather than to prevent potential exports from taking place. We believe that the UK is generally less inclined towards using its export licensing system as an instrument of foreign policy than many other nations.

Regulatory Impact Assessment and the Concerns of Industry

Were the effects of the legislation accurately and adequately identified by the Government in the Final Regulatory Impact Assessment (see http://www.dti.gov.uk/files/file7886.pdf#search=%22regulatory%20impact%20assessment%20export%20control%22), in particular, were the costs and benefits in the Regulatory Impact Assessment correct? The Committee wishes to establish whether or not the legislation has increased the burdens on the defence industry and whether it has affected UK businesses' ability to compete with other countries' defence and dual-use exporters.

Much of the RIA had been based on inputs provided by Industry and, as already stated, thanks to the constructive approach adopted in the implementation of the new regulations by the ECO, many of Industry's worst fears and predictions of what might happen did not come to pass.

We strongly suspect that much of the specific topic coverage for the review will be focused on possible areas of yet further extending and tightening of the regulations, and we would like to see this predominance counterbalanced by a detailed assessment of the increased burden placed in legitimate Industry, and undertaking a cost/benefit analysis. We believe that the regulatory impact assessment should be reviewed

not just in terms of what it has cost legitimate Industry in order to comply with the new regulations, but also, perhaps more importantly, what effective, practical benefit there has been in counter-proliferation terms from their introduction. Before Industry might be prepared to consider supporting any possible further extensions and tightening of the regulations (which is not impossible), we would have to be totally convinced of the real, practical (and not just theoretical) benefits which would result from the adoption of such new measures in terms of effective count-proliferation. It is no good imposing yet more new, additional burden on Industry, for no good and practical benefit, at the end of the day.

What have been the economic consequences of the legislation, particularly what effect has there been on manufacturers? For example, has it affected the ability of companies to enter collaborative ventures with EU or US companies? Has the transparency provided by the procedures given the UK an advantage or disadvantage in competing overseas?

It has been reported to us that the new regulations have, on occasion, been perceived to have played a part in costing UK companies prospective sales, due to the perceptions on the part of the customers that they have less bureaucratic hassle with some other, alternative suppliers. We most certainly would not want this to develop further and to become a parallel with the existing situation with regard to doing business with US companies, where there is an increasing trend internationally, wherever possible, to "buy American last", due to the bureaucratic difficulties attached with using US suppliers, goods, technology and services. Some multinational firms in areas particularly affected could well seek to make future decisions on the locating of investments based on where they perceive that the business climate is most beneficial and easier, especially in this modern global commercial environment.

When the legislation was under consideration industry had a number of concerns. Where these addressed and resolved? In particular that:

- *the proposals lacked clarity and were too loosely worded; Did the Government produce guidance which addressed industry's concerns?*
- *the record keeping requirements, particularly for intangible transfers and brokering, will be burdensome; The Government indicated that the records companies kept for their own purposes would also fit the requirements of the licensing regime. Did industry and Government devise a system for record-keeping which was both sufficient to show compliance while avoiding an unreasonable burden?*
- *was the record keeping required for intangible transfers and brokering acceptable to industry and the institutions carrying out research?*

The guidance produced by HMG, with Industry input, addressed many of the issues of clarity for companies about what they needed to do to comply with the new regulations. However, with the most extreme elements of the regulations, where HMG sought to give itself the most far-reaching possible powers (eg CBRN, and "restricted goods" and "embargoed destinations" under the trade controls), then the continuing difficulty in clearly observing the actual parameters of the regulations, at their fringes, could only really be achieved with both HMG and Industry learning as they went along and practical case studies arose. We would hope that the review in 2007 will be able to take advantage of the (by then) three years' worth of practical case work to provide greater clarity in many areas. Certainly the likes of MBDA UK Ltd, have been in the forefront of test cases to obtain clarity on the parameters of the "restricted goods" trade controls.

With regard to record-keeping for intangible transfers of technology, we were extremely gratified by the ECO's adoption of a "functional record-keeping" approach. Whilst there has been some uncertainty within companies, and sometimes apparently within the ECO as well, as to what actually constituted a "functional record-keeping" approach and what records Compliance Officers should expect to see when they audit companies, two and a half years' worth of practical experience, and the highly welcome publication earlier this year by the ECO of its "Compliance visits explained" manual should assist enormously in clarifying exactly what records need to be kept by exporters.

Were the transitional arrangements adequate?

Whilst Industry would have liked to have had a longer implementation period in which to "bed down" the new regulations, back in 2003–04, for the most part companies coped with the 6 months that they were given.

Has the licensing regime impeded trade fairs in the UK?

Trade fairs are still taking place in the UK, although it is not clear how many of the organizers have been as *au fait* with the new regulations as the organizers of the DSEi and Farnborough International Airshow exhibitions have been. It was particularly unfortunate that some breaches of the trade controls, involving the promotion of "restricted goods", came to light at DSEi'05 as the organizers had been particularly proactive and put a lot of time and effort, jointly with the ECO, into seeking to ensure that all exhibitors and visitors were made aware of the UK's regulations.

Those trade fair (and conference) organizers who are aware, seek to promote awareness of the regulations to those companies participating, whilst those that are not as aware, naturally, will not do so. In our experience some foreign exhibitors have had certain difficulty trying to understand and come to terms with the UK regulations, as we are unaware of any other nation in the World which seeks to impose the same level of control over business dealings at exhibitions held on its territory involving foreign participants.

We are not aware what impact there has been on trade fairs held outside of the UK, either organized by UK-based exhibition organizers or (where appropriate) by overseas organizers who employ UK nationals. Hopefully they are aware and complying, as well. Certainly the ECO should, fairly easily (and with DESO's, UKTI's and Industry's help) be able to track down such events (and organizers) who are affected and make contact with them. All such trade fairs, both here in the UK or overseas, can serve as excellent awareness raising opportunities which should be exploited. Certainly, EGAD and the ECO have had joint information stands at both DSEi'05 and Farnborough Airshow '06, and we are intending on having an enhanced information stand at DSEi'07—all paid for by EGAD.

Has the legislation had any unintended consequences?

Companies in those areas where the broadest possible level of control has been sought (eg the CBRN sector, and dealing with "restricted goods" under the trade controls) have encountered compliance issues which we do not believe had been foreseen or intended. We are certain that the need for companies such as Jane's Information Group to have to apply for trade control licences for the production of its publications, where they are carrying advertising for "restricted goods", or for companies to have to have export control compliance coverage in place for submitting CBRN-related technical information to our own Armed Forces (and blue light services) here in the UK, prior to contract signature, cannot have been foreseen or identified as having been amongst those proliferation threats which needed to be brought under control, as aspirations for the new legislation by HMG.

Sustainable Development

Section 9 of the Export Control Act 2002 requires the Secretary of State to give guidance on general principles to be followed when exercising licensing powers which must include guidance on sustainable development. Since 2002 only one application to export arms appears to have been refused on grounds that it was incompatible with the technical and economic capacity of the recipient country. The Committee invites views on the operation of the guidance, whether a test of sustainable development is practical, whether licences have been approved which should have been refused on this ground and whether the legislation needs to be revised.

We do not know, or have sight of, what proposed changes are planned for the new, revised EU Code of Conduct, which may well seek to address the issue of Criteria 8. We do not believe that the UK is alone in not refusing very many export licence applications on the basis of Criteria 8, and have been led to believe that this has, in fact, been a common experience across the EU, since 1998. Obviously clear and concise guidance on how to assess this Criteria and make informed judgements against it is essential, and all EU Governments must be developing mechanisms to try to achieve this. Hopefully, this information will be being shared across the EU so that some form of "best practice" can be identified and implemented in a harmonized way across all Member States. Sustainable development is an important consideration, which must be borne in mind by officials when assessing export licence applications.

Orders made under the Export Control Act 2002

Have the orders made under the Export Control Act 2002 been clear, well-drafted and intelligible?

We believe that they were clear, except in regard to those areas in which HMG sought to give itself the broadest possible control powers, where there is some confusion. Here there are still some areas of uncertainty within the trade controls legislation, which need to be addressed and clarified if Industry is to have the certainty that it needs about what it has to do to operate legally, and also to prevent illicit activities from being able to be undertaken with impunity from the realistic threat of successful prosecution.

To take one example, the ECO has stated that whilst the transfer of software and technology is not controlled as such under the trade controls, the transfer of technology can be caught, where this is related to "restricted goods" or "embargoed destinations", as the provision of technology could be construed as "an act calculated to promote" a trade deal.

However, we doubt that this interpretation by the DTI would catch a case in which a British national overseas was transferring the technology from one country to another (provided that it is not embargoed), **not** in relation to the potential subsequent physical transfer of the actual goods, themselves, from one

country to another, but to facilitating the setting up of production facilities in the second (recipient) country, for them to make the goods, themselves, where no follow-up export/transfer of goods across international borders will be required? In this case it will not be an:

> *"act calculated to promote the supply or delivery of, any restricted goods, where that person knows or has reason to believe that his action or actions will, or may, result in the removal of those goods from one third country to another third country."*

However, we also note that, under "Interpretation" within the Trade in Goods (Control) Order 2003 and the Trade in Controlled Goods (Embargoed Destinations) Order 2004, it clearly states that:

> *""controlled goods" means goods used and unused, specified in Part 1 of Schedule 1 to the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, the supply and delivery of which are prohibited by this Order.* ***For the avoidance of doubt "controlled goods" does not include software and technology***." (Our emphasis added)

Whilst we take it that the DTI's legal experts are certain that the above interpretation, published within the legislation, itself, would not undermine the chances of a successful prosecution against someone who did merely transfer technology, rather than goods, in respect of "restricted goods", we are not so certain that this would, indeed, be the case.

It is clear that the scope and parameters of the existing "Restricted Goods" and "Embargoed Destinations" controls, which have been specifically drawn up to be as wide-ranging as possible, are not clearly discernible either to Industry, which needs to comply with the regulations, or to those responsible for their enforcement. For instance, to take just one example, a clear outline of what constitutes trade control licensable "general advertising and promotion" is needed.

Clear and concise definitions will greatly assist in awareness, removing uncertainty and in easier prosecutions of transgressors.

Have those to whom the orders apply received sufficient notice of any changes and adequate explanation of the requirements in the orders?

HMG in general, and ECO in particular, has been very constructive and proactive in its dealings with Industry and very willing to discuss changes with relevant companies before they take place. We strongly believe that the ECO, and other HMG departments are far more approachable, constructive and user-friendly than many of their foreign counterparts.

Trafficking and Brokering and Extra-territorial Controls

The Export Control Act 2002 introduced controls on certain trafficking and brokering, including some extra-territorial controls on UK citizens operating outside the UK. Are these provisions enforceable? Have they been enforced? Have they reduced irresponsible transfers of arms and technologies? Do the provisions need to be revised? If so, how should they be changed?

On the issue of possibly adding yet further extraterritorial controls, we believe that HMG would be better serving the cause of effective counter-proliferation if it made greater effort to get more countries into the various international regimes, including, of course, the new proposed Arms Trade Treaty (which we support), and to begin operating more effective and transparent export control systems of their own. In practice extraterritorial controls are unenforceable. Some critics dismiss the export control systems of other countries (as they frequently do our own, of course), and demand that we should be seeking to exert some kind of (some would say neo-colonialist) power over them to make up for the shortcomings of their own systems. Some believe that it is wrong in principle to seek to control the exports of other sovereign nation states. The biggest threat, in many ways, is that of the proliferation of extraterritorial legislations, and the resulting multiple layers of (sometimes conflicting) regulations with which law-abiding exporters will have to deal. It is infinitely better to seek to encourage the adoption of best practice in other nations and to get them to implement better and tighter regulations themselves.

Industry agrees that the topic of extending the fully extraterritorial controls (ie those that apply to UK citizens operating abroad) to cover a broader range of goods is an important one, which needs to be raised and discussed. However, some observers are totally unconvinced that extraterritorial controls are effective and enforceable, and believe that it merely represents "feel good" policy, which is saved from being unjust only by being ineffective.

We would welcome clarification from HMG on the effectiveness of the existing extraterritorial aspects of the ECA. We believe that it would be invaluable if the ECO could, as part of the review consultative documentation, provide a report on how effective and successful the extraterritorial provisions of the ECA 2002 regulations have been in practice in the first two/three years of their operation, to demonstrate how successfully they have been working. This could include the publication of details of numbers of UK nationals who have applied for trade control licences because of their planned activities overseas being affected by Article 3 of the Trade in Goods (Control) Order 2003 or Article 3 of the Trade in Controlled Goods (Embargoed Destinations) Order 2004, and the numbers of licences involved. Also, it would be useful

if HMRC could report, informally, on what efforts it has made since March 2004 to investigate and pursue any suspected infringements of the extraterritorial aspects of the ECA, as, if it has made no efforts to do so because of lack of resources or the perception that it is all too difficult, then there is absolutely no point in seeking to expand the scope of extraterritoriality under the review.

We do have considerable problems with extraterritoriality, both in principle and in practice. Our objection in principle is quite straightforward. It cannot be right to impose on an individual the law of two different jurisdictions at the same time for the same act in the same place. We see the malign consequences of this all the time in the export control field as a consequence of the American so—called "deemed export" rule, under which the US authorities presume to control the nationalities of individuals to which US-controlled items shall or shall not be transferred within the UK (and elsewhere), whilst, under UK race relations (and other) legislation, discrimination on grounds of nationality is illegal. As we have commented in the past, the only doubt in our minds about the operation of the "deemed export" rule, and its fundamental conflict with our own legislation, is whether Executives from UK firms end up in jail on the other side of the Atlantic for breaches of the ITAR, or on this side of the Atlantic for breaches of the Race Relations Act! This potentially affects not just defence companies, etc, but also extends into the public consumer arena—for instance someone working at a retail outlet who knowingly sold a PC with Microsoft software to a customer who was a citizen (or dual national) of one of the USA's strictly embargoed nations (eg Iran or Syria) would be breaking US law if he/she did so, or UK and EU laws if they did not do so simply on the basis of that person's nationality, as they would clearly be demonstrating racial discrimination—so which one do you want to break? *(Note: For your information, MS Windows® falls under ECCN 5D992.b.1 of the Export Administration Regulations' Commodity Control List—See http://www.microsoft.com/exporting/basics.htm. It is therefore subject to AT Column 1 export controls in the Country Chart set forth in EAR Part 738Spir.)* This is a totally invidious position for anyone to have to face.

Our practical objections are equally straightforward—it is extraordinarily difficult (or even impossible) to bring successful extraterritorial prosecutions. It is hard to gather evidence and impossible to compel the presence of witnesses. The Secretary of State for Trade and Industry, then Patricia Hewitt, made exactly this point in evidence before the Quadripartite Select Committee on 3 April 2003 (Q 107): "[The Americans] do have extraterritorial controls on trafficking and brokering in everything, in all military equipment. We have had a look at it and our judgment is that it simply does not work. As far as I know, there has not been a single successful prosecution under the American brokering law, either for brokering offences carried out within the United States, or for offences carried out overseas."

In effect then, extraterritorial legislation affects only the law-abiding, who don't break the law anyway because it is the law, or the exceptionally stupid, whilst leaving real criminals untouched and undeterred.

By the same token, extraterritorial legislation can criminalise activities to which the Government does not object and which, in some cases, it even supports. Extraterritoriality works in an area in which there is universal condemnation (eg paedophilia, bribery & corruption and drug smuggling), but where the laws and enforcement capabilities of other nations may not be effective in pursuing and curtailing these inherently immoral and undesirable activities. This is just not the case in the vast majority of areas of the "arms trade", in most instances of which the proposed deals may not only be approved and sanctioned by the local Governments involved, but even enjoy their enthusiastic proactive support. Consider the case of a British citizen with a job in France which involves organising the move of Scalp EG missiles to Italy. This is not at all unlikely, since MBDA, the manufacturer of Scalp EG, is an Anglo—French—Italian company. It is also a crime under UK law (because Scalp EG missiles are "Restricted Goods" under the terms of the trade controls) to carry out such activities without a licence. What political signal, one wonders, is that intended to give?

Which brings us to the other issue of the position of the other national export licensing authority. In very many cases we are not talking failed states here, but often democratically elected and effective Governments. As it is, we appear to be recommending, through extraterritoriality, that the law of the former imperial power should be used to frustrate the decisions of other Governments. Thus the assertion from some that this sounds more than a bit fundamentally neo–colonialist in attitude.

It must also be pointed out that jurisdictional conflicts are already taking place. Referring back to the previously mentioned UK national who worked for a Government-owned defence company overseas, he became aware of the extraterritorial aspects of the UK's new trade controls back in 2004 (interestingly, from us, and not from HMG!) He is perfectly law-abiding and sought to remain within the regulations. He had to apply for some trade control licences for the supply of some equipment from his company to the new armed forces in Iraq, via the US DoD, who were purchasing them on behalf of the Iraqis. When he had to try to get the necessary end-user undertakings for his SITCLs from the customers, and when he had to try to get some technical information from the US authorities to satisfy some queries from the DTI, the response he got from both the Iraqis, the Government which owns his company and, most interestingly of all, from the US side, could be summarized as being a universal raspberry, and being told that "But this has got nothing to do with the British Government—they can **** off!" He had the devil's own job in trying to get hold of the necessary documentation to get the SITCLs he needed from the DTI, and eventually, as already stated, reached a mutual agreement with his employers that his continued future employment within the company was now no longer viable!

Does everyone really accept the universal principal of extraterritoriality . . . even when they are on the receiving end? We strongly believe that if HMG really does wish to exert extraterritorial controls in the field of export controls, then, in order to avoid accusations of hypocrisy, it must seek to make clear and unequivocal public statements that it, too, recognises and fully respects any extraterritoriality exerted on the UK (and others) by other sovereign nation states.

With regard to specific proposals for the review of the trade controls, as previously stated to the Committee, we are currently in the process of discussing some possible joint proposals that we can make with the NGOs, and work on this has been highly constructive and positive. We already have a set of draft proposals, which we are seeking to finalise, by early in the New Year.

Licensed Production Overseas

How effective are the current arrangements in regulating licensed production facilities? Do the current arrangements prevent arms and technology produced overseas from falling into irresponsible hands?

As previously stated in evidence to the Committee, there are already controls in place, for instance on the transfer of technology and plant to allow licensed production to be undertaken overseas. The area of licensed production is not totally outside of control.

On the possible issue of the control of subsidiaries of UK firms, this appears to have arisen from a fundamental misunderstanding of the US system by the NGOs, who are the principle proponents of this proposal. We believe that the NGOs seem to be under a bit of a misapprehension here, looking at the idea of UK controls being applied to foreign subsidiaries of UK parent companies, presumably anxious to quote the ITAR as a precedent for the NGOs' campaign to control the export activities of the offshore subsidiaries of UK-based companies. Recent cases dear to the hearts of the NGOs in this regard are potential exports by Ashok Leyland to Sudan and exports by BAE Systems' South African subsidiary, OMC, to various other, perceived contentious, regimes disapproved of elsewhere in Africa.

Except in some fairly narrowly defined contexts, eg the EAR anti-boycott provisions which apply to "controlled in fact subsidiaries", US export controls do not, as such, apply to subsidiaries of US companies. Rather, it is the case that the extraterritorial application of US law catches non-US subsidiaries in the same way that it catches other non-US parties. We think it is important that we grasp here that the US model is one of extraterritoriality **not** of extending US controls to non-US subsidiaries. US controls do not apply just to subsidiaries but to controlled items wherever they may happen to be in the World—and, in the case of the brokering controls, to US citizens, whoever their employer.

However, in reality, it is only really the foreign subsidiaries (or foreign parents) of US companies who take any real notice of the extraterritoriality provisions of the ITAR (and fewer still take any notice of the EAR's provisions, especially on crypto-enabled software—5D002 and its various US exceptions). Thus, as to how seriously non-US companies take US presumptions of extraterritoriality, that largely depends on their commercial position, or aspirations, in the United States. Those companies who are close to the USA commercially do take the US regulations very seriously, even though they are a burdensome imposition.

What is the nature and extent of licensed production overseas?

With the globalization of industrial activity, and the increasing phenomenon of countries not wanting to be seen merely to be markets for the goods of companies from other nations, but as partners, the desire to see in-country industrial participation in major programmes, especially in the defence arena, has grown. This is reflected in the very rapid growth in offset policies around the World.

Has licensed production overseas increased since 2003?

This phenomenon, and that of offset which very frequently drives this, is constantly growing, as has been doing so for the last thirty years, at least.

How important is licensed production overseas to the competitiveness of the UK defence industry?

Licensed production, as part of an offset package, is crucial to competitiveness. The importance of offset in procurement decision making around the World is growing, and is reflected by a quote from the May 2001 "Offsets in Defense Trade" fifth annual report to the US Congress by the US Dept of Commerce that: "The importance of Offset now transcends the traditional technical ones [ie quality, price and delivery] in the procurement decision making process."

Has the Government adequate information about licensed production overseas?

As already stated, HMG already has an element of control over licensed production overseas, for instance over the necessary transfer of technology related to such deals.

In addition, the Committee would welcome evidence (including specific instances) of the extent to which dual use goods that may not require an export licence are ultimately incorporated into military goods and, if there are serious concerns, how the export of these goods could be controlled.

This area is very difficult to try to address without getting caught up in minutiae, and imposing export control regimes on exports of wind screen wipers or the fuel in vehicles' tanks, etc, etc.

Intangible Transfers of Technology/Effects on Research and Academia

Are those to whom the controls on intangible transfers of technology apply fully aware of, and complying with, the requirements of the law? In particular, are the requirements to keep records to ensure compliance for open licence procedures and to submit documentation in support of licence applications workable?

The answer to this is the same as for the rest of the regulations, in that they are workable, but need harmonization of what is expected, in compliance terms, from companies.

Does the Government proactively police and enforce the controls on intangible transfers of technology?

Compliance officers ask to see records of these activities when they audit companies who are operating within the regulatory framework.

Have the controls on intangible transfers of technology affected academic freedoms or scientific research? Are the controls on intangible transfers of technology adequate and effective? If not, what changes need to be made?

We are not aware of any such effects. Enforceability of such controls is a key issue.

Enforcement

How effectively is the legislation being enforced against those who have no regard for the letter of the law? What challenges are there to bringing forward successful prosecutions?

It is clear that Customs staff must be resourced and trained adequately on export controls. If not, what is the point in burdening a compliant Industry with all this bureaucracy if no-one will actually check who complies and who does not? From an enforcement point of view, the law is deemed by some to be failing through lack of enforcement resources and commitment by HMG, and it is no good seeking to rectify this merely by seeking to add yet further unnecessary bureaucratic burden on a compliant Industry, when almost no additional efforts will be taken to identify and pursue those who are not complying with the new, even tighter regulations, than have been with the previous ones. This is not, in any way, a criticism of the staff at HMRC, who are professional and dedicated, but rather of the resources that they are given to address export control issues, along with a plethora of other responsibilities that they have.

The UK Defence Industry is a compliant and easy target for the British Government to pick on in an effort to demonstrate its commitment to counter-proliferation efforts, and we would like to see some other sectors (eg the dual-use sector and freight forwarders/couriers) receive much more attention from the Government than at present, if it is really serious about export controls and global counter-proliferation.

To some, the existing laws only seem to inconvenience the law-abiding, and represent "a collusion of the willing", and we would like to see this review being used to rectify this. We are totally unaware of a single legal action which has been taken by the Government against any of the real, non-compliant "bad guys" (despite some cases having come publicly to light—eg Sinclair Holdings 7 and its alleged dealings with Sudan, and TLT International and the alleged sale of electric shock batons to Zimbabwe), and certainly we are unaware of any cases which have been even investigated which have been of an extraterritorial dimension, since the adoption of the ECA some two and a half years' ago.

We would not want the seeming inability of HMG to enforce the existing laws to be used as a justification for pressures to tighten further the regulations, when all that is really needed (probably) in many cases, is simply for the Government to have the political will to implement effectively the legislative tools that it already has at its disposal.

We would like to see much more enforcement effort taking place (and being publicised), but also for these to be focused in really trying to tackle the real non-compliant "bad guys", rather than merely taking the easy option of seeking to pick on inadvertent administrative minutiae errors from the compliance efforts of the legitimate and law-abiding, in order to meet targets.

We believe that the regulations must be effectively re-focused on countering the activities of the illicit brokers and exporters, rather than merely seeking to add yet more burden and bureaucratic red tape onto legitimate companies who are operating within the regulatory framework, who are the easy and soft target. The bureaucracy involved in implementing red tape on the law-abiding should be reduced, without the resulting creation of any loopholes, to allow additional resources to be focused on the areas of greatest, intelligence-led concern.

There are a number of potentially very significant developments in Customs matters which are imminent. These include the EU's Authorised Economic Operator (AEO) initiative and the HMRC's National Clearance Hub (NCH), which is being created, and is based in Salford. The latter of these, which is already being implemented and should be fully operational and covering the whole country by Summer 2007 will, especially when linked into the ECO's new SPIRE electronic licensing system, potentially offer considerable further systemic improvements to the UK's system, and is to be warmly welcomed.

The legislation increased the maximum penalty for breaking export controls from seven years to 10 years. What impact has this change made?

Whilst the raising of the maximum penalties for non-compliance did have a beneficial effect in assisting export control compliance staff within companies to get the attention of their colleagues on export control matters, the subsequent dearth of any headline prosecutions featuring very heavy penalties being imposed on transgressors has allowed this threat of potential prosecution to reduce as an effective awareness raising tool. Those cases which have arisen and been publicised, even though the penalties have been quite small in comparison to those which could be available to HMG, or which are (regularly) imposed in the USA, have helped to grab the attention of colleagues within companies, and we would like to repeat our plea for more publicity to be given to HMRC's activities against illegal exporters, even if this is merely disruptive in nature and not resulting in a court prosecution.

Other Matters

Has the licensing regime impeded the provision of support to British armed forces?

The creation of two new Open General Export Licences back in 2004 (the OGEL: Military and Dual-Use Goods: Exports to UK Forces Deployed in Embargoed Destinations; and the OGEL: Military and Dual Use Goods: Exports to UK Forces Deployed in Non-Embargoed Destinations) greatly eased potential problems in this field.

Is there any evidence that the open general licences have provided loopholes or allowed goods to fall into irresponsible hands?

We are unaware of any cases which have come to light where this has been the case. Given the conditions attached to OGELs, we would assume that, if this were the case, then the OGEL will have most probably been (illegally) misused in a way which was in breach of its coverage and terms & conditions, and, thus, that the exporter concerned could be prosecuted for an illegal and unlicensed export.

Is the appeals process against refusals or revocations of licences working satisfactorily?

As far as we are aware, it is working satisfactorily, and we have not had any complaints registered with us by companies about the systems and procedures involved in the appeals process, even if they may still complain on occasion about the decision when the original refusal is upheld on appeal.

Is communication between the departments with responsibilities for considering applications for export licences adequate and effective?

We believe that liaison and communication between the various Government departments is effective. This is likely to get even better with the planned forthcoming introduction of the SPIRE electronic licensing system in early-2007, which Industry very warmly welcomes. This new development offers enormous potential systemic improvements for the whole export licence application processing system, and is likely to reap considerable benefits for all concerned.

In addition, the Clerk of the Committee also raised the following issues:

There are two other matters I should mention. In its response to the Quadripartite's last report (Cm 6954) the Government asked for more evidence of the exporters who inadvertently but persistently breach export controls. Can you supply more evidence?

We KNOW that there are large numbers of companies and individuals currently operating outside of the regulatory framework (either deliberately or inadvertently), and, whilst we would like to congratulate the ECO, especially, for its extensive series of awareness raising initiatives, HMG must put more effort into awareness raising and enforcement to address this. We believe that one promising method of doing this will be through making greater use of regional industrial links and bodies, such as UKTI, Chambers of Commerce and Business Links, etc—but first, in all too many cases, these people will also need, themselves, to be made more aware!

We have been challenged to provide evidence that there really is a large amount of non-compliance (either deliberate or inadvertent) which is taking place. We can assure the Committee that, through our contacts within Industry, especially with those who are involved and seek advice when they become aware that export controls do, in fact, affect their activities, we do, indeed, KNOW that this is happening. The problem for us is that companies approach us in confidence to seek guidance, when they become aware of export controls, and it is only by offering a confidential helpline service, that we can encourage them to approach us. Thus, quoting chapter and verse of companies' infractions, to demonstrate the scale of the problem, will only serve to dissuade others from approaching us and seeking the advice that they need to be brought back onto the path of export control righteousness, which we must be seeking to encourage and should have our highest priority.

However, some evidence can be pointed to as an indication of the scale of the problem.

During the 2002–03 and the 2004 Export Control Roadshows which we jointly undertook with the ECO, we were constantly coming across companies who had come along to learn about the new Export Control Act and what they needed to do to comply, who clearly were coming to realize at these events that they were actually operating in breach of the existing regulations. To take one instance, at the largest such event that we held, in Southampton in January 2004 (attended by over 110 industrialists), we can comfortably estimate that, from comments made at the event, at least 10–15% of the audience had become aware of aspects of the existing regulations that they were, inadvertently, infringing—and this was from an audience who were aware that they were caught by export controls.

We are sure that HMG does have information at its own disposal, of firms who have been in existence for many years, and who only suddenly appear on its export controls "radar screen" when HMRC "snags" one of its shipments through random selection or as a result of intelligence. It is very highly unlikely that their very first export shipments will have been caught in this way, and much more likely that they have been making such unlicensed exports previously, sometimes (in cases of which we are aware) for years.

When companies' shipments have been snagged, and they approach us, or our Members, for help and advice, all-too-often, time and time again, the discussions between us will include the use of the phrase that: "*But we have been doing this for XX years, and never had any problems before!*" which we always advise them should not be their opening gambit when they have their first visit by HMRC officers investigating the case!

At another of the roadshow workshops we held, back in early-2004, I also spoke to another gentleman, who had come along to learn about the new regulations which were about to be implemented, but decided that he needed to rush off, very hurriedly at lunchtime to attend to urgent matters elsewhere, who stated to me that his company had been exporting NBC protective clothing for some 25 years without realizing that they needed any export licences for this.

Perhaps the most extreme case involved an ECO official who remarked, back in the early-1990s that one of his colleagues had recently attended an Industry Reception in the North of England, and, by sheer coincidence happened to get into conversation with a gentleman from a company who had been exporting a key component for nuclear intercontinental ballistic missiles for some 30 years, without once having sought to apply for a licence, or having any of their shipments ever stopped! This was not an apocryphal story, as, a couple of years later, I happened to bump into the legal adviser for the company concerned at another Industry event, and he (highly embarrassingly) had to confirm the validity of the story.

Also, sight of the Government's own published figures, clearly indicate that something is array. For instance, taking the 2003 Annual Report and excluding EU (then) and CGEA (Community General Export Authorisation) countries for both military and dual-use (the latter of which would not be shown anyway for EU and CGEA nations), SIELs number:

Military List: 2,884

Dual-use Goods: 1,490

Even given the fact that everything "specially designed or modified for military use" is controlled and not everything which is "dual-use" falls within control parameters, it still takes some swallowing that there are double the number of military SIELs to those for dual-use goods. This is especially so when there is broader OGEL coverage for military goods than there is for the dual-use sector (because the ML sector is a UK competence, whilst that for dual-use goods is an EU competence).

Also, we understand from figures from the ECO that in the period from the start of 2004 through to 31 August 2004, whilst they had anticipated that some 20–40 companies would register for the new OGEL: Technology for Military Goods, in fact some 371 companies had registered to use it—we are not convinced that all of these companies can possibly be firms who were only and solely exporting technology intangibly, and, therefore, only coming within the remit of the regulations when the controls were extended to intangible transfer of technology. Logic dictates that they were exporting technology tangibly prior to this, and only became aware of the licensability of this activity when they were looking into the new regulations.

Also, to illustrate this yet further, up until December 2005, 8A002f of the dual-use goods regulations caught: "*Electronic imaging systems, specially designed or modified for underwater use, capable of storing digitally more than 50 exposed images*" (ie underwater digital cameras). In late-2005, realising that these goods had now become increasingly popular consumer items, it was decided within the Wassenaar Arrangement to de-control them. However, sight of the Annual and Quarterly Reports covering the period

before December 2005 would seem to reveal that, despite ever increasing sales of underwater digital cameras here in the UK, there was a total paucity of export licences being applied for by people wishing to take them out of the country (and the EU) with them, for instance on holiday. Was really no-one ever taking these cameras with them on their holidays . . . or were they taking them and just unaware that they were licensable?

Secondly, the Committee may wish to pursue the issue of end use controls on items that can be used for torture. It would welcome a submission on this matter too.

The Industry and NGOs are agreed that there needs to be introduced a torture equipment end-use control. We would like to put on record Industry's support for NGO proposals for something more effective than is currently in place to control the export of and trade in torture equipment. We believe that the only effective way in which this can be done is through the creation of a torture equipment end-use control. As it is possible to use anything for torture (eg recent reports of the use of electric drills in Iraq for this purpose) you, therefore, need a control mechanism in place which is able to catch anything, rather than going down the EU's approach of trying to come up with a definitive list of torture equipment items. Technological advancements and new products developments, as well as the ease with which almost any item can be used for torture purposes, clearly demonstrate the deficiencies of adopting a finite list based approach, which will always omit items under these scenarios.

In addition, coming up with such lists can, inadvertently, catch other activities of less concern to Government, if not properly framed. Named items (lists of goods) causes problems in so much that for example, consenting adults could not export some items (eg handcuffs) for private non-torture related, recreational purposes. (That is a polite way of describing the sex industry, of course.) Describing goods for the list can be very difficult. For example the inclusion of restraint chairs or similar, could potentially catch Children's High Chairs and Chairs for Disabled People, unless very specifically drafted.

A catch-all for torture purposes, would in theory anyway, only catch items being exported for the purpose of torture. This is the only logical way in which this can be done, and is based on existing practice with regard to the WMD and military end-use controls. It could be easily achieved by the British Government through the simple expedient of including "torture" within the "any relevant use" definition of the existing controls.

Whilst we realise that there will be the same inherent problems with such a control as there are with the implementation and enforcement of the existing end-use controls, such an initiative would clearly state that the British Government is taking this seriously and determined to do something effective about it and to give itself the necessary legislative powers to be able to do so.

General Conclusion

Much of the probable focus of the review is likely to be mostly on areas of very little interest or potential benefit to Industry, but merely to be in response to political pressure from other quarters. It must be recognized that calls from some quarters for our export control regulations to be made ever tighter and more stringent will never be satiated, no matter how tight and unworkable they may increasingly become in practice.

What Industry wants is good, effective, simple, well thought-out, workable and practical legislation with which to deal. We will happily work with Government and other interested parties to try to achieve this in a constructive way.

November 2006

Supplementary memorandum from the Export Group for Aerospace and Defence (EGAD)

The overall European Industry view is that the proposed new dual-use EU regulations is a missed opportunity to pursue real reform and amounts to little more than tinkering with the current status quo. The real prize would have been the acceptance of the much-proposed "certified company" concept in which multi-national corporations with a proven record of compliance are treated as a single entity for export controls purposes, regardless of geographic location—only when goods/data leave that global corporate entity does a licensable act occur. This proposal was dismissed out of hand by the Commission in their response.

New proposed controls centre on brokering dual-use goods, but only in the context of WMD, so the impact should be limited for the vast majority of Industry.

Perhaps the greatest potential concern is the proposed introduction in the new draft regulation of controls on "intermediation" in the supply of dual-use items, ie where one party in the EU is an intermediary for the export by another EU party of dual-use items. There is no definition of "intermediation", leaving open an awful lot of ground, eg if a UK Chamber of Commerce introduces a non-EU company to an EU company which then exports to the non-EU party, is that "intermediation"? Is the transport company which carries the goods an intermediary? What about the carrier of the freight insurance? Intermediation could quite

easily become a cottage industry in its own right, whilst actually contributing little or nothing to real world compliance or counter-proliferation. A clear and concise harmonised definition across the EU of what actually constitutes an act of "intermediation" is absolutely essential.

There is mention of providing legal security to EU exporters who, in accordance with EU law, export dual-use goods over which jurisdiction is claimed by another country—this will apparently be achieved by negotiating mutual recognition of the respective export control regimes (Comment: it would be interesting to know how long they perceive that this might take to achieve!).

January 2007

Supplementary memorandum from the Export Group for Aerospace and Defence (EGAD)

CBRN-Related Regulations

As promised at the time, we did action the NBC(UK) special interest group to submit a separate memo of its own to the Committee, after the hearing, about the impact of the regulations on the specialist CBRN sector of UK Industry, and we understand that this was, indeed, drafted and submitted to the Committee last week.

The additional level of restrictive controls which are in place on the CBRN sector, which are entirely understandable given the enormous strategic importance and sensitivity involved, do make those companies who operate in this sector subject to much sympathy from the rest of Industry!

Whilst we do not believe that any rational person would query the essential need for CBRN weapons/delivery system-related technology to be subjected to the very strictest and most restrictive form of stringent control, the logic behind the very same levels of control being imposed on technology related to the detection, identification and disposal/handling of CBRN weapons, increasingly being sought around the World by Governments to help them to deal with the enhanced threat posed by them, does, at times, seem to be confused.

Export License Processing Performance

We understand that the official figures for the processing of export licence applications during 2006 reveal that some 81% of SIELs were processed within the target timescale of 20 working days (against the target figure of 70%) and that 75% of OIELs were processed within the target timescale of 60 working days (against the target figure of 60%).

EGAD, on behalf of UK Industry, warmly welcomes these figures, which are believed to be the best ever achieved, and congratulates all of those within HMG who have made this possible though their hard work.

UK Licensing Refusals

During the evidence session given by the NGOs (before our own), there was an exchange concerning the comparison of the numbers of export licences which have been refused under the terms of Criterion 8, on sustainable development (Q7–Q9) across the EU, and the UK Government was criticised for not having refused more export licences on these grounds, whilst the French appear to have refused far more.

Whilst this observation may be strictly true, it does not, of course, reveal the whole picture. Under the French export licensing system military exports are prohibited unless a governmental authorization is granted (Art 13 of the legislative decree of 18 April 1939), and the French export control system is implemented in several stages:

- prior authorization to negotiate;
- authorization to conclude a sales operation;
- authorization to export equipment.

Therefore, a French export licence refusal, against any of the criteria, can take place right up front, when French firms apply for permission to promote their products to a potential overseas customer. Under the UK's system, export licences are only needed for actual exports of goods and technology. However, in the UK we have, in place of the French system's formal prior authorization, the informal 680 system, as well as other informal consultative mechanisms which exist, for companies to use to assess whether it is worth pursuing export business opportunities or applying for export licences. A 680 refusal against one of the criteria (including Criterion 8), or informal advice from British Government officials to an exporter that a potential business opportunity is not worth pursuing, including on grounds of sustainable development, will not show up in the official published figures. Therefore, criticism of the British Government's own implementation of Criterion 8 is based on only part of the picture being visible.

Licensed Production Overseas and Offshore Subsidiaries

Whilst we strongly believe that there are many inherent practical problems with trying to impose UK export/trade controls extraterritorially on overseas licensed production facilities and subsidiaries, we have been in discussions with the British Government and the NGOs, when assessing the plans for this year's review of the Export Control Act 2002, about what the issues are that it is perceived need to be addressed, what the practical problems involved are, and what possible solutions may be possible.

As an illustration of the practical difficulties we have alluded to above, we have already told the Committee before, in our memo of 28 March 2006:[28]

> *". . . whilst the USA does, indeed, have various extraterritorial controls of its own on re-exports of US technology as well as on the exports of offshore subsidiaries of US firms, it also has in place the Foreign Ownership, Control or Influence (FOCI) regulations, enforced by the USDoD's Defense Security Service (for details of which see: www.dss.mil/isec/FOCIFAQs.htm) which can, and does, prevent offshore interests (including UK firms) from being able to exert control over (or even, in some circumstances, to be able to be made aware of) the activities of their US subsidiaries."*

Industrial Export Control Association

The Committee has recommended the creation of an Industrial Export Control Association, along similar lines to that of Sweden. As indicated in our evidence to the Committee, we believe that EGAD already fulfills such a function. However, if the Committee had any specifics of activities which it thought we should usefully be performing but are not already doing, please do not hesitate to let us know, and we will be delighted to have these discussed by EGAD's Executive Committee, with a view to these also being taken on by the group.

Joint Industry/NGO Comments on the Export Control Act Review

The discussions which we have had over the last 12+ months with the NGOs have been highly constructive and we believe that we will be able to submit to the Government some joint proposals for the Review of the Export Control Act 2002, arising from these discussions, in the near future.

We hope that the above comments may be of interest to the Committee.

February 2007

Supplementary memorandum from the Export Group for Aerospace and Defence (EGAD)

Review of the EC Regime of Controls of Exports of Dual-use Items and Technology

On Monday, 18 December the Commission released its proposals **for reform for the EU export control regime**, consisting of both a communication and a proposal for the recasting and amendment of Regulation 1334/2000 and subsequent amendments (these are the documents attached). In many aspects, the proposed reforms are not as ambitious as the European business world would have liked.

Summary

- *Transparency/Harmonisation*
  - Improved EU and national websites with a "common entry point". (Communication, p 10)
  - "Transparency" to be generally dealt with under "administrative action" (Communication, p 10)
  - Enhanced use of the "pool of experts" to ensure more uniform interpretation of Annex I (Communication, p 10)
  - Better information-sharing among member states on national controls on denials
  - Greater harmonisation of authorisation forms (Article 10.1)
- *Catch-all clauses*
  - No public circulation of authorisation requirements
  - Better information-sharing between member states & the Commission on national controls on non-listed items; (Article 4.6)
  - Procedure for compulsory fast advice by member states within a 20-day deadline (Article 4.8)

[28] Quadripartite Committee, First Joint Report of Session 2005–06, *Strategic Export Controls: Annual Report for 2004, Quarterly Reports for 2005, Licensing Policy and Parliamentary Scrutiny*, HC 873 Ev 73.

- Guidelines/best practices to further improve information flows among member states and limit opportunities for circumvention (Communication Annex IV (b) p 24.)

— *Community General Export Authorisation*

- No proposals for harmonisation of documentation and procedures
- However, reporting is explicitly by notification with the option of reporting after first use, as per the UNICE position. (Article 6.1 (a))
- No new authorisations are proposed but the Communication (Annex V p 25) lists possibilities for future proposals for authorisations:
  1. some chemicals under CWC to certain CWC members
  2. small quantity/value shipments
  3. Wassenaar non-sensitive items to certain Wassenaar members

— *Intangible Technology Transfer (ITT)*

- Commission rejects UNICE proposal to treat a multinational company as a single entity for the purposes of controls on ITT (Explanatory Memorandum of Proposal for Regulation, p 4)
- Clarification of the definition of ITT to include "technical assistance" and transmission by electronic means. (Article 2(b)iii)
- Clarification of record-keeping requirements for ITT—nature, period transferred and destination (Article 16.2.iii)
- Clarification of reporting requirements on forms—"if applicable for intangible transfers . . ." added in several fields (Annnex III)
- For technologies developed with third countries in the context of EU-financed research special EU-wide controls are proposed (Article 23)
- Future guidelines may address harmonisation of enforcement controls are proposed to address issues such as technology transferred through company intranet. (Communication, Annex IV (b) p 24)

— *Global authorisations*

- Future guidelines may seek to improve implementation (Communication, Annex IV (b) p 24)

— *Internal compliance programmes*

- Proposal would oblige Member States to "take into consideration" the existence of an ICP in a company when deciding on a global authorisation (Article 8.2)

— *Transit*

- New possibility for MS authorities to stop goods in transit and, with reasonable grounds for suspicion, take possession of them. (Article 3.4)

— *Brokering*

- Proposals would require brokers/suppliers of intermediation services to apply for an authorisation only in two cases:
  1. where he/she is aware of a WMD end-use for the product in question
  2. where an MS authority has informed him/her of risk of same. (Article 3.3)

February 2007

Memorandum from the Department for International Development (DFID)

SUMMARY

1. This memorandum provides an overview of DFID's role within the UK Government's export control system. It explains DFID's interest in arms export control, and how DFID assesses licence applications for their potential impact on sustainable development (known as Criterion 8). It provides information on how the UK's application of Criterion 8 compares to that of our EU partners, and it outlines DFID's view of the impact of arms exports on developing countries.

2. As a major exporter of conventional weapons, and a significant provider of development assistance, the UK has a particular responsibility to ensure that its arms exports do not undermine development. DFID works closely with other government departments to do this. The Department leads on the assessment of licence applications under Criterion 8, which deals with the impact of the proposed export on sustainable development and the recipient country's economy. DFID also contributes to assessments against the other criteria, particularly when the proposed export might increase the risk of human rights abuses or violent conflict.

Detail

DFID's interest in arms export control

3. All states have a right to self-defence, and to provide for their national security, including through the procurement of conventional weapons. But irresponsible arms transfers can have a detrimental impact on development. Excessive expenditure on conventional weapons can divert scarce resources from much-needed social spending in developing countries. As a country that is consistently in the top five in terms of both arms exports and international development assistance, the UK has a responsibility to ensure that our arms exports do not hold back development.

4. In some cases, arms transfers have a hugely destabilising impact on stability and security, which in turn reverses development gains. The House of Commons International Development Committee stated in its 2006 report into Conflict and Development that, "While the link between conflict and development is a relatively new field, it is an area to which the Government must give priority in order to improve development outcomes among the poorest."[29] The forthcoming DFID Conflict Policy Paper is a reflection of the importance that the Government gives to this.

5. The 2006 White Paper on International Development, "Making Governance Work for the Poor", sets out the UK Government's commitment to prevent conflict, and enhance good governance, safety and security in the developing world. Our work to prevent armed violence and reduce the proliferation of conventional weapons, especially small arms and light weapons, contributes to these objectives. DFID works to control small arms and reduce armed violence through our country programmes and through the Small Arms Strategy of the Global Conflict Prevention Pool, which DFID manages on behalf of the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MOD).

6. The White Paper also reaffirmed the Government's commitment to ensure that UK arms exports do not undermine these goals, including by endangering human rights or increasing the risk of violent conflict.

7. The relevance of development concerns for arms export control was recognised in the UK Government's national criteria for export licensing, announced on 28 July 1997. These were reinforced by the EU Code of Conduct on Arms Exports, which was agreed on 5 June 1998, during the UK's Presidency of the European Union. The Code committed all EU Member States to adhere to the same eight criteria for licensing defence exports, and to work towards a common interpretation of these criteria. The last of the criteria placed an obligation on member states to consider the compatibility of the proposed arms exports with the technical and economic capacity of the recipient country, taking into account whether the proposed export would seriously hamper the sustainable development of the recipient country. On 26 October 2000, the UK Government included all eight criteria in the Consolidated National and EU Arms Export Licensing Criteria. The Consolidated Criteria were later published as guidance under the Export Control Act (2002). Criterion 8 is included in the Consolidated Criteria as follows:

> **The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.**
>
> The Government will take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, IMF and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously undermine the economy or seriously hamper the sustainable development of the recipient country.
>
> "The Government will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid, and its public finances, balance of payments, external debt, economic and social development and any IMF- or World Bank-sponsored economic reform programme."

8. DFID has the lead responsibility within Government for applying Criterion 8, working closely with the Department of Trade and Industry (DTI), FCO and MOD. Other departments may also provide advice on Criterion 8, just as DFID may contribute to assessments against any of the other seven criteria, particularly those on human rights and conflict.

DFID's Answers to the Committee's Advance Questions

Q1. *Explain DFID's role in assessing applications for export licences*

9. Licences are passed to DFID by DTI for an assessment against Criterion 8 when the destination is on a list of countries where sustainable development is most likely to be an important factor, and where the value of the licence is above a certain threshold for that country. This threshold is determined on a country-by-country basis. The list comprises those countries that are eligible for concessional loans from the World Bank's International Development Association (IDA), taken to represent the world's poorest countries (the

[29] *Conflict and Development: Peacebuilding and Post-Conflict Reconstruction* International Development Committee, Sixth Report of Session 2005–06, HC 923–1, Volume 1.

list of IDA eligible countries is at Appendix 1). This list is kept under constant review by the World Bank. An explanation of how DFID makes an assessment made against Criterion 8 can be found in the response to Question 3.

10. Since 2002, DTI has referred 858 Standard Individual Export Licences (SIELs) and 767 Open Individual Export Licences (OIELs) to DFID for such an assessment. The following table shows the figures for each year.[30]

Year	*No. of SIELs referred to DFID*	*No. of OIELs referred to DFID*
2002	258	n/a[31]
2003	204	209
2004	133	200
2005	114	198
2006	149	160

11. This constitutes a relatively small proportion of all the export licence applications received by the DTI as the licensing authority. For example, in 2006, 1.5% of SIELs and 27% of OIELs were referred to DFID.

12. DFID has the right to comment on any export licence application against any of the other criteria. Because of the inter-relationship between human rights, conflict and development, DFID takes a particular interest in Criteria 2 (human rights), 3 (internal tension or conflict), and 4 (regional peace and security). DFID maintains a list of countries for which the country threshold is set very low or at zero, ensuring that most or all licence applications for these countries will come to DFID for analysis. The list is kept under regular review.

13. Development concerns can also be raised through the F680 process, through which the Government provides advice to industry, at their request, on proposals for marketing or promoting products overseas. An F680 approval form is not obligatory, and does not constitute an export licence, but it is an important part of the pre-approval process that can give companies an indication about the likely success of an export licence application were it to be submitted, and provided there is no intervening change in circumstances. There is no guarantee that any subsequent export licence application would be approved, even if the F680 response is positive.

14. The Defence Export Services Organisation (DESO) in the MOD refers all F680 applications for proposed exports to IDA countries to DFID for a Criterion 8 assessment. DFID uses the same analysis as that used for licence applications. Where Criterion 8 is a possible or probable cause for concern, the MOD would warn exporters of this. This may deter exporters from submitting applications for licences that would fall foul of the criteria.

Q2. *Explain the perceived "weaker" status of criterion 8 compared to other criteria?*

15. Equal weight is given to the application of each of the criteria. However, it is clear that more licences are refused under other criteria than under Criterion 8. For example, in 2006, there were 80 refusals with the vast majority based on Criteria 2 (human rights), 3 (internal tensions), 4 (regional peace and security) and 7 (risk of diversion). By contrast, there were no Criterion 8 refusals. This has created the perception that the Government takes some criteria more seriously than others. This is not the case. Clearer procedures for inter-departmental consultation on all the criteria, and guidelines for the application of Criterion 8 in particular, have helped ensure that all criteria are taken into account in the final decision on whether to grant a licence. The application of Criterion 8 is assisted by an inter-departmentally agreed methodology.

16. The fact that more licences are refused under other criteria is not a reflection of how seriously Criterion 8 is taken, but more of the nature of the UK's arms export industry and the global market. Exports to developing countries make up a relatively small proportion of the global trade in military equipment, and of the UK's military exports (see table at paragraph 29). In addition, many potential licence applications can be deterred at the pre-approval stage if they are likely to be rejected under the criteria. This is explained more fully in the answer to Question 5.

Q3. *How does DFID assess the impact of a licence against the technical and economic capacity of the importing state?*

17. DFID's assessment of licence applications under Criterion 8 takes into account four main areas. These are economic capacity; levels of military expenditure; technical capacity and the potential diversion of resources; and the legitimate security and defence needs of the recipient country. All departments involved in the export licensing process have agreed guidance for officials to assist with this process. This guidance does not interpret policy, which remains as set out in the Criteria, but it does set out procedures to help compile the data necessary for the Government to make decisions.

[30] Data provided by Export Control Organisation, DTI.

[31] Data on the circulation of OIEL applications among Government departments was only collected from 2003 onwards.

18. Overall, DFID makes a judgement on a case-by-case basis, if necessary taking into account cumulative purchases by the country concerned. A number of indicators are used to make a judgement in each area. For example, an assessment of economic capacity would focus on the impact of the arms import on the financial and economic resources of the recipient country in the immediate, medium and long term. An assessment of technical capacity, on the other hand, would examine whether the recipient country has the requisite skilled personnel to use and maintain the equipment. Advice on *operational* technical capacity is provided by MOD, which will look at the technical complexity of the proposed export and its compatibility with the recipient country's military infrastructure.

19. The indicators provide a picture of the state of the recipient country's economy, and the extent to which it is dependent on Official Development Assistance (ODA). Examples of indicators include the level of external debt; the country's ranking in UNDP's Human Development Index;[32] the degree of ODA as percentage of Gross National Income (GNI); and the level of military spending.

20. The initial assessment is carried out in DFID's Conflict, Humanitarian and Security Department (CHASE) in London. Officials examine whether the value of the proposed export exceeds the value threshold for the recipient country. The value threshold is based on the value of the export as a proportion of health and education spending in that country, as well as the other indicators in the methodology. The procedure varies slightly according to whether the licence application is a SIEL or an OIEL. As the initial Criterion 8 assessment is based on the value of the export, a SIEL licence application, which includes a value, is relatively straightforward. Making an assessment against Criterion 8 is more complex for an OIEL, as OIELs do not specify a value. DFID will therefore usually ask DTI to obtain an estimate of the cost from the exporter. The estimated cost provides a basis for a Criterion 8 assessment.

21. If the analysis in CHASE reveals that the proposed export exceeds the value threshold for the recipient country or it triggers any of the indicators, the licence application is passed to the DFID country desk or office for a more detailed examination using the agreed guidance. Country specialists then look at (a) the extent to which the value of the export licence application exceeds the country threshold; (b) the number of indicators that have been exceeded, and the extent to which they have been exceeded. Country specialists will make a judgement, based on their knowledge of the recipient country, on whether and how the proposed export would impact on the indicators for Criterion 8.

22. Other departments may also offer opinions on Criterion 8. In particular, MOD will consider the proposed export in the light of legitimate defence needs, taking into account any security sector reform programmes or strategic defence reviews. Consideration of this aspect is usually conducted against Criterion 4 (regional peace and security) but can also feed into Criterion 8.

23. As with all export licensing applications, DTI, as the licensing authority, will assess whether, in the light of advice from DFID and other Departments, issuing or refusing a licence is consistent with the Consolidated Criteria as a whole.

Q4. *What is the expertise of DFID's staff in assessing applications?*

24. Expertise within DFID can be divided into three broad groups. First, DFID has expertise on export licensing and arms control in CHASE, where the initial assessment is carried out. Additional advisory capacity is drawn upon from within CHASE on economics, conflict, governance and social development.

25. Second, when licences are referred to DFID country offices or desks, economists working specifically in or on that country will normally lead on applying the guidance and feeding advice back to CHASE. Our economists are members of the Government Economic Service. They not only have specialist skills on a variety of micro and macroeconomic issues, but also have an in-depth knowledge of the economic conditions in the countries on which they are working.

26. Finally, DFID draws upon a range of expertise in order to comment on the other criteria. Social development, conflict and governance advisers with country expertise are able to provide advice on the potential impact of the export on human rights, internal tensions and conflict, and regional peace and security.

Q5. *Why so few applications appear to be turned down on grounds of criterion 8, and how the UK compares to other EU countries*

27. Only one application has been turned down on Criterion 8 grounds, in 2003. We note that in their evidence to the Quadripartite Committee on 7 December 2006, Oxfam argued that this showed the criterion was not being applied rigorously enough. This is not the case.

28. Criterion 8 is designed to pick up high value applications to the poorest countries. The Government receives relatively few of these, so we would not expect to refuse applications on Criterion 8 grounds on a regular basis. This is an indication of the relatively low volume of UK exports of military equipment to developing countries. The majority of these exports are for non-lethal equipment or for dual-use goods, or for exports to peacekeeping operations.

[32] The Human Development Index is a comparative measure of life expectancy, literacy, education, and standard of living for countries worldwide. It is used by UNDP in its annual Human Development Report. See http://hdr.undp.org/hdr2006/statistics.

29. In 2006, only 6.9% of the value of military list export licences issued was destined for IDA-eligible countries. Information for the last two years is shown in the table below.[33] It should be noted that this information is based on military list licences granted. Some of these military list licences may not be used at the time of issue but must be used within two years; others might not be used at all. Figures based on actual exports, using Customs Commodity Codes, show a different percentage of exports to developing countries (6% in 2005).[34]

Year	*2005*	*2006*
Total value of licences granted worldwide (£ million)	1,063.7	1,639.6
Total value of licences granted to IDA countries (£ million)	111.3	113.3
Percentage of value of licences issued to IDA countries	10.4%	6.9%

30. As explained in paragraph 14, it is possible to deter prospective exports through the F680 process before they reach the licence stage. Where Criterion 8 is likely to be a consideration, the Government warns exporters of this. This may deter some companies from pursuing a sale.

31. Annual reports on the implementation of the EU Code of Conduct demonstrate that some member states have more Criterion 8 refusals than the UK.[35] In their session with the Quadripartite Committee on 7 December 2006, Oxfam noted that out of 52 refusals on Criterion 8 by EU member states, the French Government had refused 42 and the UK only one. Although the Government cannot comment on the detailed processes followed by individual EU Member States, some interpret Criterion 8 differently. Our interpretation, and that of the vast majority of our EU partners, focuses on the impact on the recipient country's economy, rather than on the UK's national security. We have sought to minimise these differences by leading the identification of best practice on Criterion 8 as part of the EU's Users' Guide to assist with implementation of the Code of Conduct.[36] It is worth noting that the UK is one of only two EU member states to routinely involve its development department or agency in licensing decisions.

Q6. *What difference the changing of the EU Code of Conduct into a Common Position would make for criterion 8?*

32. If the EU Code of Conduct were to become a Common Position, it would place an obligation on member states to ensure that national laws are in compliance. Although UK legislation contained in the Export Control Act (2002) would not need updating as a result of the Common Position, the Government would update the Consolidated EU and National Export Licensing Criteria. However, this will not affect the wording of Criterion 8, which would remain the same. This is because the wording of Criterion 8 in the UK's Consolidated Criteria is more comprehensive than that of the EU criterion, since it requires the Government to take into account the impact of a proposed export on the recipient country's economy as well as on sustainable development.

Q7. *The impact of irresponsible and illegal arms transfers on developing countries?*

33. Calculating the impact of irresponsible and illegal arms transfers on developing countries is extremely difficult, and is dependent on accurate information on the scale of the legal and illegal arms trade. Although governments increasingly publish reports on their arms exports, and much of this data is captured in the UN Register on Conventional Weapons, the information available is not comprehensive. Information on illegal arms transfers, or transfers that are not government authorised, is far patchier.

34. Nevertheless, it is possible to use the data available to make an estimate of the impact of the global arms trade on development. DFID is working to improve our understanding in this area. In 2004, we commissioned research from Bradford University on the impact of armed violence on poverty, which looked in part at the impact of the international arms trade. The research showed that responsible transfers of conventional weapons can create space for development by helping governments provide security for their populations. On the other hand, irresponsible transfers, and the costs of maintaining and using these weapons, can divert resources from development spending on areas such as education or health.

35. How the weapons are *used* can also have a significant impact on development. Although weapons themselves do not cause war, they can play a significant part in tipping conflict into violence or in facilitating the abuse of human rights. The damage caused is compounded by the negative impact on development. A 2003 report from Oxfam and Amnesty International stated, "Weapons in the wrong hands have acute, immediate impacts on personal, economic, social and civil rights, which translate into longer-term effects

[33] Information provided by the Export Control Organisation, DTI.

[34] Calculated using table 4.4 of the Annual Report on Strategic Arms Exports, 2005.

[35] Information from Annual Reports on according to Operative Provision 8 of the European Union Code of Conduct, 2003—2005, in the Official Journal of the European Union, http://europa.eu.int/eur-lex/lex/JOIndex.do?ihmlang=en.

[36] Users' Guide to the EU Code of Conduct on Arms Exports, 18 December 2006, 16440/06,http://register.consilium.europa.eu/pdf/en/06/st16/st16440.en06.pdf.

that prevent development".[37] This is why DFID also comments on licence applications against the criteria covering human rights and conflict. DFID is also leading work in the OECD's Development Assistance Committee to develop guidance for donors on the reduction of armed violence and arms availability in developing countries.

36. However, developed and developing countries alike have the right to provide for their own legitimate defence and security needs. This principle is enshrined in the UN Charter. Yet few developing countries have their own indigenous arms industries, so they are often dependent on arms imports.

37. An international Arms Trade Treaty would create a regime to regulate the trade in conventional weapons in line with the principles described above. DFID is working closely with the FCO and MOD to promote an Arms Trade Treaty, and is focusing in particular on building support among developing countries. The UK Government worked hard to secure support for the UN General Assembly resolution of December 2006. The resolution established a Group of Governmental Experts in 2008 to examine the scope, feasibility and parameters of a treaty. We look forward to working with other government departments, with civil society, and with our developing country partners, in working towards a treaty.

[37] *Shattered Lives: the Case for Tough International Arms Control*, Oxfam International and Amnesty International, 2003, p 34.

APPENDIX 1

INTERNATIONAL DEVELOPMENT ASSOCIATION (IDA) BORROWERS

July 2006

Africa

Angola
Benin
Burkina Faso
Burundi
Cape Verde
Cameroon
Central African Republic
Chad
Comoros
Congo, Republic of
Congo, Democratic Republic of (formerly Zaire)
Cote D'Ivoire
Ethiopia
Eritrea
Gambia
Ghana
Guinea
Guinea-Bissau
Kenya
Lesotho
Liberia
Madagascar
Malawi
Mali
Mauritania
Mozambique
Niger
Nigeria
Rwanda
Sao Tome and Pr.
Senegal
Sierra Leone
Somalia
Sudan
Tanzania
Togo
Uganda
Zambia
Zimbabwe

East Asia

Cambodia
Indonesia
Kiribati
Laos, PDR
Mongolia
Myanmar
Papua New Guinea
Samoa
Solomon Islands
Timor-Leste
Tonga
Vanuatu
Vietnam

South Asia

Afghanistan
Bangladesh
Bhutan
India
Maldives
Nepal
Pakistan
Sri Lanka

Europe and Central Asia

Albania
Armenia
Azerbaijan
Bosnia-Herzegovina
Georgia
Kyrgyz Republic
Moldova
Tajikistan
Uzbekistan
Serbia and Montenegro

Middle East and North Africa

Djibouti
Yemen, Republic of

Latin America and Caribbean

Bolivia
Guyana
Haiti
Honduras
Nicaragua
Dominica
Grenada
St Lucia
St Vincent

No of countries	
AFR	39
EAP	13
SAS	8
ECA	10
MNA	2
LAC	9
Total	81

February 2007

Supplementary memorandum from the Department for International Development

RESPONSES TO QUESTIONS FROM THE QUADRIPARTITE COMMITTEE ON STRATEGIC EXPORT CONTROLS

(a) *French interpretation of Criterion 8*

****

(b) *Why do we use the IDA list? Why is a country such as Morocco not on the list?*

The list of countries eligible for IDA loans is the most authoritative, comprehensive, and up-to-date list of the world's poorest countries. Eligibility is based on low income (low GNI per capita), so IDA countries have the least available resources and the greatest need to use those scarce resources in a productive way. The list is produced by the World Bank, and is updated annually. It now includes 82 countries (Montenegro is the 82nd).

By contrast, the UN's list of Least Development Countries (LDCs) covers 50 countries and is only updated every three years. It excludes, for example, India and Pakistan. It is therefore of less relevance to exporters like the UK.

In 2005, Morocco's GNI per capita ($1,059) was slightly higher than that of Guyana ($1,000). As the cut-off point for eligibility for IDA loans is $1,025, Morocco is not on the IDA list. In the specific case of Morocco we feel that factors causing concern are subject to scrutiny under other criteria: Morocco's relatively high level of military spending and its occupation of Western Sahara would be taken into account under criteria 3 (internal tensions) and 4 (regional peace and stability).

(c) *Bradford University study*

The Centre for International Co-operation and Security (CICS) at Bradford University prepared a paper for DFID entitled, "The Impact of Arms Transfers on Poverty and Development". The paper can be found at: http://www.bradford.ac.uk/acad/cics/publications/AVPI/transfers/

The research was conducted through the Armed Violence and Poverty Initiative (AVPI), which was established by DFID using funds from the Small Arms Strategy of the Global Conflict Prevention Pool. The AVPI gathered evidence on the impact of arms transfers and armed violence on poverty and other development indicators. We are now using this research, and similar work from elsewhere, to develop programming guidance for donors in small arms control and armed violence reduction. We aim to have this guidance adopted by OECD member states through agreement by its Development Assistance Committee (DAC) in 2008.

(d) *Transparency in the defence sector*

As discussed we will keep the Committee informed about the progress of this work. At present, we are trying to determine whether such an initiative is feasible and whether it might have a significant impact on development.

(e) *Refusals under other criteria*

****

Additional Information on the Criterion 8 Methodology

All the information used in the methodology was updated at the end of 2006.

Paragraph 4:

****

Paragraphs 7, 9 and 13:

****

March 2006

Memorandum from HM Revenue and Customs

Role of HMRC in Strategic Export Control

1. HM Revenue and Customs (HMRC) contribute to a multi-agency approach to prevent and deter the illegal trade in strategic goods. Policy is determined by the FCO in consultation with the MOD and DFID. The DTI sets out the regulatory framework and issues or refuses licences in accordance with agreed criteria. Other agencies provide intelligence to inform licence decisions, to inform HMRC's targeting, and to alert HMRC to consignments of concern. HMRC's contribution is to:

- Ensure that declared export trade is accompanied by the correct documentation, to check that a licence is present and correct if required and that it covers the declared goods and destination. Where a licence covers multiple shipments, HMRC will ensure that it has been correctly decremented and will return the licence to the exporter or agent as required. Exhausted licences are returned to the DTI;
- Detect illegal goods at export and to take enforcement action, including:
  - Seizure and subsequent confiscation or restoration of the goods; and
  - Investigation with a view to prosecution in appropriate cases;
- Disrupt activity, eg by visiting potential exporters in collaboration with the relevant agencies to prevent any exports of concern. HMRC also detect non-listed goods going to end-users of concern under the WMD end-use catch-all control. These cannot normally be seized unless there is

evidence that the exporter had grounds to suspect a WMD end-use but HMRC intervention will often result in withdrawal of the goods from export or to the goods being brought within the licensing system;

— Investigate offences relating to:

the intangible export of technology;

the offshore supply of military listed goods and chemical, biological and nuclear weapons; and

the offshore provision of technical assistance in relation to WMD goods.

And refer any case that we believe meets the criteria to the Revenue and Customs Prosecution Office (RCPO)

ROLE OF HMRC IN RELATION TO THE NEW CONTROLS INTRODUCED IN ORDERS UNDER THE EXPORT CONTROL ACT 2002

2. The new controls introduced in orders under the Export Control Act 2002 extended HMRC extra territorial role to cover activities akin to existing extraterritorial controls: on the supply of goods to UN arms embargoed destinations; and on the international movement of anti personnel mines under the Landmines Act 1998. New controls on the provision overseas of technical assistance in relation to WMD goods were an extension of existing WMD controls which had been assigned to HMRC under the Anti Terrorism, Crime and Security Act 2001. And new controls on the intangible transfer of military technology were an extension of the existing controls on the intangible transfer of dual-use technology.

3. Breaches of the controls on the transfer of WMD technology by any means (including word of mouth) falls to HMRC when the transfer takes place overseas.

4. Section 7 of the Export Control Act 2002 provides that orders made under the Act may make provision for the enforcement of the order (including provision as to powers and duties of any person who is to enforce it). The provisions which HMRC have agreed to enforce are set out in article 21(3) of the order.

Are the controls enforceable?

5. We believe that the legislation provides a sound base for investigation and prosecution. Where sufficient evidence is readily available and disclosure of unused material does not present particular difficulties (in the ways we have described in our previous evidence) then HMRC would expect to present a robust case for consideration by RCPO. Inevitably there will be cases where questions of sufficiency of evidence or disclosure difficulties lead us, in consultation with departmental legal advisers and with RCPO, to abandon cases before they are reported to RCPO in order to optimise our resources. The number of prosecutions will not be high and should not be used as an indicator as to whether the controls are successful.

6. Where offences are committed entirely overseas, the enforcement difficulties can be compounded. Where the alleged activity is internationally condemned, such as breaching UN embargoes, greater cooperation can generally be expected from foreign Governments and enforcement bodies. However, where it relates to a supply or transfer that other states might consider to be legitimate trade, we may not expect the same level of cooperation from an overseas Government. Moreover, if the control relates to goods that, if exported from the UK, might have been granted a licence, the courts may consider this to be a technical offence which, unless we are able to prove guilty knowledge, would result in a maximum fine of £1,000. In allocating resources to overseas investigations that can be costly, we have to take account of the likelihood of cooperation to obtain evidence and the seriousness of the offence that we can allege.

Investigation

7. HMRC assess all intelligence and reported breaches to determine what, if any, action is appropriate. HMRC investigate all activity suggesting a deliberate breach involving a sensitive destination or particularly sensitive goods and will refer the matter to RCPO to consider whether there is sufficient evidence to mount a prosecution. The outcomes could be (a) that the reported behaviour does not constitute an offence; (b) that *prima facie* an offence may have been committed but there is insufficient evidence to support a prosecution; (c) that there is sufficient evidence to support a prosecution but that prosecution is not in the public interest; d) that there is sufficient evidence to support a prosecution and that prosecution is in the public interest.

HMRC priorities

8. HMRC's approach has been to target investigation resources on: a) deliberate breaches; and b) proliferation attempts from overseas (which may or may not suggest that UK exporters are complicit). Much valuable disruption activity has been done by HMRC investigators working with our overseas counterparts, with intelligence and security agencies, with other Government Departments and with Industry. Once our powers were in place, HMRC extended this activity to visiting a number of firearms dealers to ensure that they were aware of the controls. More recently, recognising the need to improve

deterrence, HMRC has identified strict liability cases with aggravating features and reported them to RCPO. Details of successful prosecutions have been reported to the Committee. We recognise the Committee's continued interest in the enforceability of these controls and our response and we are looking into ways of providing more information with suitable safeguards.

November 2006

Memorandum from the Revenue and Customs Prosecutions Office

ENFORCEMENT

a. *How effectively is the legislation being enforced against those who have no regard for the letter of the law? What challenges are there to bringing forward successful prosecutions?*

b. T*he legislation increased the maximum penalty for breaking export controls from 7 years to 10 years. What impact has this change made?*

GENERAL

1. Each case that Revenue and Customs Prosecutions Office (RCPO) receives from HMRC is reviewed to make sure that it right to proceed with a prosecution in accordance with the Code for Crown Prosecutors. The Full Code Test has two stages. The first stage is consideration of the evidence. If the case does not pass the evidential stage, it must not go ahead no matter how important or serious it may be. If the case does pass the evidential stage, the reviewing lawyer must go on to consider if a prosecution is needed in the public interest.

2. The reviewing lawyer must also consider what the ramifications of the Criminal Procedure and Investigations Act 1996 and the Attorney General's guidelines on Disclosure have on the particular case. A defendant is entitled to have disclosed to him any material that undermines the prosecution case or which may assist the defence case. In addition, if the reviewing lawyer is aware of material that is held by a third party such as another government department, that material also has to be considered for disclosure. There can be particular difficulties in cases where material is held by a foreign agency especially when the material is of assistance to the defence. The foreign agency is under no obligation to disclose the material, and the risk of the foreign agency refusing to cooperate could lead to an unfair trial.

3. The reviewing lawyer must also have regard to the European Convention on Human Rights and in particular Article 6, the right to a fair trial, and to the Human Rights Act 2000, which ratified the Treaty in domestic law.

THE RELEVANT LEGISLATION

4. The legislation, which deals with offences for breaches of controls, can be found in the Customs and Excise Management Act 1979 (CEMA) and in Orders made under the Export Control Act 2002.

5. By virtue of Section 68(1) CEMA an offence is committed if any goods are exported or shipped as stores or brought to any place in the UK for the purpose of being exported or shipped as stores contrary to any prohibition or restriction in force. This is a strict liability offence, which is punishable on summary conviction to a maximum penalty of three times the value of the goods or £1,000, whichever is the greater amount. In addition the goods in question are liable to forfeiture. This offence applies whenever a breach has been committed regardless of the knowledge or intent of the exporter.

6. By virtue of Section 68(2) CEMA an offence is committed if any person knowingly concerned in the exportation of goods, with intent to evade any prohibition or restriction in force shall be guilty of an offence and may be arrested. This is an 'either way' offence, which may be prosecuted either in the Magistrates' Court or the Crown Court. The penalty provisions for this offence are to be found in Section 68(3) CEMA as follows:

— On summary conviction, to a penalty of £5,000 or of three times the value of the goods, whichever is greater, or to imprisonment for a term not exceeding 6 months or to both.

— On conviction on indictment to an unlimited fine, to imprisonment for a maximum term of 10 years or to both.

7. The provisions of section 68 CEMA bite in relation to:

— Goods that are listed in the Orders under the Export Control Act 2002 as being prohibited to be exported without a licence

— Goods that are for a Weapons of Mass Destruction (WMD) end user, where it can be proved beyond reasonable doubt that the exporter has grounds to suspect a WMD end use. It should be noted that the provisions of Section 68 do not apply to persons other than the exporter having such suspicion ie a broker.

— Export prohibitions and restrictions created by Regulation (EC) 1334/2000 on the export of dual—use items, and UN sanctions and embargos. These, together with most offence provisions in the orders under the Export Control Act 2002 are "assigned matters" as defined in CEMA.

The Evidential Stage

8. The reviewing lawyer must be satisfied that there is enough evidence for there to be a 'realistic prospect of a conviction' against each defendant on each charge. They must consider what the defence may be, and how that is likely to affect the prosecution case. A realistic prospect of a conviction is an objective test. It means that a jury or bench of magistrates properly directed in accordance with the law is more likely than not to convict the defendant of the charge alleged.

9. When deciding whether there is enough evidence to prosecute, the reviewing lawyer must consider whether the evidence can be used and is reliable, and there will be cases in which the evidence is not as strong as it first appears. The reviewing lawyer must consider whether the evidence can be used in court, or whether it is likely that the evidence will be excluded. There are certain legal rules, which might mean that evidence, which seems relevant, cannot be given at trial.

10. The reviewing lawyer must also consider whether the evidence is reliable; what explanation has the defendant given? Is the court likely to find the evidence credible in light of the evidence as a whole?

11. Satisfying the sufficiency of evidence test can be particularly challenging in prosecuting offences in this area for the law for one or more of the following reasons:

— It is difficult to prove the destination intended for the goods in question. There may be intelligence to show that the goods are going to a country of WMD concern, although the apparent destination may be innocuous.

— Vital evidence is often located abroad. Whilst it may be possible for some or all of the evidence to be obtained by Letters of Request or bilateral Mutual Administrative Assistance arrangements, the degree of cooperation and the length of time that it takes to deal with the request can vary from country to country. In addition, there may be issues as to the provenance of a particular exhibit, and its subsequent evidential admissibility in a UK trial.

— Evidence about the specification, functionality and proposed use of the goods can be ambiguous, which makes inference of guilty knowledge difficult to draw.

— Exports are sometimes accompanied by End User Certificates that are supplied by foreign governments, which are suspected to be false. In these circumstances it is difficult to prove beyond reasonable doubt that they are false instruments for the purposes of a prosecution.

— When potential defendants are located outside the European Union, it can be particularly difficult to get them extradited to the United Kingdom.

Disclosure Issues

12. Disclosure has traditionally been a significant difficulty in the prosecution of this type of offence because there is more likely to be:

— Highly sensitive material from the security and intelligence agencies and the Ministry of Defence. The material may include information such as details about informants; the threat posed to the UK interests by a particular state or individual.

— There may be a history of contact between the suspect and Her Majesty's Government; the suspect may have been an informant or a contractor. It is not unusual in those circumstances for the defendant to say that he was acting with Her Majesty's Government's knowledge and consent.

— There may be sensitive information to support a defence contention that he was the subject of an agent provocateur and that he had been entrapped in to committing the offence.

— There may be information about exports with similarities to the current case that would assist the defence case, but that information may be highly sensitive.

13. When material is considered too sensitive to be disclosed, the prosecutor may apply to the judge to withhold the information from the defence (a Public Interest Immunity or PII application.) The judge must balance the right of the defendant to have a fair trial against the harm that would be done to the wider public interest if the material were to be disclosed. Generally speaking sensitive material of the type outlined above may have one or more of the following adverse ramifications on a prosecution case:

— The material may undermine the prosecution case to such an extent that the reviewing lawyer is of the view that it would be improper to continue with a prosecution.

— The judge may determine that the material undermines the prosecution case or that it assists the defence case and that it should be disclosed on the defence, but the unused material may be so sensitive that the owner of that material would object to its disclosure even in an edited form. This would be fatal to a prosecution case.

— If the material is disclosed to the defence, the defence may well argue the defendant cannot have a fair trial, or be able to defend himself properly. For example the defendant may say that he could not defend himself without revealing to his co-defendants that he is an informer.
— If a fair trial is still possible the defence may successfully argue that some prosecution evidence should be excluded on grounds that it is unfair for the prosecution to be able to rely on it or alternatively that the prosecution obtained the evidence by oppressive means.
— Generally speaking, the only sensitive material that would be protected by a PII application would be that material that is of marginal significance to the case.

The Public Interest

14. Where the reviewing lawyer is of the view that there is sufficient evidence for there to be a realistic prospect of a conviction, the reviewing lawyer has to go on to consider whether a prosecution is required in the public interest. In cases such as these, public interest militates in favour of a prosecution in the interest of preventing proliferation of WMD, conventional weaponry, related technology and materials. The reviewing lawyer must also consider:

— The age and health of the defendant.
— The likely sentence that would be imposed on conviction.
— The defendant's role in the offence and his importance in relation to other persons involved who may not be available for prosecution.
— Whether an export licence would have been granted if one had been sought.
— The danger that the goods posed.
— The availability of the goods on the worldwide market.
— The financial benefit to the defendant.
— Any assets that may be available for confiscation purposes.

15. The impact that the increase of the sentencing powers from 7 years to 10 years imprisonment has had on the commission of these offences is difficult to measure because of the challenges of prosecuting these offences and their relative rarity. It is difficult if not impossible to measure how the increase in sentence has acted as a deterrent.

16. It is apparent that the increase in the numbers of strict liability offences that have been prosecuted in the past 12 months has been widely reported in the trade, which suggest that any prosecution of more serious offences would attract similar or greater notice.

17. However should such a case be prosecuted, we believe that the court would have ample sentencing capacity to deal with the defendant in an appropriate manner. Even in a serious offence, a sentencing tribunal would be likely to take a starting point at below the maximum sentence and in most cases there is likely to be some mitigation, whether on a guilty plea or on conviction after a trial, so in general terms a sentence of up to 10 years should provide a significant deterrent. In appropriate circumstances, it may also be possible to prosecute for conspiracy to commit offences. Although this would attract the same maximum penalty as the statutory offence, a court may take a more serious view of the conspiracy and impose a higher sentence.

Conclusion

18. The legislation is adequate to provide a deterrent in such cases, and in theory the legislation should not be any more difficult to apply than any comparable legislation. The challenge lies in finding sufficient evidence for them to be prosecuted successfully.

November 2006

Letter to the Chair from the Minister of State at the Foreign and Commonwealth Office

Thank you for your letter of 25 August to Margaret Beckett about British made equipment found in Southern Lebanon. I am replying as the Minister responsible for export controls in the FCO.

The Government approached the Israeli Defence Forces (IDF) about reports that they had found British-made thermal imaging equipment in southern Lebanon. They have now provided us with full details of the two pieces of British-made equipment found. The Government of Israel made no complaint about this equipment, and has been grateful for the UK's determination to get to the bottom of this issue.

The first item was a remote video camera manufactured in the UK, which did not require an export licence and is widely available through normal commercial outlets.

The other item was a static thermal imaging system (described by the Dual Use List (not the Military List) and as such required an export licence) that was exported under an export licence to Lebanon for use at a private residence in 1999. An export licence would still be required if the same equipment were to be exported now. The exporter has confirmed that the equipment was exported and would have been part of a fixed installation, and that the equipment is not suitable for hand held operation.

The equipment found by the IDF was not exported to Iran, as the media have speculated, nor did it include night vision goggles.

We continue our policy of rigorously assessing each export licence application on a case-by-case basis against consolidated EU and national export licensing criteria. If we assess that the issue of a licence would be inconsistent with these criteria, we will not issue a licence. The licence for the static thermal imaging system was issued on the basis of all the facts available at the time, and at that time (1999), there was no reason to suspect that the equipment would be used for anything other than its described purpose. Whilst proper procedures were followed in relation to this export licence, the threat of diversion is obviously a matter of considerable concern, and one which I will continue to take most seriously. The circumstances surrounding this matter will be factored into our consideration of export license applications in the future.

The UK is, of course, fully committed to the implementation of United Nations Security Council Resolution 1701, including through our export licensing policy. UNSCR 1701 specifies that arms or related material may only be sold or supplied to Lebanon with the Lebanese Government's authorisation.

You also raise the point about end-use monitoring. The preferred position of the Government remains to issue export licences without end-use conditions, undertaking instead strict risk assessment at the pre-licensing stage and refusing a licence when there is an unacceptable risk of diversion or misuse. In addition, UK Overseas Posts have standing instructions to report any misuse of UK-origin defence equipment. If the conditions of a licence were breached, this would be taken fully into account when the Government assesses any subsequent licence applications. The Government may also, if appropriate, revoke other related licences, and consider whether to prosecute if any criminal offence has been committed.

The recommendations in the Committee's Annual Report 2004–05 were appreciated. The Government is working on a response to the report and looks forward to publishing it as soon as possible after recess.

September 2006

Memorandum from the Foreign and Commonwealth Office

Extract from the Foreign and Commonwealth Office's letter of 27 October 2005 on exports of equipment to Iraq—declassified on 13 November 2006

****

. . . you asked about theft of items covered by export licences. When assessing a licence application or contemplating a gift, consideration is always given to the internal situation in the destination country, and the risk of diversion to a terrorist organisation, as set out in Criterion 3 and Criterion 7 of the Consolidated EU and National Arms Export Licensing Criteria. Assessing the likelihood of theft is part of the normal consideration of a risk of diversion under Criterion 7, which will take account of the end-user, and declared end-use. This is particularly relevant to Iraq, given the current security situation and embargo. In certain circumstances specific provisos have been attached, for example where the licensee is also the end-user. In addition, compliance with the conditions of the licence may be monitored.

Whenever necessary, we take advice on the risk of theft from the Defence Attaché at the British Embassy in Baghdad. However, it must be understood that in the current security situation it has not proved possible to make an accurate record of thefts. It is not a condition of licences for exporters to report theft of items exported; exporters will often not be informed by the end-user of any such loss.

October 2005

Further memorandum from the Foreign and Commonwealth Office

Quarterly Report for April to June 2006 with Annual Report for 2005 and Quarterly Report for January to March 2006

SECTION A: SPECIFIC LICENSING DECISIONS (QUARTER 2 (2006))

***

1.(x) *Uruguay: why are there 40 OIELs.*

An error was made during the preparation of the report, and the information for the United States of America was duplicated under Uruguay. This will be amended and a revised report issued.

Corrected entry for Uruguay as follows:

URUGUAY

Licenses issued or where coverage was amended during the period by the inclusion of reinstatement of this destination.

No	*Type*	*Goods Summary*
1.	P	Components for body armour.
2.	P	Components for naval radars, technology for the use of naval radars, military navigation equipment, components for military navigation equipment, technology for the use of military navigation equipment.
3.	P	Components for ejector seats, ejector seats, military aircraft ground equipment, components for military aircraft ground equipment, military parachutes, components for military parachutes, military distress signalling equipment, components for combat helicopters, components for combat aircraft, components for military search and rescue aircraft, components for military surveillance aircraft, components for military training aircraft, components for military transport aircraft, components for military utility aircraft, components for military utility helicopters, components for tanker aircraft, technology for the use of combat aircraft, technology for the use of combat helicopters, technology for the use of military search and rescue aircraft, technology for the use of military training aircraft, technology for the use of military transport aircraft, technology for the use of military utility aircraft, technology for the use of military utility helicopters, technology for the use of ejector seats, test equipment for combat aircraft, test equipment for combat helicopters, test equipment for military search and rescue aircraft, test equipment for military training aircraft, test equipment for military transport aircraft, test equipment for military utility aircraft, test equipment for military utility helicopters, test equipment for ejector seats, equipment for the use of combat aircraft, equipment for the use of combat helicopters, equipment for the use of military search and rescue aircraft, equipment for the use of military training aircraft, equipment for the use of military transport aircraft, equipment for the use of military utility aircraft, equipment for the use of military utility helicopters, equipment for the use of ejector seats, military aircraft ground equipment.
4.	P	Military aircraft ground equipment, military transport aircraft, components for military transport aircraft, technology for the use of military transport aircraft, technology for the use of components for military transport aircraft, technology for the use of military aircraft ground equipment.
5.	P	Technology for the use of military distress signalling equipment, technology for the use of ejector seats, technology for the use of military aircraft ground equipment, technology for the use of test equipment for ejector seats, technology for the use of equipment for the use of military distress signalling, technology for the use of equipment for the use of ejector seats, technology for the use of test equipment for military distress signalling, components for combat aircraft, components for military training aircraft, ejector seats, components for ejector seats, general military aircraft components, military aircraft ground equipment, military distress signalling equipment, equipment for the use of ejector seats, test equipment for ejector seats, test equipment for military distresssignalling, components for military distress signalling equipment.
6.	P	Naval connectors, technology for the use of general naval vessel components, technology for the use of components for aircraft carriers, technology for the use of components for naval auxiliary vessels, technology for the use of components for patrol craft, technology for the use of naval connectors.

***

SECTION B: QUESTIONS APPLYING TO SEVERAL LICENCES (QUARTER 2 (2006))

2. *Table C in annex D of the Annual Report for 2005 details restrictions that apply to exports to Cyprus which include a prohibition on weapons designed to kill which includes guns. Has the interpretation of these restrictions been modified since Cyprus joined the EU in 2004?*

The Policy restriction on Cyprus was dropped on 25 July 2006. Export licences continue to be judged against the EU Consolidated Criteria.

Do the restrictions on the exports to Cyprus include components?

The Policy restriction stated that the Government would grant licences for the export of equipment only to the military forces of either side on the island of Cyprus which the Government is satisfied does not fall within the following categories as defined by the EU common embargo list:

(a) weapons designed to kill and their ammunition;

(b) weapons platforms;

(c) ancillary equipment, which is specifically designed for use in conjunction with a) or b).

Do they include equipment such as weapon sights which were licensed in the Second Quarterly Report for 2006?

Yes the Policy restriction stated that the Government would grant licences for the export of equipment only to the military forces of either side on the island of Cyprus which the Government is satisfied does not fall within the following categories as defined by the EU common embargo list:

(a) weapons designed to kill and their ammunition;

(b) weapons platforms;

(c) ancillary equipment, which is specifically designed for use in conjunction with a) or b).

Why given the restrictions on the exports to Cyprus did both the First and Second Quarterly Reports for 2006 include Dealer to Dealer OIELs which appear to permit the export of weapons such as semi -automatic pistols, revolvers, etc. to Cyprus and why does the Second Quarterly Report contain a SIEL covering 10 semi-automatic pistols?

The embargo did not apply to individuals, only the government (Armed forces). As a Dealer to Dealer licence is for the movement of weapons to another dealer, they wouldn't be classed as the government and the embargo would not apply.

3. *Details of the three revocations. Is the Government aware, whether UK companies have had to pay compensation because of a breach of a contract?*

The Government is considering the data relating to revocations for the period in question and will correspond separately with the Committee on this matter.

***

SECTION F: ANNUAL REPORT FOR 2005 AND UPDATES

8. *What progress has there been in the following areas since the publication of the Annual Report for 2005:*

(a) *the Arms Trade Treaty;*

On 26 October 2006 the United Nations General Assembly First Committee adopted a resolution to begin a UN based process to take the initiative forward. The resolution was co-authored by he UK, Argentina, Australia, Costa Rica, Finland, Japan and Kenya, and co-sponsored by a total of 115 countries. In a vote it was passed with 139 countries in support, 24 abstaining, and one (the US) voting against. The resolution text and voting details are enclosed. The resolution calls on the UN Secretary General to—

> "seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export, and transfer of conventional arms, and to submit a report on the subject to the General Assembly at its sixty-second session (2007)," and
>
> "to establish a group of governmental experts, on the basis of equitable geographic distribution, commencing in 2008, informed by the report of the Secretary-General submitted to the sixty-second General Assembly, to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, and to transmit the report of the group of experts to the General Assembly for consideration at its sixty-third session (2008),"

This is a clear indication of the strong support for the initiative. Those voting in favour included the EU and a wide cross section of countries, notably from Africa, where the negative effects of a poorly regulated arms trade is particularly felt, from Latin America, and from existing and emerging arms manufacturers. But this is only the start of a process. Much more work is needed to turn this beginning into a treaty that enjoys wide support and will make a real difference to the lives of those impacted by irresponsible arms trading.

The Government will now continue to build wider support for the initiative, and we will prepare our views on the "feasibility, scope and draft parameters" to pass to the UN Secretary General in 2007. In developing these views we will want to work closely with stakeholders and would welcome any views from the Committee. We will also encourage other countries to feed in their views to the UN Secretary General.

(b) *plutonium disposal;*

Since the 2005 Annual report, Russia and the US have signed an Agreement resolving liability protections that would be associated with Pu disposition co-operation and are actively engaged in resolving technical and financial issues necessary for Russian disposition to go forward. The UK has a limited role in progressing Pu disposition in Russia but will be working with the US and other donors to assist both Russia and the US to maintain the momentum in reaching a solution to the technical, financial and other challenges that remain.

***

(d) *the review of the EU Arms Embargo on China;*

The EU Arms Embargo on China remains in place. However, as the Embargo is politically binding, this places the responsibility on Member States individually to define the precise scope of the embargo as they see fit. The UK Government interprets the scope of the embargo as follows: Lethal weapons such as machine guns, large calibre weapons, bombs, torpedoes, rockets and missiles; specially designed components of the above, and ammunition; military aircraft and helicopters, vessels of war, armoured fighting vehicles and other such weapons platforms; any equipment which might be used for internal repression.

The European Council in June 2005 recalled the conclusions of Council in December 2004, which underlined that "the result of any decision should not be an increase of arms exports from EU Member States to China, neither in quantitative nor in qualitative terms". EU leaders also recalled the importance of the criteria of the Code of Conduct on arms exports, in particular criteria regarding human rights, stability and security in the region and the national security of friendly and allied countries. There is at present no consensus within the EU on the issue of embargo lift, and review of the embargo is ongoing within the parameters laid out above.

(e) *progress on implementation of the EU's "action plan for the implementation of the basic principles for an EU strategy against proliferation of weapons of mass destruction" of June 2003.*

In December 2003 the European Council agreed an EU WMD Strategy which agreed principles derived from the earlier "Action Plan" (June 2003). This Strategy reflected considerable UK input. A progress report for this Strategy has been published bi-annually (June and December), since June 2004.

During 2006 a range of projects and initiatives have been undertaken which demonstrated that the implementation of the EU WMD Strategy remains a high priority for the Union.

Council Joint Actions have been adopted to support the International Atomic Energy Agency (IAEA), the Comprehensive Test Ban Treaty Organisation (CTBTO), the Organisation for the Prohibition of Chemical Weapons (OPCW), and implementation of United Nations Security Council Resolution 1540 and the Biological & Toxin Weapons Convention (BTWC). The Council has also adopted a Common Position (on 20 March 2006) for the BTWC Review Conference, whose purpose is to strengthen the BTWC and to promote the successful outcome of the Sixth Review Conference. A draft concept paper on the EU WMD Monitoring Centre is now being discussed.

9. *What were the number of small arms and light weapons destroyed in 2005 and 2006 as a result of programmes supported by the UK Government? What were the main countries of manufacture of these arms and weapons?*

2005

Mozambique (Op Rachel): Total of 3000 SALW and 1.66 million SALW ammunition

Albania: 200 tonnes mortar rounds.

2006

Bosnia and Herzegovina—thus far 100,000 destroyed in 2006. This is expected to rise to a maximum figure of 250,000 weapons by April 2007.

Mozambique (Op Rachel)—3,000 weapons and 300,000 rounds SALW ammo, 75,000 SALW magazines.

10. *The Committee would be grateful for information on the enforcement of export controls by HM Customs and Revenue, in particular:*

(a) *the number of prosecutions since January 2006 (description, quantity, value of goods (or technologies) and destination country);*

On 23 March 2006 Vestguard UK Ltd was convicted under section 68(1) of the Customs and Excise Management Act 1979 (CEMA) for exporting Body Armour to the value of £128,000 to Kuwait, Iraq and Saudi Arabia. The company was fined £10,000 and ordered to pay £500 costs.

On 6 September 2006 Peace Keeper International Ltd pleaded guilty to 3 offences under section 68(1) of CEMA of exporting body armour and helmets to the value of £23,000 to Kuwait and Iraq during 2004. The company was fined a total of £10,000 and ordered to pay £1,600 costs.

On 7 September 2006 Winchester Procurement Ltd pleaded guilty to 10 offences under section 68(1) of CEMA of exporting military helmets and flak jacket to the value of £48,260 to Kuwait for use in Iraq during throughout the latter half of 2004. The company was fined a total of £8,000 and ordered to pay £500 costs,

(b) *the amount and number of compounding penalties since January 2005; and in August 2006 a compound penalty of £5,000, in lieu of prosecution, was paid by a company which had exported military goods to Singapore before the export licence had been issued.*

In December 2006 a compound penalty of £15,000, in lieu of prosecution, was paid by a company which had exported carbon materials to various destinations. The company had made a voluntary disclosure to HMRC, following a DTI compliance visit, but HMRC enquiries revealed additional unlicensed exports that had not been accounted for in the disclosure. In addition, restoration fees of £6,945 were imposed in 13 separate cases where we seized goods. It is likely that the figure is higher as cases are dealt with locally and not all records are complete.

(c) *the number and details of warning letters issued since January 2005.*

Warning Letters on irregularities since January 2005. (Details that could identify HMRC obligations under the particular exporters have been removed to comply with HMRC obligations under the Commissioners for Revenue and Customs Act.)

	Irregularity	*Date of Warning Letter*
1.	Export of controlled goods after licence had expired	04/02/2005
2.	Exporting military goods after repair under OGEL which did not properly cover them	24/02/2005
3.	Unlicensed export of dual-use and military listed goods	25/02/2005
4.	Unlicensed export of dual-use goods	10/03/2005
5.	Unlicensed export of dual-use goods	11/03/2005
6.	Unlicensed export of dual-use goods	14/03/2005
7.	Unlicensed export of military listed goods	04/04/2005
8.	Unlicensed export of controlled software	13/04/2005
9.	Unlicensed export of dual-use goods	11/07/2005
10.	Electronic exchange of dual-use technology 08/09/2005	
11.	Unlicensed export of controlled goods to overseas branch	13/09/2005
12.	Unlicensed export of military listed goods	08/12/2005
13.	A further 7 warning letters were issued during 2005. Publication of further details may identify the personsconcerned and therefore breach HMRC's duty of confidentiality under the Commissioners for Revenueand Customs Act.	2005
14.	Goods believed to be military listed exported fordemonstration to Governments under OGEL.Equipment subsequently rated policy listed, thereforenot covered by the OGEL. All goods returned to UK.	9/01/2006
15.	Exports of military listed equipment under OGEL for Demonstration to Governments, without MoD 680 approval	10/01/2006
16.	Export of military component. Exporter unable to comply with full terms of OGEL use (Military Components)	13/01/2006
17.	Military listed goods exported after the OIEL had expired, or not covered by the OIEL	26/01/2006
18.	Unlicensed shipment of dual use goods	15/02/2006
19.	Two exports of military goods to overseas Governments covered by OIEL but sent via countries not included in the OIEL	17/02/2006
20.	Military goods exported under OGEL (Export for Exhibitions: Military Goods) without prior MoD permission	24/02/2006
21.	Unlicensed export of dual-use goods	15/03/2006
22.	Controlled goods exported under OGEL—consignee country covered but end use country not covered	23/03/2006
23.	Military listed goods exported to non-Government customers under Government-wide OIEL (OIEL since extended); failure to obtain F680 approval	30/03/2006
24.	Unlicensed export of dual-use goods previously rated no license required	30/03/2006
25.	Failure to declare licence for military listed goods	03/04/2006
26.	Unlicensed export of military listed goods	10/04/2006
27.	Unlicensed export of military listed goods	20/04/2006
28.	Unlicensed export of controlled goods	27/04/2006
29.	Exports of military goods under OGEL that did not provide full cover	12/05/2006

	Irregularity	*Date of Warning Letter*
30.	Unlicensed export of dual-use goods	23/05/2006
31.	Export of military listed goods to consignees not named on company's OIEL	02/06/2006
32.	Unlicensed exports of military listed goods	21/06/2006
33.	Unlicensed export of military export goods	22/06/2006
34.	Failure to reference export licence details on letter of authority accompanying temporary exports of military listed software. Temporary exports of military listed software for personal use incorrectly exported under Access Overseas OGEL. Incorrect use of OGEL for demonstration to governments.	03/07/2006
35.	Military vehicle parts sold ex-works using company OIEL	16/08/2006
36.	Export of dual-use goods without declaring that they were being exported under the Community General Export Authorisation	12/09/2006
37.	Exporting a military listed item prior to license being approved	12/09/2006
38.	Military listed goods sent to UN under OIEL without prior permission form DTI	12/09/2006
39.	Goods dispatched under OGEL (Military Goods: Government or NATO End Use). Country of consignment was listed on OGEL but not country of end-use.	14/09/2006
40.	OGEL (Military Goods: Government or NATO end-use) used for export to private company.	19/09/2006
41.	Dual-use goods exported under OGEL which did not cover them	02/10/2006

In addition to the above, HMRC disrupted procurement attempts by preventing the supply on 34 occasions between 1 April 2005 and 31 March 2006 and 15 such attempts between 1 April 2006 and 30 September 2006.

11. *On page 5 of the Annual Report it is stated that one of the guiding principles of the Export Licensing Community is to "establish a dialogue with exporters". It would assist the Committees to have a note explaining how this dialogue takes place and, in broad terms, the matters discussed and decisions taken?*

As well as on specific export licence applications and compliance and awareness activities, the Government engages with its stakeholders in numerous ways. In broad terms, the four principal departments making up the ELC liaise with exporters through meetings—both formal and informal—and correspondence. As an example of formal meetings, the DTI's ECO chairs the "Export Control Advisory Committee" (attended by representatives of defence exporter trade associations and academia) and attends the "Export Group for Aerospace and Defence" ("EGAD", comprising individual exporting companies) in both cases to listen to and respond on exporters' concerns and any issues they wish to raise.

By way of example, ECO is working increasingly closely with EGAD on a number of initiatives designed to improve awareness. The EGAD website is now linked directly to key documents on ECO's website to assist exporters; industry assists in the promotion of the ECO Checker Tools by demonstrating them at industry gatherings; front line industry staff will be closely involved in testing new IT systems; and EGAD and ECO are committed to working together to produce a basic export control awareness brochure.

Informally, feedback is also received through awareness seminars run by the Government. Both have been very successful. Matters discussed are often wide ranging, covering the controls themselves and their interpretation.

12. *What are the criteria for referring licences to the Department for International Development for advice and what proportion of applications are sent to Department for International Development. The Committees note, for example, from the Second Quarterly Report that five OIELs were issued for exports to Botswana, and requests the assessments which the Government has made to meet the requirements of section 3 of the Best Practices for the interpretation of Criterion 8 (pages 83–85 of the Annual Report for 2005).*

The Department for International Development (DFID) is the lead department for advice on sustainable development considerations as defined in Criterion 8 of the Consolidated Criteria. Licences are referred to DFID by DTI for an assessment against Criterion 8 when the destination is on a list of countries where sustainable development is most likely to be an issue, and (for SIELs and SITCLs) the value of the licence is above a certain threshold, determined on a country by country basis. The destination list is made up of those countries which are eligible for concessional loans from the World Bank's International Development Association (IDA), taken to represent the world's poorest. This list is kept under constant review to take account of changing circumstances.

In addition, any export licence application may, at the request of any Government Department involved in the licensing process, be examined for its impact on the economy or sustainable development of the recipient country. DfID can also request to see licence applications for other countries which are of interest in relation to other criteria.

The proportion of licences sent to DfID for advice during any particular period depends on the mix of country destinations for which applications are made. During 2005, 1.6% of SIEL applications and 35% of OIEL applications were referred to DfID for advice.

The Committee highlights five OIELs issued for exports to Botswana during the second quarter of 2006. Botswana is not an IDA-eligible country, and consequently an assessment against Crtierion 8 was not requested from DfID for these licences.

13. *The best practice guidance for the Interpretation of Criterion states that "Member States are encouraged to exchange information regarding countries of concern on a case-by-case basis through the co-operation in COARM, or by other channels". It would assist the Committee to have a note of the arrangements which are currently in place for the exchange of information.*

All members states will consult other Partners if they are considering an application which has been denied by the other member state. This is done by the coreu intra-EU telegramme network. A member state will send a coreu to the country in question asking for additional information (specifically whether the applications can be considered as essentially identical) about the licence refused and whether the reasons for refusal are still valid. This is available for the wider community to see. The response will also be sent back via coreu so all Member States have access to the response.

As well as this consultation process, there are regular COARM meetings where information is exchanged on countries or exports of concern.

14. *Please list the cases where the UK's refusal to issue an export licence has been the subject of a notification from another EU state that it proposes to grant a licence? Were there any cases in 2005 or 2006 where an EU state has granted a licence without notifying the UK under the EU Code?*

EU Member States are obligated to consult Partners on licences where it has previously refused a licence. The initial consultation mechanism under the Code of Conduct takes place via coreu. Member States will then respond to the consultation, and notify the Member State if it wishes to undercut. To date, we are not aware that there have been any clear indications of an outright undercut.

15. *How many OIELs with terms of five years of longer were issued in 2005 and 2006?*

The Government is considering the data relating to the terms of OIELs issued over the period in question and will correspond separately with the Committee on this matter.

16. *At paragraph 4.2 of the Annual Report the Government states that it "continues to explore opportunities to extend the data available on defence exports". What opportunities have been identified?*

There is a cross departmental Defence Trade Statistics Working Group (DTSWG) which brings together the relevant experts from the statistics and data collection areas (HMRC, MoD) and policy fields (MoD, DfID, FCO and DTI) which was established to address the significant and quite longstanding difficulties associated with the production of robust defence export statistics. Some of these difficulties were highlighted in the report produced by MoD economists and university academics in November 2001 entitled "The Economic Costs and Benefits of UK Defence Exports". The work of the DTSWG has been further challenged by the current drive to reduce the data collection burden on business and on Government resources. The Working Group continues to try to improve the robustness of current defence trade data, but to date has not found it possible to extend the coverage of the data.

17. *On page 64 of the Annual Report for 2005 the Government states that "in reaching decisions on [applications for SIELs for spares for countries that have intervened in the DRC] the Government will take into account the wider implications of forcing UK companies to break existing obligations." The Committee would be grateful for a note setting out the applications to which these considerations applied. In how many cases did the Government attach weight to this consideration before issuing an export licence? Is the Government aware of any cases where UK companies have been forced to pay compensation because of a breach of a contract?*

Where a company applying for a licence makes clear that a refusal would force them to break an existing obligation this will be taken into account. However the decision whether to approve or refuse the application will be based on consideration of the Consolidated EU and National Arms Export Licensing Criteria, If an application fails to meet the Criteria it will be refused, even if a company has pointed to potential contractual difficulties should such a decision be taken. We do not however keep records of the number of cases where companies have pointed out such concerns when applying for a license. The Government is not aware of any cases where an exporter has been forced to a compensation for breach of contract.

18. *Table C in annex D of the Annual Report for 2005 details considerations that apply to exports to Taiwan. It is noted that the value of SIELs granted was £5 million and that they included components for aerial target equipment, components for ballistic test equipment, components for equipment for the use of aerial target equipment, components for military aero-engines, components for military communications equipment, components for military infrared/thermal imaging equipment, components for nuclear radiation detection equipment, components for semi-automatic pistols, components for submarines and components for unmanned air vehicles. What assessment of the impact of these exports on regional stability did the Government make?*

Exports of licensable defence-related equipment and technology to Taiwan are considered on a case by case basis. In scrutinising licence applications, particular weight is given to the implications for regional stability. In these cases to which you refer HMG assessed that the goods did not provide Taiwan with an enhancement of capability significant enough to destabilise the current balance of power in the Taiwan Strait.

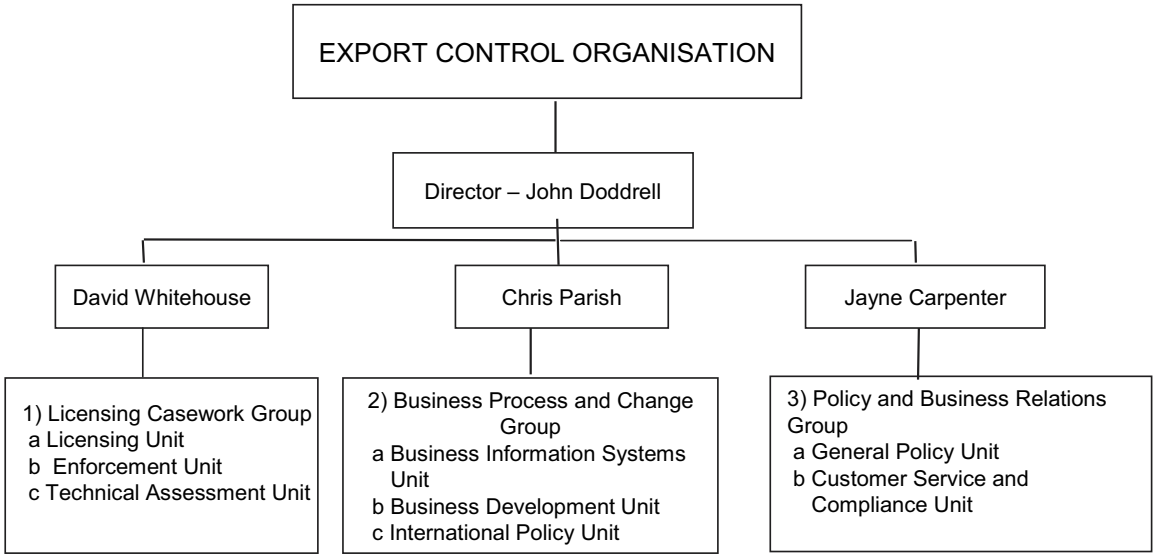
19. *To what items would the restriction set out at table E in annex D in respect of Argentina apply?*

All applications for licences to export goods to Argentina are judged on a case-by-case basis against the Consolidated EU and National Export Licensing Criteria. Licences will only be granted for exports that we are satisfied would not now or in the foreseeable future, put at risk the security of our Overseas Territories in the South Atlantic or our forces operating there.

20. *In how many cases in 2005 did the weight which the Government attached to the Other Factors on page 72 of the Annual Report outweigh the eight criteria?*

None. Other Factors can swing the decision in finely balanced cases, but do not outweigh or affect the application of the Criteria.

21. *Please supply the Committee with a short summary explaining the structure of the Export Control Organisation, how it operates and setting out its target for 2006–07.*



TASKS

ECO's core functions are:

- processing export licence applications made under the Export Control Act 2002, rating requests, and Customs pagers requests;
- maintaining the domestic legislative framework including Open General Export Licences (OGELs);
- participating in export control policy-making in the UK and in international fora, eg the international regimes and the EU;
- carrying out exporter awareness and compliance functions;
- participating in HMG's counter-proliferation machinery;
- contributing to international outreach programmes;
- maintaining the export licence denials database;
- compiling data for the Annual and Quarterly Reports;
- responding to Quadripartite Committee questions;

— responding to other Parliamentary and media inquiries; and
— maintaining its databases and website.

Objectives

ECO's key objectives are to run the export licensing regime effectively (i.e. licensing decisions accurately reflect Government policy, exporters are aware and compliant) and efficiently (applications are processed promptly, good information available to users). This twin aim of promoting export control policy objectives and providing a good service to exporters is reflected in the broader Government export licensing community Mission Statement "promoting global security through strategic export controls, facilitating responsible exports".

Strategy

DTI's overall vision is "creating the conditions for business success and helping the UK respond to the challenge of globalisation". ECO contributes to this in the following ways:

— providing a prompt and reliable service to exporters;
— promoting global security to create the conditions for global economic prosperity which is in the interests of UK plc;
— providing an effective domestic and international regulatory framework for strategic exports will promote confidence in the legitimacy of defence and dual-use exports, which is in the UK's commercial interest;
— providing a secure control regime in the UK will make it easer for UK suppliers to obtain the sensitive foreign technologies they need; and
— collaboration with overseas export licensing authorities eg through the EU and the Framework Agreement, will facilitate multinational commercial projects, thus helping the UK respond to the challenge of globalisation.

More specifically, ECO's recent strategy has been to promote efficiency through joined-up working with other Government departments (OGDs) via the "Jewel" project and a closer relationship with exporter representatives; and to make the framework of controls as effective and transparent as possible through the changes introduced by the Export Control Act. The strategy has been successful in delivering improved performance against efficiency targets (exceeded in 2003, 2004 and 2005 and on target in 2006), together with a continuing high level of effectiveness (no serious mistakes and an extended scope of control).

In addition to improving the quality of its outputs, ECO has also been focusing on its inputs, in order to maximise efficiency. Its strategy for improving efficiency is to:

— streamline business processes wherever possible (consistent with risk);
— to improve the skills and deployability of its staff through enhanced training;
— to improve the quality of applications from exporters and to reduce nugatory inquiries by providing better guidance and training for exporters;
— to improve information management within ECO so as to be able to better identify and target exporters in need of assistance and tailor licence products to suit exporters' needs; and
— to understand better the factors affecting performance so we can deploy resources accordingly and ensure we are not duplicating effort.

Targets

ECO has a range of performance targets. These are incorporated into the DTI Business Plan, specifically into business plan objective 12, on Nuclear Security and Safety and the effective and efficient DTI contribution to preventing the proliferation of arms and other strategic goods. ECO owns the first sub-objective, which is to process export licence applications promptly and accurately and improve the service offered to exporters. To achieve this, ECO works to the following published targets:

(a) Timeliness: performance against the following key targets:
    — HMG to process 70% of Standard Individual Export Licence (SIEL) applications in 20 days, and 95% in 60 days;
    — HMG to process 60% of Open Individual Export Licence (OIEL) applications in 60 days;
    — DTI to respond to 90% of ratings requests within 10 days for non-circulated requests and 20 days for circulated ones;
    — HMG to complete 60% of appeals within 20 days and 95% within 60 days;
    — Long outstanding cases not to exceed 30 > 3 months old, 6 > 6 months and 1 > 9 months, measured as average per month over the quarter.

(b) Accuracy:

— (Category One) No incorrect licensing or rating decision having consequences which materially breach the Consolidated Criteria (eg contribute to Weapons of Mass Destruction (WMD) programme, increase regional conflict) or our international commitments;

— (Category Two) An error rate of not more that 0.5% in processing licences or ratings which lead to incomplete analysis of a case prior to a decision being reached or which degrade our reputation or cause political embarrassment, while not leading to a material breach of the Consolidated Criteria.

Targets for future years have not yet been fixed but are not expected to change substantially.

22. *Please supply the Committee with a table setting out for the Export Control Organisation for 2005–06 and 2006–07:*

(a) *the number of staff in post (full time equivalents)*

Date	*Staff in post*
As at 1 April 2005	115
As at 1 April 2006	101
Projected 1 April 2007	102

We continue to monitor resourcing of the ECO's operations to ensure that we can continue both to meet our performance targets and resource other areas of work appropriately. ECO is still analyzing the potential for additional efficiencies from its current IT and business change project "SPIRE".

(b) *the number of casual/temporary staff*

Date	*Temporary staff/contractors*
As at 1 April 2005	16
As at 1 April 2006	8
Projected 1 April 2007	0

(c) *the number of compliance checks, including visits to companies, carried out with the percentage of companies that were fully compliant.*

Year	*Number of Compliance Visits*	*Percentage of companies found to be fully compliant*
2005	533	69%
2005 (to end Sept)*	421	69%
2006 (to end Sept)	378	63%

* additional figures for "2005 to end September" to enable comparison with the 2006 figures.

By way of commentary, please note firstly that during the latter half of 2005, DTI ECO's Compliance Unit was two compliance officers short due to long-term illness (five months) and a vacancy. The vacancy was filled in April 2006, but the new Compliance Officer has only recently begun visiting companies after completion of his training.

Over the last 12 months or so, ECO's Compliance Unit has been specifically targeting OGEL users, the largest increase in its client base as sub-contractors to larger companies are being asked to export in their own right for the first time. The statistics therefore include an unusually high proportion of first time visits. Many of the instances of non-compliance have been technical breaches of licence condition, for example missing or incorrect undertakings or other supporting paperwork or licences incorrectly referenced on invoices. Experience in the past has been that where such breaches occur a revisit within three to six months has usually found the company has improved its processes dramatically and is now compliant.

We have also, more recently taken a more robust approach to compliance in conjunction with making more help available to exporters. For example we have run seminars specifically on Compliance and published "Compliance Visits Explained" on our website (http://www.dti.gov.uk/europeandtrade/strategic-export-control/help-advice/page33802.html). The latter acts as a companion to the Compliance Manual.

HMRC have also tightened up on minor breaches. Examples of fines levied can be found on the ECO website (http://www.dti.gov.uk/europeandtrade/strategic-export-control/licensing-rating/guidance/page 33980.html)
shows the latest, two companies were fined £10,000 and £8,000 respectively plus costs for exporting body armour and helmets without the appropriate licenses. We are also starting to look, with HMRS, at additional measures to those already available around the issue of enforcement.

(d) *the number of licences received and processed, broken down into type of licence (SIEL, OIEL, etc)*

	Number of applications recieved				
Year	*SIELs*	*OIELs*	*SITCLs*	*OITCLs*	*Technical Assistance*
2005 (full year)	9,157	621	144	40	11
2005 (to end Sept)*	6,942	497	96	31	10
2006 (to end Sept)	7,178	459	78	42	4

	Number of applications recieved				
Year	*SIELs*	*OIELs*	*SITCLs*	*OITCLs*	*Technical Assistance*
2005 (full year)	9,055	669	136	47	10
2005 (to end Sept)*	7,529	510	72	20	8
2006 (to end Sept)	7,533	489	88	48	3

* additional "2005 to end September" figures to enable comparison with 2006 figures.

The tables show that more licences have been processed than were received. This is due to (i) ECO efforts to clear backlogs of long outstanding cases and (ii) cases carried over from the previous year.

23. *Has the Export Control Organisation a business plan for the next two to three years? If it does, please supply a copy?*

DTI ECO is currently revising its business plan and will supply the new version as soon as possible. In the interim, please refer to the ECO business plan given to the Quad at the end of 2005, ahead of the oral evidence session of Malcolm Wicks MP, DTI Minister responsible for export controls.

24. *What IT projects have been completed in 2006–07and what projects are currently underway or planned? What were the planned costs of the projects completed and what were their outturn costs? What savings were/ are anticipated by the projects and what have been achieved?*

ECO has carried out/is carrying out the following IT projects in support of existing XNP IT Systems. DTI currently employs two IT contractors to maintain these in-house IT systems. It is estimated that around £100,000 will be spent IT contractors in support of ECO for the financial year 2006–07.

SPIRE

Work is well advanced on an IT-enabled business change project known as SPIRE (Shared Primary Information Resource Environment). SPIRE will automate the export licensing system, from the completion of licence applications using newly created web-based application forms, through the DTI and OGD (Other Government Departments) business processes, and the issue of an electronic licence to HM Revenue & Customs.

Work started on Phase 1 on 10 July 2006 and was completed in early November 2006. This included a Proof of Concept to deliver the on-line export licence application forms that form the exporter's touch point with SPIRE. An OGC Gateway Review validated the project in July 2006. Preparation for the later phases of SPIRE, including costing and planning activities, has also been completed.

Phase 1 was run using PRINCE2 project management methodology and was delivered on time and within budget. Roll out of the full system, following the recent agreement by the SPIRE Programme Board to move into the next phase, will be September 2007. This will include providing licence applications and supporting documents electronically to the front door of the FCO, MOD and DfID and receiving advice back from them directly into SPIRE. HMRC will receive export licenses electronically directly into their CHIEF system. SPIRE functionality will provide the ability to fully integrate with the FCO, MOD, DfID and we will be discussing the possibilities, and the sharing of associated support costs, with them during the next phase of SPIRE.

***

OTHER IT PROJECTS

Two exporter "self-help" tools have been completed this year and are now available on the internet. The first one is called "Goods Checker" and enables an exporter to identify whether his goods are subject to control, and in which category of the Control Lists. A second tool called "OGEL Checker" identifies the appropriate Open General Export Licence (OGELs) for any given export if the rating and the destination country are input.

These projects were planned as part of a drive to reduce nugatory inquiries by providing better guidance and training for exporters. Total development costs were £96,000 and £64,000 respectively. It is difficult to quantify any savings at this time as associated training courses to enable exporters to make full use of these tools are only just being launched.

25. *What outreach to industry and overseas has been carried out since January 2006?*

The ECO arranges on average four seminars or awareness events a month for exporters at various locations in the UK. These include beginners, intermediate and advanced seminars and a workshop to help exporters to apply for licences over the internet. Customised seminars are also given, or presentations made, to a range of companies, trade organizations and groups, on request.

During 2006 two software tools have been made available on the Internet to help exporters (see table above). The first one is called "Goods Checker" which enables exporters to identify whether goods are subject to control, and by which entry in the Control Lists. The second tool is called "OGEL Checker" which helps exporters to identify appropriate Open General Export Licences that may by available for any given export and takes the user through all of the conditions on the licence that must be compiled with if it is to be used. A new workshop has been developed to help exporters with control list classification and use of the Checker Tools. In response to previous comments from industry one version of the workshops focuses on military goods and another on dual-use goods.

The ECO website contains comprehensive information about the UK's strategic export control regime. When new Notices to Exporters or the Export Control Bulletin are posted on the website they are also e-mailed to anyone who has registered to receive information electronically. Some of this information is also further disseminated by other organisations eg by Trade Alerts, the Defence Manufacturers Association Newsletter and the Export Control Association (Ernst Young) News Bulletins.

Compliance officers will also ensure companies are fully aware of UK export controls during their visits, helping companies to increase their knowledge.

ECO supports some international outreach activities set up by the FCO, the EU and the United States. Exports have participated in outward visits made by UK delegations eg to Bulgaria earlier in the year. Representatives from ECO have been invited to speak at a number of international conferences including in Berlin, Brussels, Seoul and Tokyo. The UK has been active in support of the EU-funded outreach project in China and a UK team formed part of the EU delegation to Beijing in June to plan a series of seminars and workshops in China and in London for Chinese export control and enforcement officials. Experts have participated in US funded outreach with countries such as Bosnia & Herzegovina and in particular two week long workshops for officials from Pakistan that were held at a hotel in London. ECO routinely hosts inward visits by officials from other countries, this year including from Australia, Japan (several), New Zealand, Sweden and Turkey.

SECTION H: OTHER MATTERS

26. *The Review conference of the UNPoA to Prevent, Combat and Eradicate the Illicit Trade in Small Arms Light Weapons in June and July 2006 is reported to have failed—for example see the Observer, 9 July 2006, "UN arms control conference ends in disarray". What assessment did the Government make of the conference?*

It was disappointing that the Review Conference of the UN Programme of Action (UNPoA) to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects (held in New York between 26 June and 7 July) failed to agree an outcome document covering follow-up action. However, the UK was able to use the presence of all the UNPoA member states, nongovernmental organisations and other international bodies to build support for the key UK objectives of common international standards for SALW transfer controls and addressing SALW proliferation and armed violence from a developmental perspective. As the Chair of RevCon, Ambassador Prasad Kariyawasam

said in his post conference address "the UNPoA remains an enabling framework" and "its validity and effectiveness remain undiminished". The UK remains committed to working within the UNPoA with all interested parties towards strengthening the UNPoA and its implementation ahead of the next Biennial Meeting of States in 2008.

27. *On 19 September 2006 a military coup took place in Thailand. Has the coup resulted in any change of policy on strategic exports to Thailand? Have any licences been revoked?*

We judge each export licence application on a case by case basis against the Consolidated EU and National Arms Export Licensing Criteria. This continues to apply to Thailand. We are closely monitoring the situation in Thailand, including the respect afforded to human rights. To date, no licences have been revoked.

28. *In an article published on 24 September 2006 the Observer states that DESO has identified Iraq, Libya, Colombia and Kazakhstan as "priority" markets. What assessment did DESO make of the treatment of, and respect for, human rights in these countries before promoting them as priority markets?*

A country will only be considered for DESO's Key Markets list if its inclusion is entirely consistent with the Government's foreign and security policy. The Committee will be aware that there is an exemption to the UN Arms Embargo on Iraq for supply to the Iraqi Government and Multi-National Force, and that it is the UK's policy to assist the Iraqi Government to build a stable, secure and democratic country. Given that the UK has the capability to meet some of Iraq's needs to build up its forces' capacity, the listing of Iraq as a Key Market reflects both consideration of Government policy towards assisting Iraq and commercial considerations.

The other countries to which the question refers, as the Committee will be aware, are not subject to embargoes. The identification of these as Key Markets reflects an assessment that these countries have needs which UK Industry is capable of meeting with equipment. The supply of such equipment would have to be consistent with the Consolidated EU and National Arms Export Licensing Criteria. However, the Key Markets list is not limited only to countries to which it is possible to export the full range of military goods. It may include countries, such as Libya, which have recently ceased to be subject to an embargo, where this is consistent with wide Government policy, as well as commercial considerations.

December 2006

Further memorandum from the Foreign and Commonwealth Office

Quarterly Report for January to March 2006

SECTION A: QUESTIONS APPLYING TO SEVERAL LICENSES

1. *At several points—for example for Afghanistan—the report contains an entry as follows "Good specified in Part 1 of Schedule 1 to "the Order", excluding: (1) Complete vehicles, vessels & aircraft; (2) Goods specified by PL5001; (3) Chemicals specified in the Chemical Weapons Convention (Schedule 1); (4) Equipment and components therefor for the dissemination of chemicals in (3)—as above; (5) Anti-personnel landmines and components therefor; (6) Goods specified in Category I of the Missile Technology Control Regimes; (7) MANPADS and components therefor; (8) Components for Unmanned Airborne Vehicles; (9) Nuclear explosive devices and materials; (10) Enriched Boron; (11) Nuclear power generating or propulsion equipment; (12) Nuclear reactors; (13) test models for the development of items listed above; (14) Equipment for the production of items listed above, and; (15) Software and technology for the development, production or use of items listed above." Can you please list the items covered by the entry, rather than those not covered?*

The example quoted in the context of Afghanistan, refers to one OIEL that covers an extensive list of goods to a number of destinations, and is for the use of the US Government within each destination. The exporter applied for a licence that covered all items within the Military List with a specific list of items to be excluded. As the Military List covers an extensive range of equipment, accessories, components, and other items, it would have been an extensive task to assign all the possible applicable summaries to this particular licence. A complete breakdown of the summaries would have covered several pages per destination, which would have made it unusable to the casual reader, and the report much larger. For this reason a compromise on the way in which the data was to be presented had to be made, and it was felt that this was the least cumbersome way of doing this. There are very few OIELs where this situation arises and the ECO will try, wherever possible, to use the more descriptive summaries as used for other OIELs and SIELs. As the Committee is aware, we can provide further information to it on request on a case by case basis.

***

5. *The Committee would be grateful for more information on the following licenses issued during the first quarter (January to March) of 2006:*

(a) Dealer to Dealer OIEL. The Committee would be very grateful for a note explaining how the dealer to dealer OIEL operates—in particular, how does the Government police the operation of the OIEL, whether breaches would lead to withdrawal of dealer licences, what other dealer to dealer licenses are current, does the license apply to dealers exporting or receiving arms in the Isle of Man, Channel Islands and Gibraltar?

Dealer to dealer OIELs operate in the same way as all other open licenses but all exports must be to registered firearms dealers in the receiving country, which must also be an EC destination. Dealer licence holders are also required to notify the Home Office prior to the export of any items on the licence so that the receiving country is aware of the intended import. The dealer license covers exports from the UK and the Isle of Man. The Channel Islands and Gibraltar are not permitted destinations on this type of licence, and separate licences would be needed to cover these destinations. Once a licence has been issued, the licence holder is subject to regular compliance visits. Breaches of the conditions of a licence could result in the withdrawal of any open licences (dealer to dealer OIELs included), and a decision is taken on a case by case basis if remedial action is required. Some dealers may have SIELs or other OIELs in addition, or instead of, a dealer to dealer OIEL, depending on their business needs.

(b) Dealer to Dealer OIEL: In detail, this OIEL covers semi-automatic pistols, crowd control ammunition and small arms ammunition. What arrangements are in place to ensure, and to check, that goods exported from the UK to a country covered by the OIEL (all EU countries) do not end up in the hands of an end user in respect of whom an export licence would not have been issued if the export had been directly from the UK and not via a dealer in a third country?

One of the conditions on the licence states that the consignee has to be a licensed firearms dealer. The onward shipment from that dealer is the licensing responsibility of the country in which the dealer is situated, in the same way that any dealers in the UK who receive firearms from licensed firearms dealers based in EC countries, will need appropriate license coverage from the UK authorities before export from the UK.

***

(o) Serbia and Montenegro: OIEL no 3 for components for combat aircraft, components for military training aircraft, ejector seats, components for ejector seats, equipment for the use of ejector seats, test equipment for ejector seats, equipment for the use of military parachutes, military parachutes, components for military parachutes, signal flares.

The entry included here is incorrect and should have read:

> "laser range finders, components for laser range finders, weapon sights, components for weapon sights, equipment for the use of laser range finders, aiming devices, components for aiming devices, military image intensifier equipment, night vision goggles, components for night vision goggles, weapon sights, equipment for the use of laser range finders"

***

Section C: Other Matters

6. *With the announcement of the accession of Bulgaria and Romania to the EU in 2007 it would assist the Committee to have a note setting out the FCO's assessment of the nature, operation and effectiveness of these countries' export controls, their defence industries and whether their exports comply with the EU code. What discretion will the UK Government have to decide whether or not to extend open licenses and licenses such as the dealer to dealer licenses to cover Bulgaria and Romania?*

All EU Member States are required to operate effective export controls in line with the EU Code of Conduct. We, and other Member States, have been working with Bulgaria and Romania to help them to ensure that they meet these standards. We will continue this work. However, if cases arise where we have concerns over the application of export controls we will raise them with the Bulgarian and Romanian governments, as we would do with any EU Members State. It should also be noted that Bulgarian and Romanian officials already participate in the EU COARM Working Group on Conventional Export Controls, where they are exposed to discussion of existing best practice. Romania's legislation is currently being substantially amended to ensure export controls will be operated strictly in line with EU procedures. The Bulgarian Government is also committed to improving its existing export control system.

The Government has discretion to vary a Dealer to Dealer licence to include new Members States. The Government can vary any of its open licences to narrow or widen the coverage, be it goods and/or destinations, and at any point, to take account of changing circumstances, Any changes to a strategic export control licence will be notified to an exporter either as a letter of variation or by the issue of a notice to exporters.

December 2006

Further memorandum from the Foreign and Commonwealth Office

Quarterly Report for July to September 2006

SECTION A: SPECIFIC LICENSING DECISIONS (QUARTER 3 (2006))

***

SECTION B: QUESTIONS APPLYING TO SEVERAL LICENCES (QUARTER 3(2006))

2. *How many of the licences in respect of Thailand were granted after the military coup in September 2006? Has the Government changed its assessment of the application of the criteria for export licenses since the coup?*

We issued 36 SIELs and 7 OIELs between 20 September 2006 and 8 February 2007 for Thailand. Our policy remains that all export licence applications are assessed against the Consolidated Criteria. Following the military coup on 19 September, all export applications for Thailand continue to be considered on their merits against these Criteria, on a case by case basis. The situation is being kept under review.

3. *In May 2006, it was reported that the USA had imposed a full arms ban on Venezuela, claiming it had failed to cooperate in the fight against terrorism (see the Guardian 16 May 2006). Has the UK Government changed its assessment of the application of the criteria for the export licences to Venezuela since May 2006? Has the USA attempted to extend its extra-territorial reach to prevent UK exports, which for example contain components using technology developed or made in the US, to Venezuela?*

All export licences to Venezuela are assessed on a case by case basis against the Consolidated EU and National Export Licensing Criteria at the time of application. If an application is judged to be inconsistent with the Criteria, a licence will not be issued.

We are not aware of any US attempts to extend their extra-territorial reach to block UK exports.

***

5(e) *What assessment has the Government made of the operations and behaviour of the UAE Special Operations Command?*

All export licence applications are judged on a case-by-case basis against the Consolidated EU and National Arms Export Licensing Criteria, taking into account the prevailing circumstances in the country of end-use. The equipment in this case was for the use of the UAE Special Operations Command. We have no reports of any concerns over the operations and behaviour of this end user, and as such had no concerns under the Criteria regarding this export licence application.

SECTION D: OTHER MATTERS

6. *During compliance visits by ECO staff in 2006 how many breaches of OIELs and OGELs were found? It would assist the Committees to have a summary of the many types of breach. How many breaches resulted in warning letters from the ECO? How many were referred to HM Revenue and Customs and how many resulted in action by Revenue and Customs?*

During compliance visits in 2006, 202 companies had breached the conditions of the open licences they were using. This breaks down as follows:

Unlicensed Shipments made	35
Incorrect or missing undertakings	26
Problems with electronic transfers or trade controls	14
Company unsure of where their goods fall on the control list, so cannot confirm that they can use an OGEL	6
Problems with using OGELs (misunderstanding the licence, not having the correct supporting documents, not reading the licence)	64
Problems using OIELs (not understanding or reading the licence)	13
General lack of knowledge of UK Export controls leading to errors	44

After each Compliance visit, a letter is sent to the company. If any breaches are found, these are set out in the letter with the remedial actions the company needs to take to be compliant. The question of warning letters is being considered as part of the compliance initiative mentioned in Q7 below. At least 26 breaches were referred to HMRC, and many of theses are still being investigated. Work is continuing in ECO on improving the quality of the information we produce about breaches and the action taken against companies.

7. *How many companies persistently in breach of open licences have been "deregistered" and prevented from using OGELs?*

At present, companies are not "de-registered" from OGELs, This is because we have to date, taken the view that exports under OGELs are by definition very low risk (ie exports for which we would never refuse a licence). However, as part of an initiative to tighten compliance generally, the ECO is looking with HMRC at a range of additional enforcement options, on which it will report to the Committee in due course.

February 2007

Memorandum from the Export Control Organisation, Department of Trade and Industry

ASSAULT RIFLES

Thank you for your letter of 7 July to the Foreign and Commonwealth Office, which has been passed to me for a reply. As you know, I am responsible for export control but I have coordinated the following reply with the Import Licensing Branch in DTI.

Question 1: *Import licences issued for assault rifles*

The DTI's Import Licensing Branch issues licences for the import of firearms and ammunition. Import licences are only granted to those with domestic authority to possess firearms under the Firearms Act 1968 (as amended) (FA 1968), so in effect, the import licensing regime backs up domestic controls on firearms possession, which are the responsibility of the Home Office.

Between 2003 and 2005 import licences which specifically referred to assault rifles were issued as follows:

— 2003—40 licences covering 6,220 assault rifles.

— 2004—16 licences covering 226 assault rifles.

— 2005—40 licences covering 194,659 assault rifles.

If you require any further information on import licensing, you will need to contact:

Import Licensing Branch
Queensway House
West Precinct
Billingham
TS23 2NF

Question 2: *Export Licence issued for Assault Rifles*

During the last three years, the Export Control Organisation (ECO) has issued SIELs covering assault rifles as follows:

— 2003—43 SIELs allowing the export of 1,202 assault rifles.

— 2004—47 SIELs allowing the export of 2,205 assault rifles.

— 2005—56 SIELs covering 2,502 assault rifles.

Some of these weapons were exported solely for the purposes of film production, (usually on a temporary basis—ie the weapons would have been returned to the UK within 12 months of their original export); or for resale to private collectors. In these cases, the weapons would have been deactivated prior to export. Each application would have been rigorously risk assessed against the Consolidated EU and National Arms Export Licensing Criteria. Applications to export small arms or light weapons have in the past been refused because the UK had concerns about the described end use, or, more generally, was concerned about the ability of the destination country to operate rigorous arms controls.

There were also six OIELs granted during the period for the export of broad categories of weapons which could include assault rifles. One of these was a temporary OIEL for film production purposes as above; the remaining five were for exports to countries with rigorous firearm control regimes.

OIELs are not normally quantity limited and so it is not possible to state precisely how many assault rifles (if indeed, there were any) were exported under cover of these OIELs. However, before any OIEL is granted, a range of factors are taken into account, including the items to be exported, the destination(s), the Consolidated EU and National Arms Export Licensing Criteria, and that the exporter has the relevant authorisations to hold firearms in the UK. The ECO also carry out regular audits of OIEL holders to ensure that they are complying with the OIELs and any particular conditions applied to them.

THE OBSERVER ARTICLE OF 25 JUNE

The facts of this case are as follows:

— A registered UK firearms dealer did import approximately 20,000 assault rifles from Bosnia in May/June 2005. In this context is it important to bear in mind that the removal of weapons from the Former Republic of Yugoslavia is an agreed objective of both NATO and the UN, and is fully supported by the UK. The UNDP has been active in running a programme for the destruction or removal of weapons from the Former Republic of Yugoslavia, and NATO has also played its part in arms reduction in the region, under Project Harvest (formerly Operation Harvest). The UK fully supports both the UN and NATO in their objectives.

— Import licence procedures were fully complied with.

— These firearms remain lodged in a secure storage facility within the UK and the relevant authorities continue to conduct checks on them in line with normal procedures. Some weapons have already been deactivated and many more will be, in a series of transactions. Those who hold the weapons understand that if they subsequently enter into negotiations to export them, export licence applications will be necessary (and will, of course, be rigorously risk assessed by Export Control Organisation).

August 2006

Memorandum from the Import Licensing Branch, Department of Trade and Industry

Thank you for your letter of 12 October 2006 addressed to the Head of the Branch. I have been asked to respond. Your letter asks for additional details of the AK-47s imported in 2005. Glyn Williams, then head of the Department's Export Control Organisations, in his letter of 30 August 2006 indicated the number of import licenses this Branch issued that allowed the import of assault rifles such as AK47s.

The purpose of the DTI's import controls on firearms is to provide a back up for domestic controls on possession. Provided the imported has domestic authority to possess he will be allowed to import as it would be improper for DTO to consider refusing an application whilst a person may lawfully carry on a business as a firearms dealer.

The application form asks for details of the importer and the firearms he intends to import. On receipt of the application a check is carried out with the appropriate body to confirm that the importer has domestic authority to possess that which he wishes to import. The end user, where not the importer, or whether there is an intention to re-export are not questions asked as part of the examination process. However, importers are reminded of the need to export firearms and ammunition in accordance with the export control administered by the DTI in the letter that is sent to successful applicants.

Once the application is approved an import licence is issued and is valid for six months or until the end of the importer's domestic authority to possess, which ever is the sooner. There is no obligation on the importer to use the licence once issued.

HM Revenue and Customs are DTI's agents at the port and are responsible for ensuring that the imports of firearms are made against valid import licenses. Once that firearm is imported domestic controls on possession take over which are the responsibility of agencies other than the DTI.

I attach a table listing the import licenses issued in 2005 that would specifically allow the import of assault rifles. I am unable to give you the name of the importer as this is considered confidential information. I am also unable to add the end user or whether there was an intention to re-export and this is not information asked for by DTI as I have explained above.

In addition to the licenses I have listed a further 54 import licenses were issued over the same period where it is possible that assault rifles were imported against them due to the general nature of the description on the license.

IMPORT LICENSES ISSUED IN 2005 THAT SPECIFICALLY ALLOWED THE IMPORT OF ASSAULT RIFLES

No of Licences Issued	*Country of Consignment*	*Description on Import Licence*
25	Bosnia & Herzegovina	127,500 assault rifles
3	Bosnia & Herzegovina	5,500 machine guns, assault rifles
3	Croatia	60,000 assault rifles, 1,500 machine guns and assault rifles
2	Czech Republic	7 machine guns, 16 assault rifles, 12 semi auto pistols, 2 pump action shotguns, 2 semi auto shotguns
1	Hungary	8 machine guns, 21 assault rifles
1	Malta	64 assault rifles, 2 machine guns, 4 carbines

No of Licences Issued	*Country of Consignment*	*Description on Import Licence*
2	Romania	5 handguns, 7 assault rifles, 6 single shot rifles, 2 pistols, 1 sniper rifle, 1 machine gun
2	Serbia & Montenegro	3 assault rifles, 1 machine gun
1	Switzerland	2 assault rifles

NB All import licenses were valid for six months.

December 2006

Further memorandum from the Department of Trade and Industry

1. *Could the Quadripartite Committee have a copy of the finalised terms of reference for the Government's review?*

A copy of the finalised terms of reference is attached [see Appendix 1].

2. *What are the criteria for referring applications for export licences to the Department for International Development? What proportion of applications are referred to Department for International Development? How does the Department for International Development determine whether an application is incompatible with the technical or economic capacity of the recipient country? Why are so few applications refused on the grounds that they breach criterion 8 of the EU Code of Conduct on Arms Exports?*

The Department for International Development (DFID) is the lead department for advice on sustainable development considerations as defined in Criterion 8 of the Consolidated Criteria. Licences are referred to DFID by DTI for an assessment against Criterion 8 when the destination is on a list of countries where sustainable development is most likely to be an issue, and (for SIELs and SITCLs) the value of the licence is above a certain threshold, determined on a country by country basis. The destination list is made up of those countries which are eligible for concessional loans from the World Bank's International Development Association (IDA), taken to represent the world's poorest. This list is kept under constant review to take account of changing circumstances. DFID can also request to see licence applications for other countries which are of interest in relation to other criteria.

The proportion of licences sent to DFID for advice during any particular period depends on the mix of country destinations for which applications were made. During 2005, 1.6% of SIEL applications and 35% of OIEL applications were referred to DFID for advice.

DFID's assessment of license applications takes into account four main areas. These are economic capacity; levels of military expenditure; technical capacity and the least diversion of resources; and the legitimate security and defence needs of the recipient country. A number of questions are posed in order to make a judgement in each area. For example, an assessment of economic capacity would focus on the impact of the arms import on the financial and economic resources of the recipient country in the immediate, medium and long term. An assessment of technical capacity, on the other hand, would examine whether the recipient country has the requisite skilled personnel to use and maintain the equipment. Where there may be factors that cause concern, DFID will use the professional expertise available to it to make a judgement on a case-by-case basis, if necessary taking into account cumulative purchases by the country concerned.

Criterion 8 is intended to pick up on high value Export License Applications (ELAs) to the poorest countries. Since the Government receives relatively few of these, we would not expect to see regular refusals of ELAs on Criterion 8 grounds. It should be noted that, through the F680 process, we are often able to deter prospective exports before they reach licence stage. Where Criterion 8 is likely to be a consideration, we routinely warn exporters of this.

3. *Have any orders made under the Export Control Act 2002 or Government decisions on licences (refusal, approvals or revocations) been subject to challenge in the courts? If there were, what was the outcome?*

The Government has not been challenged in court about any of the orders made under the Export Control Act 2002, or about any licensing decisions made since those orders came into force. The Government is currently subject to a Judicial Review application, but at this stage it would not be appropriate to provide further details in this document.

4. *During Commons Committee Stage of the Bill in July 2001 the Minister of State at the Department of Trade and Industry (Nigel Griffiths MP) said:*

> *The guidance referred to [. . .] in clause 8 [now section 9] [. . .] is guidance about announced policy, and about the way in which existing or future obligations concerning licensing decisions should best be carried out in furtherance of agreed policy. The consolidated [EU] criteria in themselves count as guidance [. . .] If there were to be changes to the criteria, the Government would announce them, and it would be for Parliament or parliamentary Committees to consider any changes in the usual*

way. Of course the Quadripartite Committee would have a role in scrutinising any changes with Ministers. Any other guidance issued under clause 8 could also be subject to parliamentary consideration in that way. (Debate in Standing Committee B on 19 July 2001 on Amdt no. 20)

Can the Government confirm the statement made by Mr Griffiths? What arrangements would the Government put in place to consult the Quadripartite Committee? For example, would the Government invite to the Quadripartite Committee to review and report within a specified time?

The Government can confirm that where new guidance about the exercise of licensing powers becomes necessary,—which would include, for example, any changes to the Consolidated EU and National Arms Export Licensing Criteria—this would be announced by the Government. It would then be open to Parliament or individual Members to ask Ministers questions about those changes following their announcement, and the Quadripartite Committee to do likewise, either as a specific response to the announcement, or as part of the Annual Report scrutiny process and linked evidence sessions.

5. *In its reply to the Quadripartite Committee's report on the draft bill, the Government said that "offences involving the transfer of technology within the UK are likely to be the responsibility of the territorial authorities" (Cm 5218, p 8). Please define territorial authorities.*

The territorial authorities in this instance would be the Police.

6. *The Committee requests an update of the tables on page 9 of the 2005 Annual Report on strategic export controls giving seizures for 2005–06 and successful prosecutions for the first nine months of 2006–07.*

Please see the update information below. If there are any further prosecutions this year, HMRC will provide details to the Committee.

Financial year	*HMRC seizures*
2000–01	120
2001–02	80
2002–03	67
2003–04	63
2004–05	37
2005–06	34

Financial year	*Goods*	*Destination*	*Person or company concerned*	*Penalty*
2000–01	Five-ton crane, a 12-ton heat furnace and a quantity of Aluminium	Pakistan	Abu Bakr Siddiqui	12 months suspended
2001–02				
2002–03				
2003–04	Aluminium	Pakistan	David Lee Nicklin of AM Castle & Co Ltd	£1,000 fine (strict liability offence)
2004–05	Aircraft parts	Iran	Saroosh Homayouni	18 months imprisonment suspended for two years; banned from being company director for 10 years; asset forfeiture order for £69,980.
	Body Armour	Pakistan	Praetorian Associates	£2,500 fine
2005–06	Body Armour	Kuwait, Iraq, Saudi Arabia	Vestguard UK Ltd	£10,000 fine
2006–07	Body Armour and Helmets	Kuwait and Iraq	Peace Keeper International Ltd	£10,000 plus £1,600 costs
2006–07	Military Helmets and Flak Jackets	Kuwait, for use in Iraq	Winchester Procurement Ltd	£8,000 plus £500 costs

7. *During the Export Control Bill's passage much debate focussed on the criteria which had to be met before extra-territoriality provisions could be incorporated in legislation. In 1996 the Home Office published a review of extra-territoriality jurisdiction—Review of policy on extra-territorial jurisdiction, 23 July 1996—which recommended that extension of jurisdiction to UK nationals could be considered in certain circumstances where at least one of six factors was present. Can the Government confirm whether the 1996 review still informs the Government's approach to extra-territoriality? What are the factors and considerations against which the Government will consider proposals to extend extra-territoriality?*

The report of the Interdepartmental Steering Committee reviewing the policy on the assumption of extra-territorial criminal jurisdiction, "Review of Extra-territorial Jurisdiction", published in 1996, concluded that the preferred approach was the development of a set of policy guidelines which would create a framework within which decisions as to whether or not legislation should have extra-territorial effect could be taken, once a particular need could be established. A set of six guidelines, were set out in the report. They are: where the offence is serious; where, by virtue of the nature of the offence, the witnesses and evidence necessary for the prosecution are likely to be available in UK territory; where there is international consensus that certain conduct is reprehensible and concerted action is needed involving the taking of extra-territorial jurisdiction; where the vulnerability of the victim makes it particularly important to be able to tackle instances of the offence; where it appears to be in the interests of the standing and reputation of the UK in the international community; and where there is a danger that offences would otherwise not be justiciable.

These guidelines were intended by the Committee to inform official consideration of proposals for extra-territorial criminal jurisdiction. They will inform the forthcoming 2007 review of export controls, but one in addition, when considering any proposals to extend extraterrirotial export controls, the government will have regard to other factors such as the likely effectiveness of assuming extra-territorial jurisdiction in addressing the perceived problem and any practical enforcement issues, including resource implications. Thus, the fact that an offence satisfies one or more of the six guidelines would not necessarily mean that the government will extend extraterritorial control in the relevant area.

8. *Have the prosecuting authorities used the extra-territorial powers provided under the Export Control Act 2002 to initiate any prosecutions? If they have, what was the outcome? What course of action would the prosecuting authorities take where a UK person abroad was committing an offence in a country from which extradition is, for all legal or practical purposes, impossible? Is the difficulty of enforcement of extra-territorial powers in any given country one of the criteria used in considering the grant of a licence in the first place?*

The extra-territorial powers provided under the Export Control Act 2002 have not been used to initiate any prosecutions. If a UK person abroad was committing an offence in a country from which extradition is, for all legal or practical purposes, impossible then, assuming that HMRC had managed to accumulate sufficient evidence to prosecute, and RCPO considered prosecution to be in the public interest, an arrest warrant would be issued. The arrest warrant would be available if the suspect came into any country where we had an extradition agreement. The difficulty of enforcing extra-territorial powers is not one of the criteria taken into consideration when considering an export licence application.

9. *During the Commons Committee Stage of the Bill the Minister of State at the Department of Trade and Industry (Mr Griffiths) said:*

> *[T]he Government consider the amendment [to license production overseas] unnecessary because the Bill already gives us effective powers. It provides for significant control over the practical means by which licensed production arrangements are established and maintained. Such arrangements typically depend on the company in the UK that licenses the manufacture of its products supplying component parts or production technologies to the overseas producer. Where the product is manufactured under licence and has a potential military end use, an export licence will, in most cases, be required before the equipment and technology necessary for the establishment and further operation of the licensed production facility can be supplied. (Debate in Standing Committee B on 18 October 2001 on NC no. 2)*

Can the Government explain how the arrangements to which Mr Griffiths drew attention have worked since 2004? Once a licence to export technology overseas has been granted, what control does the UK Government have over the production facility? Can the Government, for example, prevent the overseas facility selling equipment made in the plant to an irresponsible or objectionable parties?

The Government assesses all applications on a case by case basis. Where the Government has concerns about the transfer of equipment and/or technology for the establishment or ongoing supply of an overseas production facility, it can refuse an export licence application. If an application is approved, and subsequent information comes to light that casts doubt on its veracity or appropriateness, the licence can be revoked. Any subsequent application for the export of equipment and/or technology to the same end-user would have the new information factored into the assessment. Although the Government does not have jurisdiction over overseas subsidiaries of UK companies, other than where the extraterritorial provisions of UK export

controls apply, the rigorous assessment of both items related to initial set up and ongoing supply at the licensing stage, as outlined above, ensures that licences are only issued where they are consistent with the Consolidated EU and National Arms Export Licensing Criteria and other announced Government policy.

10. *To what extent, if at all, are tailored provisions inserted into licences to deal with concerns about the activities of a particular licensee? Could such provisions be used, for example, to dictate the terms of a licence granted by a UK company to an overseas company for the manufacture of products with a potential military end use? More generally it would assist the Quadripartite Committee if the Export Control Organisation could explain the extent to which it issues tailor-make licences, if at all.*

The ECO does, in a small number of applications, insert special provisos into licences. This happens where the ECO risk assessment of the end user and destination is satisfactory but certain steps need to be taken by the UK exporter to reduce specific risk elements, or protect the security of UK equipment before it reaches its destination. Provisos might then be inserted by the ECO to advise the exporter to, for example, remove sensitive elements of the equipment prior to export or ensure that the export moves through agreed routes and methods. The ECO will insert provisos only where they can be discharged by the UK exporter, and relate to events within that exporter's control. Provisos cannot be used where they can only be discharged by overseas entities.

Whilst this has not been done to date, there could be scope for using provisos to influence contractual arrangements between UK exporters and overseas customers. The difficulty here would be that whilst a proviso might ensure that the UK exporter drafted a contract in an acceptable way, it could not guarantee that the overseas customer adhered to the terms of that contract and so would not be a completely reliable way of ensuring that undesirable sales did not occur. The Government will however, consider the scope for using provisos in this way during the Government's forthcoming review of the Export Control Act 2002 and will invite contributions both from key stakeholders, and more widely during the course of the public consultation.

11. *How accurate were the predictions made in the Regulatory Impact Assessment that the effect of the legislation would be an additional 1,000 SIELs per year, an extra 100 OIELs and an additional 1,500 SITCLs?*

The number of additional SIELs and OIELs predicted by the RIA has not in fact materialised. This is due to a number of factors. Chiefly, SIELs and OIELs that already licensed the export of technology in a physical form at the time the new controls came into force, were automatically extended to cover the export of that technology electronically. Other measures, such as the introduction of new OGELs to cover, amongst other things, electronic transfers and personal use of technology overseas by employees of UK companies, also helped to reduce the number of new applications and ensure that the burden on UK businesses was proportionate. The number of SITCLs received since 2004 is also less than predicted, due mainly to use of the Open General Trade Control Licence (OGTCL). It is possible that industry's original estimates which influenced the RIA calculations, were based on the number of transactions to be brought under control, which, in the event, proved to be significantly less than the number of actual licences needed, due to the above proactive measures.

12. *Section 7(2)(b) of the Export Control Act 2002 provides that the Secretary of State may make an order which may "amend, repeal or revoke, or apply (with or without modifications) provisions of any Act or subordinate legislation". What limits apply to the exercise of the powers at section 7(2)(b)?*

Section 7(2)(b) applies to Orders imposing export, transfer, technical assistance and trade controls. Since the powers in section 7(2)(b) can be applied only in relation to these four themes, this applies practical limits to the subject matter where section 7(2)(b) can come into play. In addition, Orders imposing export, transfer, technical assistance and trade controls are subject to the normal parliamentary procedures, usually through negative resolution, although in some circumstances positive approval is required.

APPENDIX 1

FINALISED TERMS OF REFERENCE FOR THE ECA REVIEW 2007

SCOPE

1. To examine the secondary legislation introduced in 2004 as a result of the Export Control Act 2002[38] to determine:

- whether these new controls achieved their desired effect;
- whether the resulting impact upon business was proportionate and at an acceptable level; and
- whether any unintended or undesirable consequences—commercial or otherwise—have resulted.

[38] Whilst primary legislation under the Export Control Act 2002 is not the subject of this review, if a change is agreed which can only be effected through amending primary legislation, then this course of action will be followed.

2. To review the Government's administration and enforcement of the controls introduced under secondary legislation in 2004, and identify any administration and enforcement issues arising.

3. To determine whether any of these new controls should be extended, adapted, or abolished, taking account of evidence gained from the work carried out at points 1 and 2 above.

METHODOLOGY

The review will be conducted fully in accordance with Cabinet Office Better Regulation principles and will follow an evidence based approach.

Better Regulation principles

The changes to secondary legislation were introduced in 2004 in accordance with Cabinet Office Better Regulation principles, including a public consultation exercise and a Regulatory Impact Assessment.

The Final Regulatory Impact Assessment will be revisited during the course of this review, using information held within ECO, to confirm that its findings still hold good, and the conclusions of this internal work will form part of the consultation paper. Further evidence generated as a result of the public consultation exercise will be taken into account before final conclusions are reached on the impact of the secondary legislation introduced in 2004.

Similarly, the assessment of any proposals for new, extended, or altered controls will follow Cabinet Office Better Regulation principles, with the production of an initial Regulatory Impact Assessment, adequate public consultation, and a commitment to further review the impact of any necessary further changes to secondary legislation at a later date.

Evidence based approach

The key element of the Government's own internal assessment of the effectiveness of existing controls, will be the Government's evidence, (mostly gleaned from licensing statistics and other case-based information). Contributions to the review from other parties should similarly be based on firm evidence, consistent with the Government's commitment to evidence-based policy making and Better Regulation principles. In particular, requests to restrict, change or extend controls, or introduce entirely new ones, should be backed up by evidence of the scale or impact of the problem that needs solving and/or the business consequences of adopting any particular resolution method.

TIMETABLE

A public consultation will commence in May 2007, with the broad issue of a consultation document. The deadline for receipt of responses will be August 2007.

Autumn 2007 will be the period for evaluating responses and reporting back to Ministers, with recommendations for change as appropriate. The review will be completed by December 2007, by which time the Government will publish details of the actions it will take. Any legislative amendments will be subject to Post Implementation Review in accordance with Better Regulation principles as above.

November 2006

Further memorandum from the Export Control Organisation, Department of Trade and Industry

EXTRA-TERRITORIALITY

1. *How does the Government propose to measure the effectiveness of the extra-territoriality controls since 2004?*

In accordance with the agreed Terms of Reference for the Government's forthcoming review, the Government will measure the effectiveness of the extra-territorial controls by looking at three key factors; (i) the extent to which the controls achieved their desired effect; (ii) their impact upon businesses operating them; and (iii) the extent to which difficulties were encountered in administering or enforcing them. Evidence for the first factor will include the number of licence applications, number and nature of any refusals, and any other evidence about behavioural change caused by these new controls (eg business being refused by UK entities because it could breach these extra-territorial controls). Evidence for the second factor will include, where available, the costs to business both in terms of money and staff time, of instituting new procedures and then ongoing administration, training and record-keeping costs. Evidence for the third factor will be sought from the UK licensing and enforcement authorities.

2. *How many UK nationals resident abroad have applied for, and how many have been granted, trade control licences?*

Three UK nationals working overseas have applied for trade control licences. In one case ECO determined that no licence was necessary. Licences were issued to the two other applicants. In total, 1 OITCL and 3 SITCLs have been issued.

3. *On 3 April 2003, the Secretary of State for Trade and Industry, then Patricia Hewitt, stated that, "[The Americans] do have extraterritorial controls on trafficking and brokering in everything, in all military equipment. We have had a look at it and our judgment is that it simply does not work. As far as I know there has not been a single successful prosecution under the American brokering law either for brokering offences carried out within the United States or for offences carried out overseas." She went on to say that she was not interested in laws which look good on paper, but wanted a law which would "actually have some practical effects." (HC (2002–03) 620, Q107) The Committee heard from EGAD that "it is extraordinarily difficult (or even impossible) to bring successful extraterritorial prosecutions". (QM14) In the light of these comments, how does the Government justify the continued use of extra-territorial controls, particularly in relation to brokering and trafficking?*

The Committee has here drawn attention to one of the most difficult issues that is going to confront the Government in the course of the forthcoming review. The Government has always adopted a cautious approach towards the imposition of extra-territorial controls, reflecting the sentiments expressed above by the then Secretary of State for Trade and Industry. That is why extra-territorial controls have been introduced in a strictly defined range of circumstances, usually when the activity to which they relate could never be regarded as in any way acceptable to the Government—for example, the supply of weapons to embargoed destinations, the supply of torture goods, or provision of assistance to Weapons of Mass Destruction programmes. In these limited circumstances, it has been judged that the difficulties inherent in enforcing such controls were outweighed by the need to create a legal framework that enables the Government to refuse to sanction UK involvement and perhaps, to deter UK citizens who might be considering becoming involved.

Whilst numbers are small, experience has shown that the UK has been able to prevent some undesirable activities taking place as a result of the imposition of these controls. Whether this is sufficient to justify the retention of these extra-territorial controls, and whether convincing evidence can be produced to support arguments for extra-territorial controls to be extended into broader areas, will be key issues for the Government's forthcoming review.

4. *The operation of extra-territorial controls must involve some degree of cooperation with third countries. Likewise, to the extent that third countries, notably the United States, also operate extra-territorial controls, they must also require a degree of assistance from time to time. Will you elaborate on the type of cooperation with third countries necessary in order to investigate and enforce extra-territorial controls? Will you also detail the types of assistance the UK gives to third countries such as the United States in relation to the administration of their domestic regimes?*

Third countries' control regimes, and their enforcement, are a matter for the administrations of those countries. The Government does not assist in the enforcement or prosecution of those countries' extra-territorial controls, but will take action under the relevant UK legislation if information provided by the third country demonstrates that actions taken in the UK have also led to a breach of UK export controls Co-operation with other countries in the broader area of export control is however, strong, and takes place on a number of levels. The Government provides general advice and guidance to countries in shaping their control regimes, through its international outreach programme, and works closely with a number of other countries on general counter-proliferation issues.

On the enforcement side, HM Revenue and Customs regularly co-operates with law enforcement agencies in other countries for the purposes of sharing and gathering information. Where activities are internationally condemned, for example breaches of UN Sanctions, cooperation can generally be expected from foreign Governments and enforcement agencies. This is normal practice within the law enforcement community in areas where there is commonality of enforcement objectives.

General information sharing, with a view to gathering information to help identify breaches, is usually carried out under Mutual Administrative Assistance (MAA) agreements or Memorandum of Understanding arrangements. This might involve requesting information from a company in another country or looking into particular transactions of concern. HMRC regularly provides assistance in relation to US requests under such agreements, in order to assist with the enforcement of strategic export controls

Request for information in respect of alleged offences, where prosecution may result would usually be carried out under Mutual Legal Assistance Treaties (MLATs). Such requests might, for example, involve executing a search warrant or summonsing a witness in another country. Other countries would provide information to HMRC , only by consent and there would be a general expectation from the recipient country that HMRC's requests should relate to a type of activity that would also constitute an offence in their own

country. If the activity was carried out legally in accordance with the laws of the country concerned, HMRC could not expect to be given the required assistance. This would be a consideration when considering any further extension of UK extra-territorial controls.

5. *EGAD have argued that there may be cases where an individual may find himself in breach of US extra-territorial provisions if he does not take a certain course of action and in breach of the laws of the UK if he does. (QM14) Have there been any conflicts between domestic legal provisions on the one hand and the operation of extra-territorial controls of third countries on persons or circumstances occurring within the UK on the other? If so, how was the conflict resolved? If not, what is the Government's view on how such a conflict would be resolved?*

The Government is not aware of any conflicts between UK and third country legislation. As set out above, the Government does not directly assist in the enforcement or prosecution of third countries' extra-territorial controls. In complying with the extra-territorial controls of third countries, UK companies, may consider that such a conflict arises in practice. The Government does not however, involve itself in resolving these perceived conflicts.

In the context of the forthcoming review though, and any potential further extension of UK extra-territorial controls, the Government will certainly be interested in evidence from industry and others on these issues and will need to consider in particular, whether the UK extra-territorial controls that are currently in force have placed UK citizens overseas in unacceptable positions. The Government will seek specific evidence on these points.

6. *In its recent evidence to the Quadripartite Committee EGAD stated that "the trade controls which encompass an extraterritorial dimension do [. . .] act as a potential discriminator against the employment of UK nationals by firms overseas" (QM14). The Committee would welcome the Government's response on EGAD's assertion? In addition, was it the Government's intention in framing the legislation to apply the control regime to a UK national working abroad in the example quoted by EGAD?*

When framing the extra-territorial controls that were introduced in 2004, it was the Government's intention to control the extra-territorial activities of UK citizens where they were related to the supply of a strictly defined range of goods or services. We suspect that few would argue against the principle of controlling overseas activities by UK citizens that would facilitate the supply of torture goods, WMD or of military equipment supplied to embargoed destinations (notwithstanding the practical difficulties referred to above). However, because they control acts related to the supply of the whole range of Restricted Goods" as defined by the legislation,, these extra-territorial controls currently encompass the supply of other goods, such as long range missiles and unmanned air vehicles. The example quoted by EGAD refers to long range missiles and does raise valid questions about what equipment should fall within the Restricted Goods definition.

7. *What ancillary services—such as transport and financial services—have been brought within export control? How are the controls enforced? How many breaches have been subject to prosecution or sanction such as a warning letter?*

Ancillary services have been brought within export controls only where those services are provided in relation to restricted goods or to the supply of controlled goods to an embargoed destination. Such services are specifically exempted from controls when provided in relation to other controlled goods. The legislation lists these ancillary services as:

(a) Transportation services.

(b) Financing or financial services.

(c) Insurance or reinsurance services.

(d) General advertising services.

Thus, services that fall under these four categories are subject to control only when provided in relation to restricted goods or the supply of controlled goods to embargoed destinations.

There have been no HMRC prosecutions of transport companies or finance companies in relation to strategic export controls and neither has HMRC issued any formal warning letters to transport companies or finance companies. However, if, during the course of an investigation, it were found that a UK transport company or finance company had committed an offence, HMRC would take appropriate action, up to and including reporting the case to the Revenue and Customs Prosecutions Office.

8. *The Working Group on Arms in its evidence to the Committee suggested an additional category of goods to which some extra-territorial controls could apply (QM15, para 13). The new category would cover small arms and light weapons. Does the Government envisage any practical problems in applying the extra-territorial controls to an additional category of goods?*

As indicated in our answer to question 3, there will always be some degree of practical difficulty in applying UK export controls extra-territorially and so arguments for further extension need very careful and cautious evaluation. That however, does not mean that we should rule out further extensions; it is a question of striking the correct balance. We will be certainly be giving the suggestion from the Working Group on Arms serious consideration.

Transit and Transhipment

9. *In its evidence to the Committee the Working Group on Arms stated that "the current licensing requirements regarding transit and transhipment of controlled goods are extremely confusing, to the point where industry itself is not clear as to its obligations. Even the use of the terms 'transit' and 'transhipment' is confusing, and may not tally with usage by the World Customs Organisation, of which the UK is a member". (QM15, para 32, and see also paras 33 and 34) The Committee requests the Government's comments on the Working Group's assertion.*

The Government is not aware of any significant practical difficulties that are faced by UK exporters in these areas, but will of course be interested in any evidence that industry and others might put forward during the course of the forthcoming public consultation. However, in the course of its preparatory work, the Export Control Organisation has noted a few areas where some legal tidying up work might be of value in making the intention of the controls clearer and will consider this point in the same light.

Enforcement

10. *EGAD was challenged to provide evidence that there really was a large amount of non-compliance—either deliberate or inadvertent—taking place. In its recent submission EGAD assured "the Committee that, through our contacts within Industry, especially with those who are involved and seek advice when they become aware that export controls do, in fact, affect their activities, we do, indeed, KNOW that this is happening" but EGAD was precluded by confidentiality from supplying detailed evidence. (QM14) The Committee may raise the matter with HM Revenue and Customs but would welcome DTI's view on EGAD's assertion and how it can be tested?*

As with any illegal activity, scientific quantification of the extent of non-compliance would be impossible and any attempt to do so would be extremely resource intensive. The Government believes that the principle weapon in the fight to improve compliance, is, on the one hand, working with industry to improve awareness and on the other, a robust compliance auditing regime. A good deal of effort has already gone into this, and this is continuing, but the Export Control Organisation is open minded about suggestions to improve awareness activity or focus it specifically on identified problem areas.

Crown Exemption

11. *Does the Government apply the EU Code to government-to-government transfers?*

All forms of government-to-government transfers are subject to rigorous examination against the Consolidated EU and National Arms Export Licensing Criteria before being approved.

Where the transfer of ownership of surplus goods sold to overseas governments takes place in the UK, the purchasing government is required to obtain a UK export licence before collection. Disposal sales are also made through UK contractors who, if they sell to overseas customers, are required to apply for export licences in the normal way. There are a small number of Government-to-Government supply agreements. Under these arrangements goods are supplied through UK contractors and exported under export licence. In all the above circumstances, export licence applications are required and are assessed on a case-by-case basis against the Consolidated Criteria.

Government-to-Government transfers also include military items handed over by the UK as gifts. Such transfers are assessed in accordance with the F680 process administered by the Ministry of Defence, in consultation with Other Government Departments, particularly the Foreign and Commonwealth Office. F680 applications are considered case-by-case against the Consolidated Criteria.

12. *Has the use of Crown exemption been raised in the EU working group COARM?*

This issue has not been raised at COARM.

13. *Are there any practical difficulties in ending Crown exemption from export control?*

There would be significant practical difficulties. We invoke Crown immunity where the Government has ownership or right of disposal over items that are required to be transferred overseas both for its own use, and for certain transfers to other Governments being made as gifts. Where items of military equipment are gifted by the Government this is subject to assessment in accordance with the F680 process as set out above, and such gifts are reported in the Annual Report on Strategic Export Controls. The Ministry of Defence, including UK Armed Forces, transfers its military equipment overseas for its own use, including for operations and training, the transfer of which without Crown immunity would otherwise be subject to export control. The Committee will appreciate that these are not transfers in the normal sense of the word, since the equipment remains in the possession and under the control of the UK authorities. Licensing, including consultation with Other Government Departments which is the bedrock of the assessment of export licence applications, or the reporting of such transfers**,** would not add any value in these circumstances.

Export Control Organisation

14. *When it gave evidence to the Committee on 7 December EGAD was critical of the changes to the Export Control Organisation's website (Q 34). How does the department respond to EGAD's criticism?*

ECO is aware that a number of people have found the ECO section of the DTI's Website difficult to navigate. We are working with those responsible for the DTI Website to try to address these criticisms.

UK Subsidiaries Overseas

15. *When EGAD gave evidence last session it told the Committee that "that the present licensing control regime discourages licensed production overseas" and that "the licensing regime makes the transfer of technology to do that more difficult and imposes controls on it". EGAD pointed out that "one of the things that the Export Control Organisation examines when asked to give a licence for overseas production is what the likely end-use is going to be of whatever it is that is produced overseas" (HC (2005–06) 873, para 198). The Committee requests the department's comments on EGAD's evidence and, if it concurs with EGAD's description, an indication of the assessments which the Export Control Organisation makes about the operation of a recipient county's export control system and the end-use to which goods manufactured overseas may be put. It would be of assistance to see an example of an application and the Government's assessment, under the usual classification.*

When they apply for a licence to export controlled goods or technology, exporters are expected to place all relevant facts before the Export Control Organisation. Where it is apparent that the export will pass through one end user on its way to another destination, or will be used by the initial end user to make controlled goods that will then be re-exported, the Government will need to consider the risks posed by both the initial end user and any known or potential end users after that. A more extended risk assessment is therefore necessary in these cases than in many others and ECO may need to contact the exporter to establish the details of onward supplies more fully.

In the context of overseas production, the Government would wish to examine any risks posed by the known or potential end users of the licensed goods that will be produced overseas (ie whether they are likely to use the licensed goods in ways that might breach the Consolidated EU and National Arms Export Licensing Criteria), plus, more generally to consider the extent to which the country hosting the licensed production has any links with countries or programmes of concern or represents a risk of onward diversion. The Government therefore concurs that "what the likely end use is going to be of whatever it is that is produced overseas" is examined as part of the risk assessment process involved in granting or refusing a licence.

The Government does not however, accept that this extended risk assessment places excessive burdens upon the exporter, but that they reflect the wider issues associated with licensed production. It would be perverse to deny the export of licensed goods to end users or destinations of concern, whilst at the same time allowing to proceed unfettered, exports of technology that would enable the same goods to be produced to achieve the same end result.

The Government will seek to provide the Committee with a case example, but this may prove difficult since the historical database does not specifically identify licences granted in connection with licensed production overseas.

16. *In the view of the Government does the Export Control Act 2002 provide that, for the purposes of export controls, the actions of foreign companies in which UK persons have a controlling interest could be deemed to be the actions of those UK persons and, accordingly, made subject to the same restrictions as they would be if they were acting as principal?*

Where a UK company or national controls a foreign company that acts overseas, trade (NB: not export) controls can be imposed in relation to the acts of that company (see section 4(8)).

17. *It has been suggested that governments should also introduce a system for controlling re-exports of major components once they have been incorporated into military or security equipment. The US system has been cited as model under which, for a specific list of "friendly" countries, the re-exporting country is only required to notify the US government of any re-export within 30 days of the export taking place but for all other destinations, any re-export requires an additional export licence from the US government. The Committee would welcome the Government's assessment of the practicalities of running such a control regime.*

The Government is not convinced of the merits of extending UK controls so as to duplicate the export controls of other nations, thus subjecting overseas customers to the need to get approval from two licensing authorities for the same transaction. We take account of known subsequent supplies when we initially assess the application to export goods or technology from the UK (see answer 15 above). Where those subsequent supplies would, in our view, be likely to result in breach of the Consolidated EU and National Arms Export Licensing Criteria, we will not issue a licence. We believe that system is both simpler and more effective.

Controls on Chemical, Biological, Radiological or Nuclear (CBRN) Materials

18. *Have research institutions and funding agencies adequate arrangements in place for the reviewing of research projects to ensure that the risks of misuse are assessed and precautions taken to prevent misuse for the development of WMD?*

19. *Are there national guidelines and codes of practice for scientists operating in areas which could be used for the development of WMD? Is the Government content with the codes and guidelines, and with their operation?*

20. *What outreach does the Government carry out to researchers to ensure they are aware of their legal and ethical responsibilities about the publication or transfer of information that could be used for WMD?*

21. *What assessment has the Government made of the need for, and operation of, a system of accreditation for scientific researchers?*

22. *Has the Government reviewed research papers or vetted students?*

23. *Has the Government prevented or delayed the publication of, or persuaded a researcher not to publish, any research which could be used for WMD? Please give details of the instances.*

Questions 18 to 23 are all addressing the issue of the impact of the new controls upon academic activity and the steps taken by the government to raise awareness of these new controls amongst that community. It would therefore probably of more assistance to the Committee if the Government answers all these questions together.

In the run up to the introduction of the new controls in 2004, the Export Control Organisation (ECO) consulted representative bodies for the academic community. Following these consultations, ECO placed extensive guidance on its Website. Titled, "Guidance on the Export Control Act for academics and researchers in the UK", this guidance is specifically tailored to the concerns of the academic community and includes a number of case examples to illustrate how the new controls impact upon activities that they regularly undertake.

"Universities UK", a body representing the interests of UK universities, is a standing member of the Export Control Advisory Committee, (ECAC) a grouping co-ordinated by ECO to bring together trade associations or other bodies who are subject to UK export licensing regulations. ECAC provides a forum for discussing export control issues or raising matters of concern. Representatives of academia have attended ECAC meetings on a number of occasions. ECO has also undertaken a number of compliance visits to higher education establishments and has given presentations about the new controls to academic audiences. This awareness effort has been supplemented by awareness-raising efforts from within the academic community.

As part of the preparations for the forthcoming review of export controls, ECO has already been in touch with a selection of academics and has arranged to meet them in February. This meeting is primarily to seek their views on the impact and effectiveness of the 2004 controls, but we will also discuss current levels of awareness and what efforts both Government and academia could take to enhance export control awareness.

Whilst in principle, all export controls apply to academia in the same way as they apply to any other person or entity subject to them, in practice, the main area of concern has been the potential transfer of technology that may be of use in Weapons of Mass Destruction programmes of concern. Controls apply where the academic or researcher has been informed by the Government that such a transfer is intended for a relevant WMD-related use, or is aware that it is so intended, and may be used outside the EC. As such, the controls are triggered more by the recipient of the technology and the intended use, rather than by the intrinsic nature of that technology. For these reasons, vetting of individual research papers or publications is not part of the Government's strategy for enforcing controls in this area.

The Government instead follows a two pronged strategy. The first line of defence against unwelcome transfers of technology is to prevent students of concern attending courses where such technology might be imparted. Historically, this has been achieved by way of the Voluntary Vetting Scheme, but this is soon to be replaced by a more comprehensive, compulsory scheme known as ATAS (Academic Technology Approval

Scheme). Under this pre-Visa scheme, which will be run by the Foreign and Commonwealth Office, all non-EU students intending to undertake PhD and Masters research in specific areas (broadly Maths, Engineering, Physics, Chemistry, Biology and Computing) will need to apply for an ATAS certificate. The application will be rigorously risk assessed and a clearance certificate either granted or refused. Until the student possesses the certificate they will not be able to apply for a student visa or extension. The Government then sees export controls as a second line of defence, with the awareness effort as its key tool. A good deal of awareness raising with academics has already taken place, as set out above, but the Government is by no means complacent and will consider whether its efforts can be expanded or improved in the light of our forthcoming discussions with the academic community.

24. *EGAD stated in its evidence to the Committee that "there are still some areas of uncertainty within the trade controls legislation" which need to be addressed. EGAD pointed out that while the Export Control Organisation stated that the transfer of software and technology was not controlled as such under the trade controls, the transfer of technology can be caught, where this was related to "restricted goods" or "embargoed destinations", as the provision of technology could be construed as "an act calculated to promote" a trade deal. (QM14) What is the Government's view of EGAD's analysis?*

EGAD's analysis is correct. The trafficking and brokering of technology is not subject to export controls. But where technology is not the subject of the export itself, but is used by a UK concern as a medium, to promote the trafficking and brokering of restricted goods or of controlled goods to embargoed destinations, that act of promotion is controlled, whether it is done by the provision of technology or by any other means. A theoretical example of when this might happen would be when an exhibitor attending a trade fair in the hope of cultivating customers for Restricted Goods (say Unmanned Air Vehicles) might feel that it was necessary to display technology relating to those goods in a more professional manner. The exhibitor might therefore ask a software house to produce an interactive display package. In doing so, the exhibitor would pass, to the software house, technology in hard copy form and receive back, technology in the form of an interactive display package. In this instance, technology has been used as a medium to promote, on behalf of the exhibitor, the potential sale of Restricted Goods and so the provision of it to that exhibitor would be subject to export control.

Although this is an area that is somewhat more difficult to explain than others, the Government thinks that it is clear when the controls apply. We are not aware that UK companies are encountering significant difficulties in this area, but will of course look seriously at any evidence that is put forward during the forthcoming public consultation. We will also consider whether current guidance adequately explains this distinction and take steps to clarify it further if necessary.

25. *To what extent, if at all, does the Government consider that transfers of technology are covered by trade controls? The Committee should appreciate any examples which might illustrate this issue.*

Technology is controlled where it relates to the export from the UK of goods that are controlled for strategic purposes, and, in the context of Weapons of Mass Destruction programmes, under the provisions of the Export of Goods, Transfer of Technology and Provision of Technical Assistance Order 2003. This Order controls the transfer of software or technology by any person in the UK, or by any UK person overseas, where that person is aware, or has been informed that the technology may be used in support of a Weapons of Mass Destruction programme of concern outside the EU.

Dual-Use

26. *At its meeting on 7 December 2006 the Quadripartite Committee received evidence supporting the extension of "catch-all" provisions from WMD to dual-use items with a military end-use and to items used for torture. The Committee would be grateful for the Government's views on two aspects of such a control. First, catch-all brings within control specific goods which the Government has notified should not be exported. What evaluation has the Government made of the effectiveness of such a control if applied to dual-use goods used for a military purpose and to items used for torture? Second, there is a requirement for a degree diligence on the exporter. What level of diligence does the Government expect from an exporter for items that could be used for WMD? In the Government's view could a similar level of diligence be applied if catch-all were to be extended?*

The Committee has again highlighted one of the key issues for the Government's forthcoming review. As with many other issues, it will undoubtedly be difficult to balance the need to stop inherently undesirable activities with the need to do so in a practical and enforceable way and without imposing unreasonable burdens.

Exporters have a legal obligation to contact the Export Control Organisation if they know or suspect that their export will be used in connection with a Weapons of Mass Destruction programme or associated WMD delivery systems. The ECO Website provides extensive guidance to exporters, highlighting a number of factors that could reasonably raise the exporter's suspicions. Whether the same practices could be

mirrored if catch all provisions were extended to new areas will be one of the factors in which evidence is specifically sought by the Government in the course of the forthcoming review and will form part of the evaluation at the end of that process.

27. *On dual-use does the Government envisage any practical problems with a threshold system as operated by the USA?*

The Government's stance is as set out in the response to Question 17.

UNINTENDED CONSEQUENCES

28. *In its evidence to the Committee EGAD stated that companies in those areas where the broadest possible level of control has been sought such as the Chemical Biological Radiological and Nuclear sector, and dealing with "Restricted Goods" have encountered compliance issues which we do not believe had been foreseen or intended. EGAD cited the requirement on Jane's Information Group "to apply for trade control licences for the production of its publications, where they are carrying advertising for 'restricted goods', or for companies to have to have export control compliance coverage in place for submitting CBRN-related technical information to our own Armed Forces (and blue light services) here in the UK, prior to contract signature, cannot have been foreseen or identified as having been amongst those proliferation threats which needed to be brought under control, as aspirations for the new legislation by HMG". (QM14) Does the Government agree with EGAD's assertion?*

The Government sees two separate issues here.

The Jane's Information Group example raises questions about the coverage of Restricted Goods (see answer to question 6 above) and about whether the legal provisions relating to restricted goods are perhaps overzealous in bringing within export controls, general advertising services such as those provided by Jane's. The Government is open minded about both these issues; we will continue to work with stakeholders to identify possible solutions and will look very carefully at the evidence that is brought before us as a result of the forthcoming public consultation.

The CBRN equipment issue is somewhat different. In recent months, the Export Control Organisation has been working very closely with EGAD to review the current coverage of OGELs. A number of alterations to OGEL coverage have been agreed in principle, and the necessary drafting work is now being undertaken with a view to releasing a package of OGEL changes within the next two months. Part of that package will be an extension to the Government and NATO End Use OGEL, so as to allow that OGEL to be used for supplies of the listed goods and technology where they are for detection and identification purposes. In this way, OGEL coverage for supplies by the CBRN equipment industry—which whilst related to WMD are by definition, not of concern—will become available. The Government believes that this will in large part deal with the concerns raised above.

December 2006

Further memorandum from the Export Control Organisation, Department of Trade and Industry

Quarterly Report for: (i) January to March 2006; and April to June 2006; and Annual Report of 2006

3. *Details of the three revocations. Is the Government aware whether UK companies have had to pay compensation because of a breach of a contract?*

The three SIEL revocations reported as having been made in the Quarterly Report for the second calendar quarter of 2006, covered goods that, following the introduction of the EU Torture Regulation, were no longer covered by the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, but were instead covered by Council Regulation (EC) No 1236/2005 of 27 June 2005, as implemented by the Export Control (Security and para-military Goods) Order 2006 and The Technical Assistance Control Regulations 2006. Two of the licenses were subsequently reissued under the new legislation and the third was no longer required by the exporter. Thus, these were all "technical" revocations which did not prevent any exports taking place, None would have given rise to any breach of contract.

It also transpires that these revocations should have been recorded as having appeared at the beginning of the third quarter rather that the end of the second. Our report on the third quarter will cover any other revocations in that quarter.

15. *How many OIELs with terms of five years or longer were issued in 2005 and 2006?*

Of a total of 503 OIELs issued between 1 January and 31 December 2005, 336 have a validity period of five years or longer. For the period 1 January 2006–30 November 2006, 399 OIELs were issued of which 347 have a validity of five years or longer. OIELs are usually issued for five years, but ECO will consider issuing

them for shorter or longer periods depending on the circumstances. OIELs of any validity period will only be issued following careful assessment and if consistent with the criteria. HMG keeps its export licensing decisions under review, for example in the light of changing circumstances, and our advisory Department carry out a review once a year of extant OIELs to determine if their original advice to DTI is still current. OIELs can be revoked or amended at any time.

23. *Has the Export Control Organisation a business place for the next 2–3 years? If it does, please supply a copy.*

Please find attached ECO's Business Plan for the 2006–07 financial year. [not printed]

January 2006

Further memorandum from the Department of Trade and Industry

Thank you for your recent letter following up the issues raised at the Westminster Hall Debate on Strategic Export Controls, held on Thursday 22 February 2007. The response below covers the areas where Jim Fitzpatrick MP, Parliamentary Under Secretary of State for Employment Relations and Postal Services agreed to respond.

This response is structured so to provide at points 1–5 below, a short summary of the main issues raised by the relevant Committee Member under each key theme and the Government's response.

1. Refused Export Control Licences to Israel

Sir John Stanley asked the Government to provide the Committee with examples of equipment for which it has refused to grant export licences to Israel.

DTI's Export Control Organisation ("ECO") provides the Committee with information relating to refusals, including those for Israel, on a quarterly basis, along with information on incorporation. This is passed to the Committee via the Foreign and Commonwealth Office on a CD.

For ease of reference, I have created a separate spreadsheet at Annex A [not printed], which provides specific details of Israel export licence refusals to end September 2006. Please note that any refusals that occurred between October and December 2006 will be detailed in the Quarterly report for October to December 2006, which is due to be published at the end of March 2007.

2. Cluster Munitions

Sir John Stanley MP asked a number of questions regarding cluster munitions. As the Minister made clear during the debate, cluster munitions are primarily the responsibility of the Ministry of Defence; DTI involvement would be in the context of export control related matters. The following input has therefore been provided by Ministry of Defence colleagues.

Sir John asked firstly whether, since responding to a Parliamentary Question on cluster munitions on 31 January 2005, there had been any change in the Government's knowledge of UK companies manufacturing cluster munitions for export; and if the Government is presently aware of any UK companies that are actually manufacturing cluster munitions, whether components or complete items, for export.

The position has not changed since the answer given on 31 January 2005. The Ministry of Defence is not aware of any UK company manufacturing cluster munitions for export since 1998.

Sir John also asked whether the Government still considered it appropriate to provide financial support through contracts to the Israeli cluster bomb manufacturing industry.

Further to the answer given by Adam Ingram on 17 November 2003 (Official Report, Col 497W), the contract to which that answer refers had been awarded by MOD to BAE Systems and was completed in 2004. Israeli Military Industries (IMI) acted as a sub-contractor to the main contract. Since 2004 IMI has on occasion, when requested, provided to MOD expert advice only, during routine maintenance checks of remaining stocks.

Finally, Sir John asked why it would take until 2015 to withdraw dumb cluster bombs from the British Armed Forces inventory and, in light of incidents in Lebanon, whether the Government would consider accelerating this phasing out.

The Ministry of Defence is currently considering this question and will respond directly to you shortly.

3. Criterion 8 Methodology

Dr Roger Berry MP, Chair of the Committee, requested details of the methodology for applying Criterion 8, the reasons for the disparity between the UK and France in the number of refusals using Criterion 8 and whether the UK had approved any exports that were previously denied by France on Criterion 8 grounds.

Details of the methodology for applying Criterion 8 were passed to the Committee in confidence by Gareth Thomas MP, Parliamentary Under-Secretary of State for International Development, at the Committee's evidence session on 1 March 2007. Mr Thomas also advised the Committee that further information would be provided in writing by the Department for International Development. Mr Thomas also explained at the evidence session that the reason for the disparity between the UK and French use of Criterion 8 was a "difference between the ways in which Criterion 8 is interpreted in some countries." Further information about this will be provided in writing by DFID to the Committee in confidence.

The DTI is currently preparing a response to a letter from Dr Roger Berry MP, Chair of the Committee, dated 7 February 2007, in which the issue of the disparity is raised and information relating to French refusals and any UK undercuts is requested. The DTI and DFID will be working closely together to ensure that the response provides as much detail as possible.

4. Arms Trade Treaty

Tobias Ellwood MP asked the Minister a number of questions relating to the international arms trade treaty, including the potential for UK export controls to act as a model for an arms trade treaty; the Government's reaction to those States that refuse to sign any treaty; what discussions the Government has had with other key States and how concerns on the China embargo will manifest themselves as negotiations proceed.

In responding to these issues, we have received advice from the FCO.

The Government is committed to securing a legally binding treaty on the trade in all conventional arms. As we have made clear before, we want a treaty that will make a real difference and stop arms being sold which will be used by human rights abusers or fuel conflict. To make sure a treaty is properly implemented we envisage it including an effective mechanism for enforcement and monitoring.

This is an ambitious project and there is a long way to go, but in December 2006 153 countries voted for the UN process that is now just starting to get underway. This is a good start. But to have the impact we are looking for a treaty will have to be global, and will in particular need to include all of the major arms producers. That is why we are working to build support generally, and why we are actively working to encourage those major manufacturers who did not vote for the start of a UN process, including the US, Russia and China, to engage positively as discussions move forward.

The China arms embargo was also raised in the context of an Arms Trade Treaty. There is no read-across between the embargo and encouraging China to engage positively on the ATT initiative. A cross-Whitehall team are proposing to travel to China in the near future to have formal discussions with Chinese Government officials to explain the case for the ATT, and encourage them to engage.

5. Debate in Parliament on the Result of the Review of Export Controls

Tobias Ellwood MP asked whether the result of the forthcoming review of UK export controls could be debated on the Floor of the House rather than in Committee in order that more Members would be able to participate.

As the Minister made clear, this suggestion will be communicated through the usual channels and we will advise the Committee of the outcome as soon as we are able to do so.

I hope that the responses above have covered the points raised by the Committee at the debate. Should you have any other concerns or questions, please do not hesitate to contact me.

March 2007

Memorandum from the Ministry of Defence

1. The Committee has requested a memorandum from the MoD, further to the one supplied on 11 July 2006, setting out the extent and nature of the investigations that it undertook to test the accuracy of allegations made in 2003 and 2006 concerning bribery in connection with UK defence exports.

2. The allegations made in *the Guardian* newspaper in 2003 centred on an obsolete provision in the MoD Contracts Manual in the version then published on the internet. The newspaper also drew on Government files from the 1960s available in the National Archives. To assess those allegations searches were made of available departmental files with a bearing on the issues raised, and certain files in the National Archives were examined, including those on which it appeared *the Guardian* had drawn.

3. Research in departmental files sought to establish when the provision concerning special commissions in the Contracts Manual had been in force, the context in which it had been applied, and when its relevance had ceased. This entailed searches for surviving records of policy and practice on the employment of agents and payment of commissions. These searches went back to the 1970s, and also referred to a PAC Report from the 1980–81 session incorporating MOD evidence. The searches identified directives issued by the Permanent Under Secretary to the Head of Defence Sales in 1976 and 1977, setting out the policy to be followed. Paragraph 4 of the memorandum sent to the Committee in 2003 reflected the terms of these directives. The same paragraph also reflected the work to establish the basis on which a revised directive was issued in 1994.

4. The 2003 memorandum also rested on:

— findings from the research in the National Archives, for details supplied in paragraph 7;

— investigations, reported in paragraph 8, concerned with establishing the availability of evidence from a corruption trial in 1977, to which *the Guardian* allegations also referred; and

— checks on the applicability of UK laws concerning bribery to UK civil servants when serving overseas, before the coming into force of legislation enacted in 2001. The findings on this point were reflected in paragraph 6, in response to the Committee's specific question on the effect of this legislation.

5. Turning to the allegations made this year, having studied these the Department concluded that the issues raised were not sufficiently different to bear further detailed investigations. The documentary evidence for which references were given in the memorandum supplied to the Committee by the Campaign Against the Arms Trade (CAAT) is from the 1960s and 1970s. The recollections of Lords Gilmour and Healey, reported in the media, referred to the same period. The work on the allegations made in 2003 had underlined the many practical difficulties involved in establishing a reliable picture of practices over thirty years ago. The Department remains clear that its interpretation of the evidence on which its 2003 memorandum was based has not been put in question by the memorandum from CAAT, or the other allegations to which the Committee drew attention.

November 2006

Further memorandum from the Ministry of Defence

The response below covers an issue raised during the Westminster Hall Debate on Strategic Export Controls, held on 22 February 2007 and referred to in DTI's reply to you on 14 March on the same subject.

Sir John Stanley asked why it would take until 2015 to withdraw dumb cluster bombs from the British Armed Forces inventory and, in light of incidents in Lebanon, whether the Government would consider accelerating this phasing out.

On 4 December 2006 we stated in a Written Ministerial Statement the UK position on cluster munitions and that we would withdraw dumb variants by the middle of the next decade. On 15 December, in debate in the House of Lords, we explained that we were examining the possibility of bringing this date forward. We have now completed our assessment and, as we stated in a Written Ministerial Statement on 20 March 2007, we will now withdraw our dumb cluster munition variants with immediate effect.

March 2007

Memorandum from the Sentencing Guidelines Council

Review of Guidelines on Sentences for Breaches of Export Control

I refer to your letter of 3 August 2006 enclosing a copy of the Committee's report.

At its meeting on 6 October, the Sentencing Guidelines Council discussed the Committees' recommendation that it "conduct a review of the guidelines on sentences for breaches of export control as a priority". The Council already has a very full work programme for 2006–07 and, after careful consideration, decided that sentencing for breaches of export control could not be accommodated within this, particularly in view of the relatively small number of cases involved. The Council agreed, however, to consider the issue again when it determines its work programme for 2007–08.

October 2006

Memorandum from the Chief Secretary, Isle of Man Government

Thank you for your letter by email of 1 November 2006 advising us of the terms of reference of an inquiry into Strategic Export Controls: Post Legislative Scrutiny and inviting the Isle of Man Government to comment if it so wishes to do.

In responding it is perhaps helpful at the outset to clarify the position of the Island *vis á vis* export controls in general, and in particular the role played by Isle of Man Treasury and the Customs and Excise Division.

The Export Control Act 2002 of Parliament does not apply to the Isle of Man. However, the various orders made under that Act have, where necessary, been applied in the Island, as part of Island law, using powers found in the Customs and Excise Act 1993 of Tynwald. This is because the Customs and Excise Agreement that governs the customs union between the UK and the Island requires the Island to impose import and export prohibitions and restrictions corresponding to those in force in the UK. The relevant paragraph 8 of the Agreement is reproduced in the Annex to this letter [not printed].

The Island takes very seriously its international commitments and has always made rigorous efforts to ensure that the requirement in paragraph 8 of the Agreement is met. The Treasury has no desire for the Island to be used as, or perceived as, a back door for the avoidance of export controls. Any checks would show that the Treasury has mirrored all necessary export control and dual-use legislation.

In the Island, the role of dealing with export control legislation, dealing with licence applications and enquiries, and generally administering the export control and UN and EU sanctions regimes is delegated to the Treasury's Customs and Excise Division. The Division makes recommendation to the Treasury as to whether or not a licence should be issued, and it would be the Treasury that would formally grant any licence.

Before the Export Control Act 2002 and its subordinate legislation were brought into operation Customs and Excise Division, Isle of Man, had extensive discussions with both the Department of Trade and Industry (DTI) and Department of Culture, Media and Sport (DCMS) in order to agree procedures and the action to be taken. As a result the Island was able to introduce corresponding controls on strategic, dual-use and cultural goods on the same dates as the controls imposed under the 2002 Act came into force in the UK.

Whilst the Isle of Man Treasury is the designated licensing authority for goods exported from the Isle of Man, the orders applied into Island law contain provisions which allow export licences issued by the UK DTI to be regarded as if they were issued by the Treasury.

Any one enquiring about an export licence other than for cultural goods is advised that for convenience and for practical reasons they may wish to apply directly to the UK DTI. It is explained to them that by doing so they would prevent any chance of their licences not being recognised by the UK (or other) authorities during their export—particularly as it is highly unlikely that many exports would go directly from the Island, but rather would go via the UK.

It is also made clear to any enquirer that Customs and Excise Division would normally refer licence applications to the Export Control Organisation of the UK DTI—because there are not always the necessary resources or expertise to evaluate such applications properly on the Island. The same is true of export licence enquiries relating to cultural exports to third countries.

In any event, the criteria against which any licence application would be considered would be the same as that in the UK. In fact, in recent years, the only export licence issued by the Treasury was in 2004, soon after the new legislation came into operation, and that was for the export of a painting to Ireland.

No export licence is required (except for certain items of a cultural importance to the Isle of Man) for movements of goods to the UK. However, once in the UK those goods would be subject to UK laws, and if exported from there would require an export licence issued by the UK authorities—unless purely in transit and under cover of a licence issued by the Isle of Man Treasury.

Similarly, whilst no export licence is required for the movements of goods to the Isle of Man, once here they would be subject to Manx laws, and would require a licence issued by either the Isle of Man Treasury or the UK DTI before they could be exported to a third country.

The Customs and Excise Division has a recently-updated page on its website that deals with sanctions and export controls. On it may be found a copy of Notice 279(MAN) which explains export licensing controls in the Island. This page also includes a link to the Export Control Organisation. The Notice includes contact details for the Export Control Organisation and asks readers to contact it with any technical queries or if they wish to know if specific goods would require an export licence. The web page may be found at—http://www.gov.im/treasury/customs/sanctions.xml

To conclude, the Isle of Man makes every effort to ensure that export controls and UN and EU embargoes etc. are enforced along the same lines as in the UK and maintains contact with the relevant UK Departments to ensure that we do so. The Isle of Man always aims to have matching export control measures in place to come into effect at the same time as those introduced in the UK.

Meanwhile the Isle of Man Government continues to monitor changes to legislation and take action as required to ensure that the Isle of Man cannot be used to circumvent the controls imposed by the United Kingdom.

Should you require any further information or if the Committee would find it helpful to discuss any matters referred to above in person please do not hesitate to contact me.

November 2006

Memorandum from Reed Exhibitions Ltd

1. Reed Exhibitions Ltd organises several aerospace and defence exhibitions both in the UK and overseas. Close liaison is maintained with the Ministry of Defence and the Department of Trade and Industry to ensure compliance with current Export Control legislation. Appropriate Trade Control licences have been sought and obtained, mindful, in particular, of the impact of recently introduced Controls on British citizens operating extra-territorially.

2. Of the Reed Aerospace and Defence Group's events held in the UK, the most significant is Defence Systems and Equipment international (DSEi). The others are Helitech—a helicopter exhibition aimed principally at the commercial operator, ITEC—which covers military training and simulation, and a new acquisition, APTS, which serves the security sector.

3. DSEi is a biennial international defence exhibition staged at ExCeL, in London Docklands. The last was held in September 2005, after the UK Export Control Act 2002 came into effect. 1,201 companies (approximately half of which were based in the UK) exhibited at DSEi 05: the event attracted approximately 25,000 international attendees, including over 50 Official Defence Delegations, invited by HMG.

4. As the organiser of DSEi, Reed Exhibitions made the following efforts to communicate the new legislation to all exhibiting companies and visitors:

- An explanation of how the legislation may affect individuals and companies was written into a pdf file with links to the relevant sections on the DTI website. This was translated into several languages and sent to all exhibiting companies. The same information was shown on the DSEi website.
- Each company exhibiting at DSEi 05 was required to sign a statement of compliance with UK law and UK's international undertakings, EU/UN law and EU/UN international undertakings. An additional paragraph has been added to the 2007 exhibitor contract that refers specifically to the UK Export Control Act 2002.
- An explanation of the new legislation and the impact on exhibiting companies was included in the exhibitor brochure and a flyer included in every access badge wallet sent to all visitors and exhibitors.

5. During DSEI 05 two potential breaches of the law were brought to Reed's attention. The appropriate authorities were informed and the two offending exhibitors' stands were closed down.

Summary of Impact

6. The only significant impact of the Act on Reed, as an organiser of defence exhibitions, has been the time and effort required to understand the new legislation, to interpret, translate and then communicate it to exhibitors and visitors, and to handle the associated enquiries, particularly from overseas companies.

November 2006

Supplementary memorandum from the Foreign and Commonwealth Office

I am writing to you following the evidence session on 15 March.

Robert Key MP asked whether I could give the Committee an example of a licence refused to India under Criterion 4—preservation of regional peace, security and stability. In 2005–06 we did not refuse any licences to India under Criterion 4. However earlier this year, we refused an F680 application to India on the grounds of Criterion 4. An F680 is not an export licence application but is a request for permission to carry out preliminary activities. It is considered under the same Criteria as an export license application. The refused F680 was for market surveys and promotion of anti-tank weapons systems.

More generally, in 2005 there were a total of 17 export licence refusals under Criterion 4. These were to destinations including: Ertirea, Ethiopia, China and Israel. In 2006, the total number of licences refused was 135 licences, of which 22 were on the basis of Criterion 4 concerns. These were to destinations including Israel and China. I hope this reassures the Committee about how seriously we take the issue of regional stability when assessing licence applications.

I would also like to take this opportunity to clarify a point that was raised at the evidence session about the Human Rights, Democracy and Good Governance Department (HRDGG) of the Foreign Office. In responding to the Committee's question about how many licences are sent to HRDGG, I'm afraid the

impression may have been given that every licence received in the Foreign Office is sent to HRDGG. In fact, only those licences where there is a concern on the grounds of Criterion 2 are sent to HRDGG. In 2006, this was the case in a total of 631 licences.

During the session the Committee also raised the issue of Cluster Munitions. You will by now have seen the Ministerial Statement given by the Defence Secretary on 20 March 2007, announcing the withdrawal and disposal of the UK's "dumb" cluster munitions with immediate effect, This is a significant and positive step towards addressing their humanitarian impact. We will continue to urge other countries to take similar action.I would also like to take this opportunity to thank the Committee for inviting me, for what I hope you will agree, was a productive session. Work on the 2006 Annual Report on Strategic Export Controls is currently underway, and I look forward to seeing the Committee's comments on the report once it is published.

April 2007

Further memorandum from the Department of Trade and Industry

On 20 February, 2007, I provided an interim response to your letter of 7 February. In your original letter you requested details of the methodology that the Department for International Development uses to assess whether applications for export licences meet Criterion 8 of the EU Code on Arms Exports and a working example of its application, and also raised a number of questions relating to the apparent disparity between refusals on Criterion 8 grounds made by France and the UK.

I understand that the methodology used by DFID to assess export licence applications under Criterion 8 was passed to you on 1st March 2007, and that DFID have also provided you with an explanation of the disparity in the number of refusals between the UK and the French. However, I am now able to answer your more detailed questions relating to the French Criterion 8 refusals. I apologise for the delay in reaching this stage.

Your first request was for details of the French refusals and the reasoning behind them. My officials have been in contact with the Foreign and Commonwealth Office concerning the release of this information. The advice that we have received is that this information has been provided by other Governments to the UK in confidence under the relevant regime, and that it therefore cannot be released by the UK Government to any third parties. However, I hope that the more general information on procedures in France recently provided by DFID may have helped to clarify these matters, in principle at least.

Your second question was whether the UK or any other Government had undercut these refusals by France. I should start by explaining that many refusals never raise an issue of undercut. It is necessary for the UK to consider that issue only if a UK exporter applies, subsequent to a refusal by another regime member, to export goods or technology which are essentially identical to those which were the subject of the refusal. My officials have checked the records thoroughly for the relevant time periods and confirm that no such applications were lodged by UK exporters; so in practice, the issue has never arisen from a UK perspective and I can confirm that the UK has not undercut any of the French Criterion 8 refusals.

Consultations concerning potential undercuts are between the state that has refused and the country of intended export. The UK would not be advised of any of these consultations unless it were directly involved, and so does not hold the information that you request concerning undercuts by other countries.

April 2007

Further memorandum from the Department of Trade and Industry

EXPORT CONTROL REVIEW: POTENTIAL CHANGE OPTIONS REQUIRING PRIMARY LEGISLATION

During the Committee's meeting with Malcolm Wicks MP on 8 March, we undertook to obtain definitive legal advice on which of the potential options for changes to the controls would require changes to the Export Control Act 2002. That advice has now been received.

There are three areas where new primary legislation would be required. These are:

- some possible approaches to the introduction of a control on UK companies granting production rights to an overseas production facility (in other words licensing a licensed production agreement);
- publishing a register of traders, should such a register be created (our view is that merely creating such a register could be permitted as "regulation" of the acquisition or disposal etc of goods within section 4(2) of the 2002 Act); and
- some possible approaches to changing the Military End Use Control, if introduced as a UK, rather than as an EU measure.

Primary legislation is or may be required in these areas because:

— in the case of granting of production rights, if this involved granting intellectual property rights, this is not an activity that amounts to export, transfer, technical assistance or trade (the activities we can control under sections 1 to 4 of the 2002 Act);

— as to publishing details on a register, section 7(f) of the 2002 Act allows us to make provision in an order under the Act "*about the persons to whom [information held in connection with anything done under or by virtue of the order] may be disclosed*". However, this section of the Act is not conclusive as to the extent to which such information can be published; and

— the Government's powers under the 2002 Act provide for national controls to be introduced only in relation to exports, trading, etc in military items or items that are capable of having a "relevant consequence". Because "military use", is not, in itself a "relevant consequence", the existing powers would not accommodate some approaches to changing the Military End Use Control.

Although new primary legislation would not be required to set up (as opposed to publish) a register of traders, the Committee will wish to note that there is another potential legal issue. Such a register would be an authorisation scheme under the EU Services Directive (2006/123/EC). Articles 9 and 16 of this Directive (which would apply respectively to traders established in the UK; and to traders established elsewhere but carrying on business in the UK) would require the UK to justify creating a register in order to be able lawfully to do so. In the case of Article 9 there would need to be an "*overriding reason relating to the public interest*" for creating a register. Such an interest might be difficult to demonstrate because the Government already collects information about traders through licence applications.

I hope this is helpful. Please let me know if the Committee requires any further detail.

May 2007

Memorandum from The Royal Society

REVIEW OF EXPORT CONTROL LEGISLATION

I wanted to thank you for writing to me regarding your Committee's review of export control legislation. We welcome your inquiry into the 2002 Export Control Act and the orders made under the Act.

The Society is committed to ensuring that academic freedoms are not unduly hindered by any new legislation or regulation. We raised a number of questions during the passage of the Export Control Act and its secondary legislation. In particular we stressed the following points:

— The scientific community appreciates its responsibilities in combating terrorism and weapons proliferation and consequently welcomes the majority of the legislation. The Society's long-standing commitment on this subject is illustrated by the meetings held in October 2004 on reducing the potential for the misuse of life science research and in September 2006 on science and technology developments relevant to the Biological & Toxin Weapons Convention. I have enclosed copies of the meeting reports for your information.

— Academics do not have a culture of dealing with export controls: this is something that will need to be built up over time.

We would like to stress that it is too soon to determine whether the Export Control Act is significantly affecting academic freedoms or scientific research. We would like to suggest that the Department of Trade & Industry should monitor this issue. We will continue to maintain our watching brief over all legislation or regulation that might unduly hinder scientific progress. If we discover any such issues we will bring them to the attention of your Committee, the Department of Trade & Industry or other Government Departments as appropriate. Please do not hesitate to get in touch if the Society could provide any further relevant information.

November 2006

Memorandum from the Campaign Against Arms Trade

1. The Campaign Against Arms Trade (CAAT) is working for the reduction and ultimate abolition of the international arms trade, together with progressive demilitarisation within arms-producing countries.

2. CAAT would like to draw the Committee's attention to issues with regard to Saudi Arabia; Israel; Libya; the Defence Export Services Organisation (DESO) Strategic Marketing Analysis; the export licence application process; and the Quarterly figures.

Saudi Arabia

3. It is disappointing that the UK government continues to court the rulers of Saudi Arabia and to excuse their behaviour in the quest for arms sales. The desire to seal the contract for the sale of 72 Eurofighters appears paramount, and blunts the impact of stated ongoing concerns about the human rights situation and lack of democracy in Saudi Arabia.

4. CAAT hopes that the Attorney General will not accede to Saudi demands, reported in the *Sunday Times* on 19 November 2006, that the Serious Fraud Office investigation into allegations of corruption around deals with BAE Systems be dropped. Unless the UK is genuinely serious about combating corruption, its appeals to overseas governments to clamp down will appear hypocritical and are likely to be ignored.

5. On a more general note, CAAT would suggest that the Committee keep a watch on the financing of the Eurofighter deal as it is clear from contemporary documents obtained from the National Archive that there were significant concerns, not least from the Treasury and the Bank of England, about the financial arrangements for Al Yamamah 1 and 2.

6. The benefit to the UK of the Eurofighter sale remains open to question, especially given the multi-national production of the aircraft. For instance, CAAT has been told by the Defence Procurement Agency that the only estimates of Eurofighter Typhoon employment have been generated by industry, no independent study has been undertaken.

Israel

7. CAAT is amazed that, despite the frequent use of arms against the Palestinians, the UK government continues to licence the export of military equipment to Israel, both directly and via the United States as components to be incorporated in US supplied weaponry.

8. The amazement turned to bewilderment and anger when no embargo was imposed during the war against Lebanon. Although the UK is only a small supplier to Israel, an embargo is nonetheless vital as it would send a strong message of disapproval of that country's military actions.

9. It is even unclear how the UK government monitors the use by Israel of equipment which includes UK parts. Questioned by your Committee on 25 April 2006, Foreign Office Minister, Dr Kim Howells MP, said that, on a visit to Israel, he did not see any UK equipment being used. Since most of the licences granted are for components, this is hardly surprising.

10. In its response to the Committee's report for the session 2005–06, the Government says: "UK Overseas Posts have standing instructions to report any misuse of UK-origin defence equipment." Are the Posts given full information about the licences granted, including of the equipment in which the components are incorporated, in order that they are able to monitor its use? Without such information, it would appear impossible to monitor the use of UK-origin equipment in Israel.

11. CAAT would suggest that the Committee ask the Foreign and Commonwealth Office for sight of all the evidence it has collected of Israeli use of UK-origin equipment, and an assessment of how it thinks its information is comprehensive.

Libya

12. The Committee's report for the session 2005–06 mentions that the European Union is considering introducing a "toolbox" for countries emerging from embargo status. Disappointment was expressed that the "toolbox" had not be used with respect to Libya. In fact, far from acting with any restraint after the embargo was lifted, Libya was immediately seen as a major marketing opportunity.

13. The embargo was lifted in October 2004. In June 2005 the Defence Export Services Organisation (DESO) held a seminar on Libya as an emerging market; according to the Defence Manufacturers Association News in July 2005, Libya was seen as "a relatively sophisticated customer with a political will to procure equipment from the UK". DESO opened an office in Tripoli in January 2006.

Strategic Marketing Analysis

14. As a result of Freedom of Information requests, DESO has made its Strategic Marketing Analysis (SMA) for the previous year available in the form of a snapshot of the website from March 2005. CAAT would like to suggest that it would be helpful if your Committee examined the SMA on a regular basis and to consider its appropriateness given export guidelines.

15. The SMA also identifies categories of priority markets. In March 2005 these were as follows.

The Priority Markets: Greece, India, Japan, Malaysia, Oman, Romania, Saudi Arabia, Singapore, Thailand and the USA.

The First Tier: Bahrain, Brunei, Chile, Iraq, Libya, Poland, Qatar, South Korea and Trinidad & Tobago.

The Middle Tier: Australia, Brazil, Czech Republic, Denmark, Egypt, Italy, Kuwait, Pakistan, South Africa, Turkey and the United Arab Emirates.

The Bottom Tier: Belgium, Canada, Colombia, Finland, France, Germany, Kazakhstan, Spain, Sweden and Switzerland.

Future Markets: Russia and Vietnam.

Miscellaneous: Bulgaria, Hungary, New Zealand and Slovakia.

Background information is given as well as details of prospects for UK sales.

Human Rights and Export Licence Applications

16. In order to assess how much weight is given to human rights when assessing export licence applications it would be helpful to have more information on the role played by the Human Rights, Democracy and Good Governance Group (HRDGGG).

17. Greg Mulholland MP raised this issue and asked the Foreign Secretary (*Hansard,* 19.7.06, *Col 492/3W*) how many applications for a standard individual export licence were referred to her Department by the Export Licensing Organisation (ELO) in 2005; how many of these applications were considered by the HRDGG; in how many of these applications the Group initially advised against the granting of a licence; how many were the subject of written submissions from the Group; and in how many cases where an initial recommendation for refusal was issued by the HRDGG her Department recommended to the ELO refusing that licence.

18. The FCO replied that it "received 7,381 standard individual export licence applications in 2005. It is not possible to give a further breakdown of departmental assessment of applications since this information is not recorded.".

19. The Annual Reports on Strategic Export Controls give details of how many specific licences are refused, revoked or withdrawn and why, so it would appear that the information is recorded somewhere. There is, presumably, also a check on, or audit of, the figures provided in the Quarterly and Annual Reports.

20. In these circumstances, it is puzzling that the information requested by Greg Mulholland is not available. It would help shed light on the export licensing process were it to be.

Quarterly Figures

21. The figures for the April to June 2006 quarter appeared on the Department of Trade and Industry website on 28 September 2006. They were not in an obvious place on that site, and did not appear with the other figures on the FCO site until mid-November. CAAT understands there was some incompatibility with format.

22. This is not the first time CAAT has raised with the departments the issue of access to the figures. The lack of consistency with their location has meant that CAAT has been asked for comment on them before being able to find them. It would be helpful if your Committee could stress to the two departments the need for figures to be placed on both websites at the same time.

DSO Bribery

23. In your Committee's report for the session 2005–06 it says that you will consider in this session the contentions concerning the accuracy of the Ministry of Defence's 2003 memorandum refuting allegations that bribes had been paid by the former Defence Sales Organisation. CAAT is very willing to assist in your investigation of this matter.

November 2006

Further memorandum from the Campaign Against Arms Trade

1. The Campaign Against Arms Trade (CAAT) is working for the reduction and ultimate abolition of the international arms trade, together with progressive demilitarisation within arms-producing countries.

2. CAAT took an active part in the various consultations that took place before the Export Control Act 2002 was introduced.

Implementation of the Export Control Act

3. The Act gave the Government the powers necessary to ensure that UK arms exports do not contribute to regional instability, internal repression or external aggression. However, the desire by Government to support a strong arms industry and military exports is at odds with this. The two aims are inherently contradictory.

4. It is clear that the current Government, like its predecessors, puts the second aim, assisting and subsidising arms companies, before the preservation of peace and the promotion of human rights. Thus, although there is little wrong with the Act itself, there is much to be desired in the way it is currently interpreted.

5. In the 1980's CAAT campaigned to stop the sale of military equipment to Iran and Iraq; in the 1990's, after Sir Richard Scott's report, it joined with others calling for changes to the export control legislation. However, since the Act came into force in 2003 it has been mostly business as usual, and the work to achieve the Act appears to be largely effort wasted. One exception is that the Act means there are now powers to control trafficking and brokering.

6. For the Act to be worthwhile, the Government would have to change its priorities when it is considering export licence applications. For example, it would have to stop the export of military aircraft to Saudi Arabia, thus withdrawing support from the country's barbaric rulers; impose an embargo on weapons destined for Israel, when its armed forces are killing Palestinian and Lebanese people; and realise that arming both India and Pakistan does not contribute to regional security.

Trafficking and Brokering

7. One change that could usefully be made is to the controls on trafficking and brokering. CAAT would argue, as it did during the passage of the Act, that these should be fully extraterritorial.

Corporate Mercenaries

8. Another area which urgently needs addressing, either by amendment to the Export Control Act or otherwise, is that of mercenaries, or contractors, or private military or security companies. Whatever terminology is used, this is a growing, but unregulated, industry.

9. Legislation is needed to outlaw involvement by such irregular forces in combat and combat support. The other services provided by these companies must be brought within a licensing system and be open to parliamentary and public scrutiny.

November 2006

Memorandum from Professor Ross Anderson

The Export Control Act and Scientific Research

During the passage of the Export Control Act, I organised the Royal Society, the Committee of Vice-Chancellors and Principals (as it was then) and the AUT (as it then was) to introduce Section 8 via an amendment in the Lords.

Our concern was that export controls on intangibles would require many academics working with colleagues overseas on science and technology to get export licenses. This would seriously damage scientific research by limiting collaboration in many disciplines to large, formal projects—excluding the flexible ad-hoc collaborations that, thanks to modern communications, are an ever-larger part of research. It is just not practical to call the DTI and wait six months whenever I spark an interesting idea with a US researcher at a conference or on an email discussion list and want to follow it up; and if non-EU academic visitors require export licenses then Britain's strong position in science will be seriously damaged. The scope of the potential damage is also much wider that one might think. The dual-use list consists of all scientific topics of interest to the Pentagon; and it has a very substantial overlap with the list of topics of interest to academic researchers.

For these reasons, the House of Lords introduced the Section 8 exemption for scientific research. However, this was stopped up by subsequent regulation made in terms of EU regulations (although the EU regulations in questions had been made at Britain's instigation)—a breathtaking instance of a department cynically circumventing the clearly expressed will of Parliament.

We have been unable to work out whether a number of common examples of routine scientific collaboration breach the regulations or not. The regulations appear to have been deliberately made so complex as to frustrate any independent analysis or adjudication, and to force enquirers into reliance on official interpretation. (Indeed, where four years ago the texts of OGELs could be easily found on the DTI website, now all I find from a quick web search are brief introductory pages pointing the enquirer to contact eco.help@dti.gsi.gov.uk)

On speaking with officials at the time of the Act's passage through Parliament, we received embarrassed half-reassurances that the regulations are not designed to target bona fide scientific research; on speaking to one of the Government's supporters in the Lords I was told "Look, you can't expect us to get the boundary absolutely precise; just act reasonably, keep records, and stop being so suspicious." Since then, there has been no serious attempt to inform potentially affected "exporters" such as academics and SMEs.

I have no doubt that thousands of UK academics are conducting bona fide research with colleagues overseas that could be held, should the Government ever care to go after them, to be criminal. We pointed this out at the time, and the DTI was not interested. Other lobbyists pointed out that large numbers of small firms are probably breaking the law in blissful ignorance. Software companies, for example, routinely incorporate cryptography into products without being aware that they might have to register for OGELs; so do private individuals and even students developing or enhancing open-source products.

The Export Control Act is thus, as currently administered, one of the most objectionable pieces of legislation on the UK statute book. It criminalises thousands of people by stealth, laying them open to jail should they ever annoy the Government, The DTI has not had the courage to advertise this fact at all widely. Thus the affected parties have not, in your words, "received sufficient notice of any changes and adequate explanation of the requirements in the orders", and the system of export controls is far from being accountable and transparent.

I can only refer the committee to Lord Bingham's recent speech on the rule of law in which he set out eight principles: "The law must be accessible and intelligible; disputes must be resolved by application of the law rather than exercise of discretion; the law must apply equally to all; it must protect fundamental human rights; disputes should be resolved without prohibitive cost or inordinate delay; public officials must use power reasonably and not exceed their powers; the system for resolving differences must be fair. Finally, a state must comply with its international law obligations."

It is unclear to me that our system of export controls meets even one of these criteria. The official attitude of "You are all criminals now, but don't worry—we won't put you in jail unless you make us cross" might be expected in North Korea, but should not exist here in Britain. Even if no academics or small software developers have been prosecuted up till now, that is still no excuse. Members of Parliament might care to recall that although the Government quite rightly stopped the prosecution of gay men who had sex between the ages of 16 and 21 once it came to office, it was still thought to be a good idea to actually change the law so that such behaviour was no longer an offence.

All I can say is that I did what I could—and if anyone is ever prosecuted under the Export Control Act for exporting an intangible good, I hope they win on appeal to Europe.

November 2006

Memorandum from NBC UK

THE HISTORY AND CONTEXT

Export Control in General

1. NBC UK has been asked to respond to questions posed by the Quadripartite Committee on Export Controls of the House of Commons. NBCUK is a vociferous supporter of the ideals and aims of export control regulation. As a responsible industry body dealing with this difficult and dangerous subject area, critical to National Security, NBCUK recognises restraint has to prevail, however so to does common sense. However, frequently NBCUK's views have been ignored to the detriment of all. We seek to change this for the good of all.

Export Control as it Applies to the Area

2. NBCUK has held discussions with many of the experts who provided input to the legislation. They are unanimous that the restrictions UK's CBRN Industry now labours under were neither contemplated nor intended. It seems to NBCUK, and many others, that the heart of the problem is that in drafting a "catch all clause" to prevent proliferation the authorities failed to take into account the impact it would have on the industry involved in defence against the threat. This "Relevant Use" clause[39] seems to be at the heart of the problem. (Key words are highlighted in the footnote) NBCUK has always put forward balanced and reasoned arguments for changes in the legislation, pointing out some of the absurdities, contained within it, including this provision. The warnings NBCUK gave were not heeded. The result of this has caused confusion, bureaucratic issues and unnecessary additional work.

[39] . . . for use in connection with the development, production handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons . . .

The Questions

3. This paper attempts to answer the questions as posed. It also makes a number of related points. It is important to examine the subject in the round and therefore security restrictions that play a part in the general export licence regulations need to be considered at the same time. A detailed isolated discussion of specific items is neither sensible nor profitable. Where commercial confidentiality will not be breached examples will be cited. However NBCUK is prepared to cite specific examples in confidence to ECO authorities to illustrate its points. NBCUK has enthusiastically entered the recent joint activity with ECO and DESO on reviewing specific parts of the legislation and regulations. It welcomes the progress made in certain specific areas but there remain many issues to resolve. NBCUK welcomes the questions the QUAD has raised as they address some of the fundamental issues still unresolved. The questions as posed were.

(a) How does Export Licence Control impact National Security in the CBRN world?

(b) What impact are the current regulations having on:

(1) Loss of reputation.

(2) Increased Costs.

(3) Loss of opportunities.

(4) Loss of business.

(5) Late delivery.

THE CURRENT NATURE OF THE CBRN ENVIRONMENT

The Role of the UK, UK Industry and the Relationship Between Government and the Need to Export

4. Before answering the questions in detail it is important to understand the current international multi-faceted nature of the CBRN (Chemical, Biological, Radiological and Nuclear) environment in which companies, and UK Companies, in particular, now operate. CBRN is important because it encompasses substances not traditionally thought of as warfare agents in NBC terms. The UK is arguably the World's leading nation at providing an integrated CBRN response and capability from either a defence or counter terrorism standpoint, although the distinction is now so blurred as to be meaningless. This response and capability is the result of years of dedicated co-operation at all levels between UK Government and Industry. This co-operation is maintained from the policy level, through research, to doctrine and tactics, to manufacture, deployment and support in the field. However, the UK market (even including the civil sector) is simply not strong or large enough to support and sustain the work of UK Industry. This is particularly true of the research and development field where UK companies are pre-eminent worldwide. This work is an important adjunct to HMG work and the R&D and Manufacturing bases, and the high quality jobs that go with them, in Industry, of all sizes, and Academia can only be sustained by funding from export revenue. If lost, this capability and these jobs will not be regained; a fact recognised by both the Defence Industrial Strategy and the Defence Technology Strategy. Many world-leading and innovative products and capabilities have resulted from UK companies and joint Government and Industry activity. If this industrial effort was removed from the equation the Government would have to fund the shortfalls, currently estimated at £300 million in Defence CBRN R and D alone, or drop the capability and protection levels of the Armed Forces. The additional impact on the civil community has not been calculated but it would be considerable if we wish to protect the civil community. To sustain this effort export is therefore in the best interests of all concerned.

The World Market

5. In the Defence arena UK Industry "owns" somewhere in excess of 50% of the international market to which they are allowed to export. However, coincidental with the rise of the perceived international terrorist threat has been the rise in the CBRN terrorist threat. It is worth pointing out that there is also a rise in crank threats, acts and hoaxes, which can be as disruptive, and even a move into the CBRN area by criminals. At the same time there has been a perceptible reduction in the Defence market (although the size of the US market in which UK companies are heavily involved swamps all others and makes comparisons difficult.). This public change in perception started to occur at the same time as the framing of the new Export Control Regulations, in 2000, although counter terrorist experts had been predicting it as far back as 1985.

Impact of CBRN

6. Some believe that the Tokyo subway Sarin chemical attack incident in 1995 had the potential to kill, and indeed did injure, more people than the attacks in the US on 11 September 2001. Recent cases before the UK courts would indicate that CBRN terrorism is a rising threat. The new market is unpredictable and fragmented. It is not just government centric. People who thought they had no NBC (or CBRN) equipment and training requirements now feel they have urgent need for these. These new customers include but are not confined to defence forces that had not previously paid the subject any attention, police and civil defence

agencies, Critical National and Transport Infrastructure and Legislatures.[40] Also included in this new customer mix are the financial, transportation, leisure and sports sectors, to name but a few. In these sectors even a simple hoax or a relatively minor real incident can end up costing millions of pounds and severely undermine confidence and well being.[41] Predicting these new customers and their order of arrival is near to impossible.

THE LICENSING REGIME

The Licensing Regime and the New Environment

7. Given the heightened perceived threat, these new potential customers in the market naturally turn to the UK and British companies, because of their world-renowned operational and technical pre-eminence in the field. However, these new markets, unlike governments, frequently do not recognise the strictures of dealing with export regulations—they just want to get on and deal with the issue and then return to doing their day jobs. It is a similar attitude to fire prevention and protection. NBCUK companies have to deal with the licences and watch with growing frustration as, because of bureaucratic issues, more and more business is turned away or going elsewhere.

Key Factors for the Failure of the Existing Regime in the New Environment

8. This background provides the backdrop against which UK companies now operate. The current export licence regulations are inhibiting UK companies from competing in this legitimate new market. The fundamental flaws within it, as they apply to CBRN, fail to recognise a number of factors, the most important of which are:

(a) People involved in proliferation of CBRN material do not apply for export licences.

(b) People that do try to comply with the system are those that are law abiding and even then for those that fail it is more by omission than commission.

(c) The attempt to draft a "catch all" clause, The Relevant Use Definition referred to earlier, that prevented proliferation also caught all the defensive equipment and associated industry. Despite NBC UK raising this issue numerous times over the years, our basic position has been rejected time after time.

(d) The definitions of transfer and technical assistance are all embracing, dangerous and catch many innocent users and manufacturers.

(e) Given the pace of the new market companies are simply not able to submit applications, either licences or 680s, fast enough and guarantee responses from the ECO and DESP with sufficient speed to deal with the enquiries in the time frame the market demands.

FAILURES IMPACTING NATIONAL SECURITY

MOD

9. Members will recall our Chairman briefed the Quad during the Iraq War in 2003 about not being able to provide product support to UK forces on operations had the new licensing regime been in force, which they were less than 60 days latter. This is a very good example of the unintended consequences referred to previously. The QUAD's intervention in this issue was the only factor that led to Government negotiating with industry the OGEL[42] that has allowed UK companies to enter into technical discussions on CBRN matters with MoD(UK) without obtaining a licence for every occurrence. Even now there are several issues, such as dealing with overseas contractors working for the UK MOD, to do with this subject that require resolution. NBCUK had previously raised it formally four times, at every stage of consultation, and it was still not accepted despite repeated assurances that it would be addressed in the legislation. It was only accepted when it failed in reality. It took a war and the QUAD's intervention to start to impose the beginnings of common sense in this one instance. NBCUK thanks the QUAD for its clear advice and comment.

Blue Light Services (and other Emergency Activities)

10. However, as yet no such solution has been created for similar discussions and activities with the UK Blue Light Emergency Services or other similar bodies. This is a fundamental issue with a direct bearing on

[40] Committee Members may remember that during the "Purple Powder" incident, (a hoax by a crank?) on 19 May 2004 they took precisely the wrong action, despite clear instructions issued by the police to the contrary. The results of which, had the agent been real, could have resulted in preventable deaths and illnesses and clean up cost of several million pounds or at its most dire the loss of the parts of the Palace of Westminster as a venue forever.

[41] The recent Polonium 210 incidents in London and Hamburg illustrate the situation well, however, this was a relatively small incident, albeit with considerable financial and personal costs.

[42] Directive 2004/18/EC on the deliberate release into the environment of genetically modified organisms and Regulation (EC) 1829/2003 on genetically modified food and feed.

national security. Under Section 2 (2)c of the Regulations[43] entities may not discuss technology, use or operation of CBRN equipment with people in the UK who might then subsequently take that technology outside the EU. In the same way that the MoD (UK) is expected to operate overseas, the Prague and Istanbul undertakings mean the Blue Light Services are increasingly expected to advise and operate overseas when their help is requested either planning for or responding to an incident, eg the Athens Olympics. Companies, therefore, have to get export licences to discuss these issues with the UK's Blue Light Services, who, themselves, are, according to the DTI, not covered by "Crown Exemption" and would in turn need export licences to deploy the goods, technology and technical assistance overseas. This can not be right.

Impact of the Organisation of the Emergency

11. However, since the Blue Light Services operate on a regional or local basis a simple OGEL to cover all forces and services has been deemed inappropriate by the ECO for dealing with them. Given the number of products some companies would have to apply for, applying for full export licence clearances for every police and fire service and every NHS Ambulance Trust and Trusts with A&E facilities is a massive undertaking. Even the larger companies have shied away from this- again this has a direct bearing on National Security.

Lack of Crown Exemption

12. NBC UK's contention is that given there is no "Crown Exemption" in the new regulations, these UK Blue Light Services should, strictly, not go overseas to discuss CBRN issues without a licence. This has been confirmed to NBCUK by the DTI.[44] The same is true of security officials from airlines, shipping companies, railways hotels, banks, restaurants or any of the other myriad potential other sectors and groups that feel they may be under threat or have been contaminated. This basic position which NBC UK have outlined in respect of the "Any Relevant Use" and "Technology Transfer" and "Technical Assistance" clauses is now seriously inhibiting UK Industry. NBC UK understands the rationale of the regulations but the fact is that the wording is so poor that it is impossible to operate in the real new market (World) situation. It is to be hoped that another real incident will not have to be the touch stone for common sense prevailing.

Major Commercial Factors

13. Companies involved in this Industry have now had nearly three years' experience of operating these new regulations in the new security environment. Apart from the inhibition in their approach to the new market, which is having a severe effect on the UK's reputation, there are a number of major issues that are having an adverse effect on companies. These include:

(a) Loss of reputation.

(b) Increased Costs.

(c) Loss of opportunities.

(d) Loss of business.

(e) Late delivery.

Loss of Reputation—UK and UK Industry

14. Loss of Reputation is perhaps the most important issue. Whilst direct calculation of the costs is very difficult, all members have reported that their reputation had been adversely effected by the new legislation and regulations. This not only reduces UK's standing; it also opens up the civil population to attack. This is perhaps best illustrated by the recent PASR.[45] A major study in PASR called IMPACT looked into the protection of the European population against CBRN attack and tried to work out some ways of countering weaknesses. This study was run by TNO of the Netherlands and involved several major European Governments' research institutes, academic institutions and CBRN companies. Given UK pre-eminence in the field there was a heavy reliance on the UK's expertise. At the public presentation of its results in Brussels on 25 October 2006 a major conclusion of its work was stated as "Export Licence Controls, particularly those of the British, may well be the Achilles Heal of the defence of the Citizens of Europe against CBRN attack". This came about for three reasons;

(a) Because the bureaucratic issues in obtaining export licence to make software changes (to detect chemical simulant not real agent) took so long that the project nearly failed. In part this was due to security concerns or rather length of time clearing the security concerns.

---

[43] Section 2 (2) c "by a person or from a place within the United Kingdom to a person who, or a place which, is also within the United Kingdom (but only where there is reason to believe that the technology may be used outside the United Kingdom);"

[44] DTI Letter dated 22 September 2005.

[45] Preparatory Action on Security Research Launched by the EU Commission in Preparation for FP 7.

(b) Because passing information about technologies involved with defeating biological terrorism was so constrained that the study concluded it would not be possible to respond adequately to a real incident because not enough people would know what measures and capabilities were available.

(c) The constraints on technology are so broad that the passage of meaningful information between the people on the study was so great that the study concluded that there needed to be common test protocols across Europe to overcome the licensing issue. (Even though they deal with export licence issues on a daily basis the study members are not export licence experts. They therefore failed to realise that setting up these protocols would need a licence and then passing information between the laboratories would require licences every time information needed to be passed!) Although not reported on per se the discussion within the study team concluded that the WHO virtual laboratory set up to deal with recent SARS outbreaks would have been illegal if it were dealing with a CBRN incident.

15. These conclusions are covered specifically in work packages 300 and 400 of the study but the problems permeated every facet of the programme. Relevant extracts of the study can be obtained from the EU Commission. [DG Enterprise]. The study members realising the sensitivity of the work have placed an embargo on public dissemination of large parts of it. An example of a responsible industry at work. The IMPACT study was the first time that there has in effect been a direct real time comparison of the different EU Export Licence regimes. The international study team as referred to above regarded the UK situation as being far worse than any other nation of the 10 or 11 taking part.

Increased Costs, Loss of Time

16. Costs associated with export licensing have been a frequent complaint of NBC UK Members. The regulatory impact assessment estimated them to be negligible. Two of the larger companies, Smiths Detection and Avon Technical Products, initially estimated that the direct costs were 1% of fixed costs. This is a considerable rise in any company's costs especially when the company has no control over them. As time has gone on practical experience has revealed that the true figure is in excess of 3%, a common figure from many members. Companies with a larger number of products and technologies reported much higher percentages.

17. However the indirect costs, which are more difficult to calculate, seem even greater, again a common theme from members. Every time a person within the company wishes to communicate with anyone new they first have to discover whether there is export licence/680 cover in place (680 cover often being a mandatory condition of the licence) and whether it covers the subject under consideration. This applies to both customers and suppliers. With suppliers, all too often companies not familiar with export control at all, it then entails ensuring they have sufficient controls in place to ensure compliance in their own company and down their own supply chain. Putting a new licence or 680 in place is time-consuming. This has a huge impact on a company's speed of action in getting new products to market, costs, competitiveness and reputation. The costs for the supply base are hidden and are considerable, but are not quantified here. These supply base costs are not quantified but inevitably have to be passed on to OEMs and therefore form another indirect cost-often hidden and virtually impossible to calculate.

18. An example of how the export licence system can adversely impact UK companies' costs and time has been illustrated in the last week. A long planned trip to the Middle East by one company was suddenly expanded in scope by the government of the country concerned who wanted to include a different mix in the audience and wanted to discuss an additional item of equipment and application of the equipments' use. In the time frame available to expand the existing licence cover to include the additional audience and obtain a new licence to cover the additional equipment was impossible. The only alternative was to cover the issue generically and now return to the country concerned.

Loss of Opportunity

19. Loss of Time and Reputation directly lead to loss of opportunity. It is to be hoped that the opportunity cited above still exists once the licences are granted. One member, there are others, specifically cited an example of a new product specifically designed as an item of safety or escape equipment for civilians. It was designed so as not to be in any way military and not to include any military grade components or technologies. The company got to market first with this type of product and, thus, obtained a world lead. However, the loss of impetus arising from the need to wait for the export licensing system to "catch up" has allowed overseas competitors, apparently unfettered by similar such restrictions, to capture parts of the market that the UK firm would rightfully feel were ones it should have captured.

20. This catching up appears to come from a lack of decisiveness as to whether the product was military or dual use and therefore licensable under either UK or EU regulations or not licensable at all. Similarly officials offered contradictory and changing advice on the need for 680s. It seems there is not a rapid, effective system to decide which products are licensable or not and even where such decisions do occur there seems to be no consistency. We would strongly recommend the establishment of such a system so companies

could deal with this before development and marketing starts. When an item is deemed dual use, other exactly comparable items seem to go unchecked both in the UK and Europe; however, our European industrial colleagues seem far less restricted than those in UK.

New Technology Not Coming to Market

21. Similarly examples exist where member companies have quite deliberately not brought a new technology to the CBRN field. This is because they regard the bureaucratic and emotional effort of obtaining an export licence every time they want to talk to someone just too great to justify the effort, especially when there are markets for the technology elsewhere. This too touches on issues of national security since if the technology has not been exposed to the armed and security services they in turn can hardly be expected to know about it.

Loss of Business

22. Loss of business is a persistent cause of complaint. A simple example is recently a major City of London based bank chose to purchase and install a German CBRN protection system where the technical discussions could be held face-to-face and electronically immediately, without apparently having to apply for an export licence. An export licence would not normally be required for this application because it could not reasonably be expected that the technology would leave the City of London. An export licence was required because the security branch involved operated from outside the UK, there was a technology transfer issue, and once installation had been achieved in UK they wished to duplicate the system overseas. They wanted guarantees that they would be able to do this and within the timeframe of the discussions—15 days. No UK based company could offer such a guarantee given the current regulations. This is a far from exceptional case. Examples exist across the whole spectrum of CBRN defence. Speed of response is critical in the new market. The licensing system prevents it.

Late Delivery

23. Late delivery caused by the time-consuming processing of export licences, or companies having to undertake major efforts to achieve on time delivery when all that is holding things up is an export licence, is the cause of the largest number of complaints. There are numerous examples of this. These complaints have become more numerous since the closure of the telephone help line and reliance on e-mail based system by the ECO during 2006. Apart from simply not getting the licences out in time the complaints range from:

(a) Questions from the licensing authorities, the answers to which are already actually contained within the completed and submitted application forms.

(b) Asking questions to which officials either must already know, or ought to, the answer to.

(c) Setting impossible deadlines for small and medium companies to respond to queries to and then, when they don't receive the answer within the stated very tight timeframe, arbitrarily lapsing the application. This being done by e-mail which can not always be accessed or dealt with in the timeframe given.

(d) E-mails simply not arriving within the government system or being transmitted by it or e-mails simply not being answered.

(e) In short, a source of endless frustration, and, too often, embarrassment and cost.

THE FUTURE AND SOME RECOMMENDATIONS

24. NBC UK fully subscribes to the ideals and aims of the Export Control Act 2002. However, we would point out that compliance with it is a conspiracy of the willing. NBC UK Members comply, at great expense, but it is detrimental to the UK's reputation, leadership in the CBRN protection technology sector and, in its current form, does little to deter or, even less, prevent actual CBRN weapons proliferation. One is tempted to ask if any of the CBRN capability acquired by India, Pakistan, Libya, Iran or North Korea passed through the export licence process. There are sensible ways to deal with this situation and we are sure that there are better forms of legislation and regulation to address this which are possible. NBC UK welcomes the recent initiative by the DTI ECO to examine the situation. We remain committed to it but maintain these changes do not go far enough or deep enough and would welcome the chance to revisit the issue which is presented by the planned 2007 review of the Export Control Act 2002.

25. Our thoughts currently run along the following lines;

(a) The formal process of deciding whether a product is licensable should be regularised, speeded up, and made more easily accessible and should seek to achieve more uniform decisions across common products. It should be available earlier in the industrial process. Similarly if an industrial or non military product of broadly similar capability to another unlicensed industrial product is put forward for assessment then without extreme good cause the new product should not require a licence.

(b) The suggestion put forward by NBCUK on two previous occasions involving licensed companies and approved end users/sectors should be accepted. This would allow faster decision making to be undertaken on key issues by officials, rather than wasting time on bureaucratic process.

(c) The Relevant Use clause should be rewritten omitting the highlighted words.

(d) The rules on transfer of technology should be rewritten to allow transfer to individuals and entities involved in emergency response and civil protection (including commercial entities). A possibility is that the recipient should show good cause to the supplier to allow such a transfer.

(e) The technical assistance rules should reflect a similar approach

(f) If the above is not possible then an OGEL for the Blue Light Services and users perceived to be under threat should be brought into operation. Thus a generic sector could be included eg the Rail Operating Companies rather than listing each one.

February 2007

Memorandum from Transparency International UK

Arms Trade Treaty

UN resolution L55 notes that "the absence of a common international standard on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and terrorism", and that the absence of such standards undermines "peace, reconciliation, security, stability and sustainable development".

Corruption erodes the effective implementation of common international standards. Anti-corruption must therefore be at the core of the ATT.

1. Introduction

Transparency International UK is actively working with governments and defence companies to strengthen international defence procurement and the arms transfer process against corruption. A short outline of our work can be found at the end of this document.

This submission presents ideas for promoting anti-corruption in arms control by the recipient and supplier.

2. Corruption is an Important Risk Factor

Corruption greases the circumvention of arms controls. It facilitates the diversion or re-export of arms consignments to unintended recipients such as embargoed countries and terrorist organisations. It undermines the capability of officers to apply effective controls and facilitates the trade of banned or illegal weapons such as landmines. It introduces distortions into decision-making, such as whether the proposed export might be used for internal repression, or provoke conflict. It undermines security and defence, good governance, the rule of law, the democratic process as well as sustainable development, all of which it is hoped the International Arms Trade Treaty will protect.

The appendix presents a brief selection of stories from the press, showing examples of how bribery undermines arms control in practice.

3. The Supplier—Proposed Anti-Corruption Requirements

(a) **Export licensing** should be strictly conditional on presentation by exporting companies of rigorous contract-specific no-bribery warranties. These should be reinforced by clear evidence that companies:

— have in place sufficient internal compliance systems capable of detecting orruption-risk and preventing the payment of bribes, including through application of anti-corruption requirements to teaming arrangements and subsidiaries;

— are committed to investigating alleged anti-bribery violations;

— are committed to disclose corruption (and other) violations voluntarily;

— are committed to extending their public accountability through annual reports and best practice fora; and

— have extended their anti-bribery compliance programmes to offsets.

Exclusion from export licences should be used as a sanction against companies or brokers found to have paid bribes. Reference should be made to blacklists such as the World Bank list of debarred firms.[46] Registration for brokers under Export Control Acts should also include signing a no-bribe warranty.

(b) **Export credit support** should contain rigorous anti-corruption criteria, such as the requirement for the full disclosure of agents appointed by the supplier, by the supplier's group companies, by the supplier's joint venture, consortium or similar parties. Powers of inspection by the export credit body should not be limited to the supplier's home-country premises, but should also cover the supplier's overseas premises.

4. The Recipient—Possible Form of Anti-Corruption Requirements

We suggest three elements of guidance be considered in the ATT:

(a) a section on how to consider corruption as a risk factor;

(b) a section that defines the level at which corruption should be treated as a major risk factor, and which triggers more specific scrutiny; and

(c) a section on the type of additional control mechanisms that could be considered where corruption is seen as a significant risk factor.

(a) Considering corruption

Corruption is a wide issue that could be seen as influencing all aspects of the transaction: the exporting company, the trans-shipment organisations, the end user organisation, customs officers, licensing officers, any intermediary or broker on the recipient side, etc. We expect that the licensing authority will take into consideration the history and track record of the recipient organisations, and known or suspected corruption incidents in the recipient country.

The bigger corruption issue is the more general corruption environment in the country, as this will affect the likelihood of diversion, re-export, or other undesired transfer of the shipment. We believe this should be considered as per b. below.

(b) Threshold for high corruption in recipient country

An index of corruption perception, such as that of the World Bank[47] could be used as a proxy for corruption risk. We suggest the licensing authority use such lists as a reference to indicate the corruption risk perception in that country, and apply progressively more stringent examination as the perception level gets worse. For example, using the World Bank table (and selecting "percentile rank" view), an authority could set a range of above 60% as being not a major corruption risk, 40% to 60% as significant risk, 20% to 40% as high risk and below 20% as very high risk.

If the recipient country is above one threshold, we suggest that the licensing authority carry out more than the "normal" level of background checks of the recipient organisation. If the level is below the lowest indicator, then we suggest that the licensing authority considers refusing the license, or places additional controls on the approval. Intermediate steps would be applied for intermediate risk levels.

(c) Enhanced controls in such cases

Where material is being exported to very high corruption perception countries, additional controls should be required as a condition of the export license. Proposed additional controls could be placed in the license application itself by the applying company, or specific controls could be imposed by the licensing authority, depending upon the practice of the national authority.

The nature of these additional controls would vary according to the material being exported and the recipient country. We suggest that the User Guide give some examples as guidance to licensing officers, but not be prescriptive. As examples, some of the following controls could be suggested:

— Pre-shipment verification: Requiring the pre-licenser to conduct additional checks on the identity, business activities and business location of the end user.

— Only permitting the shipment to go direct to end users and not to intermediaries/brokers.

[46] World Bank list of debarred suppliers: http://web.worldbank.org/external/default/main?contentMDK=6409844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266

[47] World Bank "Control of Corruption" http://info.worldbank.org/governance/kkz2004/year_report.asp?yearid=1 (slect "percentile rank" view" or Transparency International "Corruption Perceptions Index" http://www.transparency.org/cpi/2005/cpi2005_infocus.html

— If intermediaries/brokers have to be present, the exporter should require the broker to be vetted by a centralised business conduct agency, for instance "Trace International".[48]

— Shipping verification: Requiring the transporter to double check the recipient to positively confirm actual use and physical presence of recipient.

— Post shipment verification: Requiring a follow up check by the exporter that the goods were received and used as intended in the receiving country.

Transparency International (UK) is happy to discuss any aspect of the above with those engaged in the preparation of this User Guide.

5. Transparency International UK's Defence Project

Transparency International UK is engaged with export controls issues with a view to finding practical ways to strengthen international transfers against corruption. This work is sponsored by the UK Government, with additional financial support from the Swedish Ministry for Foreign Affairs, and has the active backing of the Ministry of Defence in the UK and in other countries.

Transparency International has contributed to inter-government conferences on this topic, for instance International Export Controls Conference: Budapest 2003, London November 2004, Stockholm October 2005, Brussels October 2006.

APPENDIX

Shady dealers aim to arm Iraq
Copyright Asia Times
27 Jul 2006
http://www.atimes.com/atimes/Front—Page/HG27Aa01.html

Two Indicted In China Weapons Plot
Copyright The Washington Times
11 February 2006
http://washingtontimes.com/national/20060210-110723-3940r.htm

Costa Rica's president calls for stricter controls on arms trading
Copyright Xinhuanet
18 November 2006
http://english.people.com.cn/200611/18/eng20061118—322866.html

Hard-wired for corruption
Copyright Prospect
28 August 2005
http://www.prospect-magazine.co.uk/article—details.php?id = 6975

February 2007

Memorandum from Joanna Kidd and Dr Christopher Hobbs, Department of War Studies, King's College, London[49]

Report on the Adequacy of the United Kingdom's Export Controls to Prevent the Proliferation of Weapons of Mass Destruction

This report will examine how adequate are the United Kingdom's (UK) export controls to prevent the proliferation of weapons of mass destruction (WMD). It will assess the adequacy of the UK's current controls in terms of both new challenges to non-proliferation which have recently emerged, such as the A.Q Khan network, and also in terms of clear definitions of and new developments in science and technology and information technology (IT).

The export controls which the report will examine are the 2002 Export Control Act (henceforth known as "the Act"); the Guidance on the Export Control Act for Academics and Researchers in the UK; the Supplementary Guidance Note (to the 2002 Act) on Additional Controls relating to the Prevention of Proliferation of WMD; the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (henceforth known as "the Order"); and the Uranium Enrichment Technology (Prohibitions on Disclosure) Regulations 2004 (henceforth known as "the Regulations"). Additionally, the Department of Trade and Industry's (DTI) general guidelines on export controls will be analysed as will multilateral export control arrangements, such as the Nuclear Suppliers Group, of which the UK is a member.

---

[48] www.traceinternational.org

[50] The authors would like to acknowledge the help of Ben Rhode of the International Institute for Strategic Studies in preparing this report.

The issues which the report will cover are: proliferation by state actors; issues associated with the A.Q. Khan proliferation network; multilateral export control agreements; any effects on academic research in the UK; potential restrictions on the transfer of software under the Act; the clarity of the law and future proofing.

Proliferation by States of Concern

Summary:

The new UK export controls have significantly reduced the scope for proliferation by state actors through abuse by unscrupulous UK exporters. Ambiguous areas do remain, however, which could possibly be exploited by those who seek to avoid legal punishment if their activities are detected. An emphasis should be placed on efforts to prevent the inadvertent transfer of seemingly innocuous goods to entities which may then re-export UK goods (and possible intangible transfers such as designs and software) to states of proliferation concern. Although those exporters who are either willing or indifferent to eventual re-export can be punished, there is a limit to the ability of UK legislation to prevent this occurring inadvertently, and the ability of the UK to verify the final destination or end-use of nuclear-relevant goods and technology.

It would appear that UK export controls are generally adequate in regard to proliferation by state actors, except in the areas of front companies and re-exports, which are difficult to control. Proactive actions by the Export Control Organization (ECO) are clearly being taken to prevent inadvertent exports by UK companies to states of proliferation concern. An example of such action took place in March 2006, when the ECO published a special supplement to its Guidance on the Operation of the WMD End-Use Control. This listed various Iranian entities which were suspected of being involved in WMD programmes. The publication of such lists is to be commended, as it will help UK exporters to be more wary when dealing with these entities, and also to be cautious when dealing with other Iranian customers. It should be noted, however, that such lists are by no means exhaustive, and are likely to require frequent updating. Furthermore, state procurement networks frequently create front companies to obtain their required goods. This area is perhaps more in the realm of intelligence gathering, but the ECO should make UK exporters aware of this tactic and that the latter should note any requests from newly-established firms from countries of WMD concern.

A greater challenge when combating state proliferation is the fact that states often make extensive use of high volume transhipment hubs such as Dubai and Singapore, in order to mask their proliferation. Taking the case of the UAE, where most of the re-export trade is concentrated in the emirate of Dubai, it would appear that this trade is growing. According to the UAE Federal Government, "Overall re-exports in the 1990s have grown at a much faster rate than imports. Currently more than 25% of imports are for re-export, compared with less than 17% as recently as 1994".[50] For the past decade Iran has been the largest recipient of the re-export trade from the UAE.[51] UK Trade and Investment states that Iran's "key demand is for machinery products, which accounts for more than one third of its purchases from the UAE and is closely followed by textile products, vehicles and parts".[52] Although, as noted by the US International Trade Administration in a 2002 report that, "Iran has sharply restricted imports in an attempt to come to grips with a deteriorating economy and mounting debts"[53], figures of re-exports from Dubai produced by Dubai's Department of Ports and Customs demonstrate that, between 1998 and 2002, Iran remained the leading recipient of Dubai's re-exports.[54] In the same period, the value of Iran's re-exports rose from 2,791 million UAE Dirham to 7,399 million UAE Dirham. In this period, the value of Dubai's re-exports to Saudi Arabia, Kuwait, Algeria, Turkey, Pakistan, Egypt and Jordan also rose.

It should be noted that very little if any of this re-export trade will be related to WMD proliferation. However, it does present a state wishing to proliferate with a possible means of avoiding UK export controls. Two actions may be able to lessen the threat posed to the UK's export control regime by such proliferation routes. Firstly, the UK should actively encourage states such as the UAE and Singapore to tighten their own export controls and also to subscribe to multilateral export control agreements. The United States government has sought to persuade the UAE to do so for some time. Kenneth I. Juster, the US Under Secretary of Commerce overseeing the US export control programme, visited the UAE in March 2004 for

[51] Report carried on the website of the Federal Government of the United Arab Emirates, http://www.uae.gov.ae

[51] "Dubai: Major (non-oil) trade partners—re-exports", Department of Economic Development, Government of Dubai http://www.dubaided.gov.ae/NR/rdonlyres/416E4405-17BD-4341-88A7-FA250985BDE6/527/eforeigntrade.pdf

[52] "UAE Economic Overview and Guide to Doing Business", UK Trade and Investment, https://www.uktradeinvest.gov.uk/ukti/ShowDoc/BEA+Repository/345/366341

[53] International Trade Administration, US Department of Commerce, Country Commercial Guide FY2002: United Arab Emirates http://www.world-digest.com/Guides/tc

[54] "Dubai: Major (non-oil) trade partners—re-exports", Department of Economic Development, Government of Dubai http://www.dubaided.gov.ae/NR/rdonlyres/416E4405-17BD-4341-88A7-FA250985BDE6/527/eforeigntrade.pdf

this very purpose.[55] Hitherto, this has met with some success as the UAE has joined the US Transhipment Country Export Control Initiative (TECI)[56], but there is still considerable room for improvement to be made in this area. Secondly, UK exporters should be made alert to this proliferation tactic, and then requests from firms in such hubs for dual-use technology would be more likely to prompt suspicion, and subsequent notifications to the ECO.

A.Q. Khan Network

Summary:

> In general, the new UK export controls appear to be fairly adequate when it comes to closing loopholes which would allow an unscrupulous person or entity to export goods or technology in the knowledge or suspicion that they had a WMD end-use, although some may remain. However, given the lengths to which proliferation networks will go to disguise their true intentions, current legislation may be inadequate in the sense that it may be unable to prevent UK exporters unwittingly supplying proliferators with nuclear-relevant technology and/or goods. In addition, actions taken to try to remedy this may lead to a disproportionate burden falling on UK industry through overregulation.

The exposure of the A.Q. Khan network in 2003–04 prompted a thorough examination of export controls worldwide. A.Q. Khan was a Pakistani national and unlike, for example, the Iraqi nuclear programme, his network did not use the UK as a direct supplier. This suggests that the strengthening of UK export controls after the Gulf War has reduced the likelihood of British firms being targeted directly by a proliferant state's procurement apparatus, or a proliferation network. However, certain British nationals are alleged to have participated in the Khan network's activities. Moreover, it is unlikely that Khan's will be the last proliferation network to exploit gaps in export control regimes in order to obtain the necessary components for a covert nuclear programme. Although it is not apparent that any non-state proliferation network has emerged to take Khan's place, it is clear that various countries, notably Pakistan and Iran, still rely on clandestine imports for their nuclear programmes, and continue to target the UK and other EU states using their procurement networks.[57]

Although certain items can be confidently identified as primarily for use in a nuclear programme and placed on export "trigger lists", the Khan network was notable for its skill in procuring dual-use items under the pretext that their end-use was innocuous. It was also accomplished at re-exporting items, often via states perceived to be of minimal proliferation risk, to final destinations which would not originally have been granted an export license by the supplier state. In addition, the network's operations were aided by its capacity to produce sensitive components in what had been perceived to be less industrially-developed states such as Malaysia. The network was able to obtain the raw materials and equipment required by its workshops without arousing suspicion, as such states had little or no nuclear infrastructure and expertise, and hence were not considered to be proliferation risks. This "second-tier proliferation"[58] was partly possible thanks to the transfer of specifications and designs for nuclear components to "second-tier" states in electronic format. This information was then utilized by European "consultants" experienced in proliferation. Urs Tinner, a Swiss national, was employed as a full-time technical consultant to the SCOPE factory in Malaysia, configuring the machines that would produce dual-use items for Libya's nuclear programme. The Khan network also sold information necessary for the construction of an actual nuclear weapon, including component designs, information on fabrication of components, and instructions on the assembly of the weapon.[59] Alarmingly, there are indications that these plans and designs were "copies of copies of copies", suggesting that many copies exist and may still be available for sale, especially since there are concerns that all the nodes of the Khan network have not yet been rolled up. In addition, the network offered the Libyans ongoing technical assistance with any operational problems they may have encountered with the gas centrifuge facility that would have been provided to them. The ability of current UK export controls to deal with similar "intangible transfers" will be examined below.

Two UK citizens, Peter and Paul Griffin, are alleged to have been involved with the Khan network through their firm, Gulf Technical Industries of Dubai, although neither has been charged with any offence. As of 2004, UK export controls cover the activities of anyone in the UK or UK persons abroad. The

[55] Kenneth Chang, "Buy a Golf Club, Build a Bomb", *New York Times*, 14 March 2004.

[56] US Department of Commerce Transshipment Country Export Control Initiative (TECI), http://www.bis.doc.gov/ComplianceAndEnforcement/ExecutiveSummary.html

[57] According to the Security Service's website, "in 2003–04 we contributed to the disruption of 30 proven or suspected attempts by countries of concern to acquire WMD-related goods or expertise from the UK.

[58] See Chaim Braun and Christopher Chyba, "Nuclear Proliferation Rings: New Challenges to the Nuclear Nonproliferation Regime", *International Security*, Fall 2004, Vol. 29, No. 2, pp 5–49: "First-tier or primary proliferation may be defined as the spread of nuclear weapons—relevant material from states or private entities within states that are members of the formal nuclear exporters groups, the Nuclear Exporters Committee (or Zangger Committee) or the Nuclear Suppliers Group. Second-tier suppliers are other states or private entities within states that may be supplying nuclear weapons[en rule]relevant material on the international market".

[59] David Albright and Corey Hinderstein, "Unravelling the A.Q. Khan and Future Proliferation Networks." *The Washington Quarterly* Vol. 28 No. 2, Spring 2005, p 114.

extension of the maximum penalty for illicit exports to 10 years' imprisonment is an improvement; however, whether this is a sufficient disincentive to the potentially substantial profits to be made in illicit exports of nuclear-relevant technology is difficult to ascertain.

Many past proliferators have taken advantage of national control lists by ordering dual-use items whose specifications fall just below the parameters of controlled goods. This tactic has been countered by "catch-all controls", or what the UK terms an "end-use control": even if a good or technology is not on a controlled list, it will require an export licence if an exporter knows, has been informed by the UK government or (in most circumstances) has grounds for suspecting that they may be intended for any "relevant use". However, the grounds for judging "suspicious behaviour" by a potential customer are inevitably fairly subjective. Although Annex A in the DTI's general guidance on the Operation of WMD End-Use Control gives some useful indications of suspect behaviour, any adept proliferator will do his best not to display these signs of questionable conduct. As the Guidance itself admits, "this is not an area where we can give definite up-front guidance as the judgement is always made on a case-by-case basis."[60]

Under previous UK law, a license has been required if an "exporter knows, or is informed by UK Government, or has grounds for suspecting, that exports of technology or electronic transfers of technology from the UK to a destination outside of the EC would, or might be used in connection with WMD . . ."[61]. This rule has been broadened since 2003 also to include the transfer of WMD end-use technology by any means, including "face-to-face communication, personal demonstration, or by handing over material recorded on documents or disks". These new restrictions now also apply to anyone in the UK who proposes to transfer technology by any means to another entity within the UK, if the provider knows or has been informed by HMG that it may be intended for use outside the EC in connection with WMD. However, "none of the new controls are based on suspicion of a WMD end-use. The person or entity concerned must be aware or have been informed".[62]

According to the Supplementary Guidance Note on Additional Controls Relating to the Prevention of Proliferation of WMD, under the new controls a licence is needed if a person or entity in the UK "is aware or has been informed by the UK Government, that a proposed transfer of technology is or might be intended for . . . any 'relevant use' . . . There is no requirement, however, to make active attempts to check that a proposed recipient of technology does not intend to use information in a WMD programme". Presumably, this caveat is intended to reassure potential exporters that they do not have to investigate all casual business acquaintances, as they will not be liable for prosecution on the basis of a face-to-face conversation with a foreign entity who, unbeknownst to them, was involved with WMD and sought to elicit technical details from them. This is probably reasonable; it would be impractical for a licence to be required for all such exchanges. However, it might be possible for an unscrupulous UK person to communicate technical details in a face-to-face conversation to a foreigner, and afterwards claim that he was unaware of his counterpart's nefarious intentions, and that there had been no obligation on him to make active attempts to investigate the foreigner's intentions. Presumably, he could also argue that he was not "reckless" regarding any such disclosed information, as is defined in the Regulations, ie that he had not recognised that the disclosure would create a risk of enabling "a specified activity", and that he was not indifferent to such a risk. Paragraph 2.2.(a) of the Regulations expands on the definition of "reckless", but still seems subjective enough to be open to abuse: "the disclosure creates an obvious risk . . . but at the time he makes the disclosure he has failed to give any thought to the possibility that the disclosure would create such a risk."

There is only a limited amount of time that a busy UK exporter of dual-use goods can devote to evaluating a potential customer's intentions. Proliferators are aware of this, and often bury their desired items in a long list of innocuous products, or only make a request after a secure business relationship has been secured with the exporter. Possible technical solutions to the problem of end-use, such as (non-removable) transponders attached to dual-use goods which would reveal their final destination, could be explored in an attempt to make this task easier for the exporter.

In the 2003 Order, a distinction is made between transfers to the EC and outside the EC. Naturally, any transfer which the transferor knows or has been informed is intended for any relevant WMD use requires a licence. However, it may be useful to examine the calibre of export controls within the newer EC states, such as Romania and Bulgaria. Bulgaria in particular suffers from a high level of organized crime and, being located on the Black Sea and next to Turkey, is not far from numerous nuclear relevant smuggling routes.[63] Of course, any foreknowledge of re-export from an EC state to a non-EC state is also forbidden without a licence. However, it may be useful for UK exporters to be aware of potential weaknesses in the law enforcement and export controls of these new EC states, particularly if they receive a flurry of requests from these states for technology which is nuclear-relevant.

[60] The Operation of the WMD End-Use: Guidance.

[61] Supplementary Guidance Note on Additional Controls Relating to the Prevention of Proliferation of Weapons of Mass Destruction (WMD), p 2.

[62] Supplementary Guidance Note on Additional Controls Relating to the Prevention of Proliferation of Weapons of Mass Destruction (WMD), p 3.

[63] It is suspected that fissile materials have been smuggled towards Iran, with both the Caucuses and Turkey being notable transit points.

One difficulty possibly involved with intangible transfers is that, once they have been initially transferred, it is difficult to contain their further dissemination. For example, a UK exporter may be asked to electronically transfer information which could be useful to a WMD programme. However, although the original recipient of this information may appear to be perfectly innocuous, what mechanisms exist to prevent further transfers? Presumably, technical diagrams can be printed, photocopied and otherwise distributed indefinitely, once a licence has been granted to export them from the UK.

Multilateral Export Control Agreements

Summary:

> The UK remains one of the leading proponents of the non-proliferation regime and of its associated export control agreements such as the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement, the Australia Group, the Zangger Committee, the Additional Protocol of the Non-Proliferation Treaty (NPT) and UN Security Council Resolution 1540 (UN 1540). It appears that whilst progress has been made in some of these areas, such as the Additional Protocol, others areas may be going backwards eg the reliability of certain NSG members is uncertain. Furthermore, the non-proliferation regime itself is under increasing pressure internationally and seems to be weakening (eg the cases of North Korea and Iran and regional responses to them). Further weakening of the regime would appear to be likely in the short term unless these cases can be resolved successfully.

Progress would seem to be slow in regards to expanding the membership and effectiveness of the various multilateral export control groups and arrangements. The Wassenaar Arrangement has a membership of 40 and does not include key states such as India and China.[64] Membership of the Zangger Committee is similar, it having 36 members, but its membership does not include Pakistan, Brazil, the UAE or India.[65] Participation in the Australia Group is of the same order, currently standing at 40; Russia, Israel, China, Brazil, the UAE, Pakistan and India are just a few of the states that are not participants.[66] Moreover, some of the newer member states of these groups such as South Africa, which is now a participant in the NSG[67], should not necessarily be given a higher "trustworthy" rating than other states. Whilst these factors do not have a direct effect on the adequacy of the UK's export controls, it should be noted that they do lessen the overall effectiveness of these controls for, as long as "gaps" in the international system remain, traffickers will be able to adapt to increased export controls by diverting their activities to these less-monitored states, as Khan did.

More importantly, the wider non-proliferation regime itself is under increasing pressure internationally and seems to be weakening. It is the case that Additional Protocols, granting the IAEA complementary inspection authority to that provided in underlying safeguards agreements, are now in force for at least 71 states[68], and thereby have increased the effectiveness of IAEA safeguards. However, the recent and unchecked acquisition of nuclear weapons by Pakistan, India and North Korea have weakened the regime, as have the current nuclear activities by Iran. It may be difficult to contain this recent wave of nuclear proliferation, as it may lead to a nuclear "domino effect". The response of states neighbouring North Korea or Iran—such as Saudi Arabia, Turkey, Egypt, Japan and South Korea—to those countries' nuclear programmes may be to start their own nuclear weapons programmes. Whilst other responses may be more likely, the nuclear response cannot be ruled out. Further and rapid weakening of the regime would appear, therefore, to be likely in the short term unless the cases of both North Korea and Iran can be resolved successfully.

The merit of the recent decision by the UK government to replace the Trident nuclear deterrent is outside the scope of this report. However, it should be noted that within the context of the non-proliferation regime, the decision is not necessarily to be welcomed. Under the NPT the UK is of course entitled to possess nuclear weapons, but it is also supposed to work towards nuclear disarmament, although not within a given timeframe.[69] The decision to replace Trident could be used by states such as Iran to justify nuclear weapons programmes of their own. Moreover, the decision will diminish the UK's ability to dissuade current non-nuclear states from starting their own nuclear weapons programme. It will also lessen the ability of other parties, such as the United States, to persuade states such as Japan that nuclear weapons are not militarily or politically effective; this issue is of particular concern given the current weakness of the non-proliferation regime outlined above.

[64] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, http://www.wassenaar.org/participants/index.html

[65] Zangger Committee, http://www.zanggercommittee.org/Zangger/Members/default.htm

[66] The Australia Group, http://www.australiagroup.net/en/agpart.htm

[67] Nuclear Suppliers Group, http://www.nuclearsuppliersgroup.org/member.htm

[68] IAEA Annual Report for 2005, p 68, http://www.iaea.org/Publications/Reports/Anrep2005/index.html

[69] Article VI, Nuclear Non-Proliferation Treaty, states that, "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".

Effect on Academic Research

Summary:

It would appear that little scientific research has been affected by the UK's export controls for two reasons: firstly, few scientists are aware of 2002 Export Control Act and its implications on research and, secondly, those that are aware do not alter their research programmes to take the Act into account. This is not a satisfactory state of affairs. It is recommended that, as a matter of some urgency, the relevant Research Councils be made aware of the 2002 Act and its implications for academic research and that they are asked to disseminate this information to universities.

Research was carried out in order to ascertain the affect that the recent UK Export Controls legislation has had on academia. A number of high level UK academics were contacted from a range of scientific disciplines whose research remit was likely to fall within UK Export Controls. The particular institutions contacted included: the Department Physics, Oxford University; the Department of Physics, Imperial College London; the Department of Physics and Astronomy, Birmingham University; the Computer Laboratory, Cambridge University; and the Biochemistry and Computer Science Departments, King's College London. In addition to the aforementioned individual universities the Engineering and Physical Sciences Research Council (EPSRC) and Universities UK were also contacted.

UK scientific research comes under the "UK Export Control Act" within the "control list" and "end-use" sections of the "UK Export Control Act". For example under category 3 (Electronics) of the "UK Export Control Act" Control List a number of items of technical equipment (eg mass spectrometers, various equipment for epitaxial growth used in the manufacture of semiconductor devices; high energy capacitors etc.) commonly used by researchers in the physical sciences. "End-use" controls can potentially apply to a much wider range of scientific research, although these include exceptions for "basic scientific research" and technology or software in the "public domain".

As stated above, it would appear that little scientific research has been affected by the UK's export controls for two reasons: firstly, few scientists are aware of 2002 Export Control Act and its implications on research and, secondly, those that are aware do not alter their research programmes to take the Act into account. Evidence to support these conclusions was obtained through conversations and email exchanges with a variety of senior UK scientists, the results of which are cited with their permission in the following paragraphs.

Dr. Richard Nickerson[70] a senior physicist from Oxford University and a member of the ATLAS project stated that his group were unaware of the existence of the Act. A similar response was received during correspondence with a number of other Universities, such as the Biochemistry Department at King's College London. Indeed the majority of scientists contacted appeared to be unaware of the Act and how it could potentially impact upon their research.

Dr Nickerson also believed that it would be difficult to implement a pro-active scheme designed to make individual UK academics aware the specific details of the Act. Instead he suggested that the implications of the Act should be addressed at the funding/research council level. He proposed that research councils should be given the responsibility of raising the Act with the principle investigator of any experiment that they deemed to fall under its remit.

Professor Ken Peach[71] is a former Director of Particle Physics at the Council for the Central Laboratory of the Research Councils (CCLRC), and as he was responsible for the in-year management of the UK particle physics programme. When asked about the Export Control Act Professor Peach indicated that he was aware of the general issue of collaborating with sensitive states although he was unaware of the potential impact that the Export Control Regulations could have on research because of the very wide range of technologies controlled under the Act (he was specifically aware that access to certain chemical agents was controlled under the Act.)

In terms of the wider particle physics community Professor Peach suspected that few members of the UK particle physics community would be closely aware of the precise details of the Act and how their scientific research could potentially be encompassed by it. More specifically Professor Peach did not believe that fellow UK particle physicists would be aware of the section of the Act that restricts the transfer of certain types of expertise or software. In relation to this particular area of the Act Professor Peach expressed his view that it was difficult to see how a research programme could be pursued within the context of an international experimental collaboration if some of its members had restricted access to the technical information about the experiment, for example in sensor technology, advanced electronics or Grid technology.

[70] Dr Richard Nickerson is a member of the ATLAS Group in the Particle Physics Department at the University of Oxford, http://www.physics.ox.ac.uk/users/nickerson/

[71] Professor Ken Peach is currently Director of the John Adams Institute for Accelerator Science, University of Oxford.

Professor Ross Anderson[72] a member of the Cambridge University Computer Laboratory Security Group is acutely aware of the details and potential implications of the Act and the affect it could potential have on UK scientific research[73]. In the past he has campaigned, in his role as chairman of the Foundation for Information Policy Research (FIPR)[74], for amendments to be made to the Act.[75]

Members of FIPR are concerned that the Act in its current form could damage UK scientific research by seriously limiting non-EU collaborations across a range of disciplines.

An active researcher in the field of Cryptography (which comes under Section 5 of the dual-use list) Professor Anderson was a member of the international collaboration which developed the Serpent encryption algorithm. Professor Anderson emphasised that during the development of the project an essential activity was the frequent email exchange of code fragments with non-EU groups. This type of exchange of information is prohibited under Category 5, Section 5A2 of the dual use list as the Serpent algorithm uses a key length of 128 bits (the Act only permits symmetric algorithms with key lengths of 56 bits or less). It should be noted, however, that this particular project did not contravene the Act because the email exchanges took place before the Act came into force.

Professor Anderson is of the opinion that certain scientists, who are aware of the Act, will at times have no choice but to ignore its implications. This is because he believes that a strict adherence to the Act would render the formulation of exciting scientific collaborations impossible.

Transfer of Software

Summary:

> It would appear from the research conducted for this report that the area of software transfer where UK Export Controls are most contentious and possibly at their least adequate. The controls are frequently flouted because of their impracticability. It is suggested that they should be reviewed as a matter of urgency.

The physical export or electronic transfer of software is covered in the UK Export Control Act under both the "control list" and "end-use" sections. Within the "control list" different types of applicable software are largely referred to in very general terms. It would appear from this that software exchange in a wide range of scientific disciplines could potentially be affected. It should be noted, however, that there are exemptions within the Act for software which is available in the public domain or software which is used for basic scientific research.

A number of the senior academics interviewed in this study expressed concern over the potential implications of the Act for collaborations in software development projects with non-EU groups. In order to develop a piece of source code in an international collaboration it can be necessary to transfer frequently (usually via email) fragments of code from one group to another. This type of exchange was emphasised by Professor Anderson in the previous section as being essential to the development of the Serpent encryption algorithm (see previous section on academia). Under the Act it would appear to be necessary to apply for separate export license to sanction each separate email exchange (with non-EU colleagues). If this is indeed the case, the effectiveness of any collaboration with non-EU groups would be seriously inhibited.

It is possible that the public domain exemption may help to circumvent this course of action, as in many cases the final source code produced in an academic collaboration is made freely downloadable on a university website (ie placed in the public domain). Although at the time of the email exchanges the code fragments would not have been available for public consumption. It is unclear to academics as to whether the public domain exemption could apply retrospectively in this case.

Clarity of the Law

The laws on export controls appear to be clear, the main exception to this being two definitions. The first is in the area of how to make a practical distinction between basic and applied scientific research. Basic scientific research is covered under the end use section of the act whereas applied research comes under both dual-use and end-use. It does not appear to be clear as to how a distinction is made between the two, which raises the question as to whether researchers in the basic sciences should be made aware of the dual-use list? For example, it is not clear how collaborative work on theoretical nuclear and particle physics by a UK citizen with a group outside the European Union (EU) would be judged? In order to avoid such queries, it is recommended that UK export controls include some additional clarification as to what constitutes a basic science project and what constitutes an applied science project.

[72] Ross Anderson is Professor in the Computer Laboratory Security Group at Cambridge University, http://www.cl.cam.ac.uk/~rja14/

[73] See memorandum to the Quadripartite Committee, Ev 121.

[74] The Foundation for Information Policy Research (FIPR) is a think tank that investigates UK internet policy implications.

[75] As a result of the campaign by FIPR the Act was altered through the inclusion of an academic freedom amendment (Section 8).

A second area where lack of clarity is apparent is that of the definition of the "public domain", where it is not clear as to what would be the ruling on the grouping of a number of papers/sources which individually would not come under the control list because they are available in the public domain. An example of this might be a list of technical manuals and scientific papers that gives all the necessary information to build an explosive lens system could be grouped together and the emailed to a colleague outside the EU. Again, in order to avoid such queries, it is recommended that UK export controls include some additional clarification as to what constitutes the public domain.

A third and much broader area of concern is likely to be the public dissemination of the laws relating to export controls. Due to time constraints, this area was not able to be examined in depth, but given the evident lack of knowledge amongst UK academics it is possible that UK companies may also be unaware of the full implications of the country's export controls.

Future Proofing

Since the Act game into force in 2002 there have been a number of IT developments and changes in common practice which have increased the ease with which information can be transferred and shared globally. Thanks in part to increases in computer power and ease of access to the Internet, use of resources such as blogs, podcasts, wikis and online forums[76] have become increasingly mainstream. In addition the use of e-mail as a primary means of communications has become even more widespread.

In terms of online resources such as blogs, podcasts, wikis and online forums these are, by there definition of use, available in the public domain. Any information posted using these resources will come under the public domain exemption of the Act. The increasing use of e-mail as a means to transfer large documents in electronic format is perhaps of more concern, with most e-mail servers now able to easily cope with attachments of 10Mb or more. This is of a large enough size to facilitate the instant transfer of entire software packages or detailed technical manuals between groups. Developments in this area have substantially increased the ease in which the Act could be circumvented.

Conclusion

Current UK export controls do appear to be adequate in general. As regards issues relating to state proliferation and non-state proliferation networks, the export controls do seem to be quite tight and any further tightening may result in unnecessary difficulties for UK companies. Areas do exist, however, where weaknesses are evident and immediate reform should perhaps be carried out. These areas are as follows:

- Transfer of software.
- Lack of awareness of the UK's export controls amongst UK academia.
- Lack of clarity of some definitions used in the export controls.

UK export controls would be strengthened further if the various multilateral export control arrangements were themselves strengthened. Therefore, it is recommended that the UK government both supports these arrangements and attempts to broaden compliance with them internationally as vigorously as possible. Such action would also serve to reinforce the overall non-proliferation regime which would be a welcome development, given the mounting challenges to it.

February 2007

Memorandum from Dr Sibylle Bauer and Anna Wetter[77]

COMPARING SANCTIONS AND PROSECUTIONS RELATED TO EXPORT CONTROL VIOLATIONS IN THE EU

1. The Role of Sanctions and Prosecutions in Enforcing Export Controls

In 2006, the UK Quadripartite Committee recommended that Her Majesty's Revenue and Customs (HMRC) examine how other EU countries' experience in prosecuting export control breaches be exchanged and built upon more systematically. In the evidence session on 1 March 2007, the Customs Prosecutions Office explained that it had initiated work with Eurojust to examine this issue. This background paper is a contribution to this discussion.

Transfer controls for dual-use items (goods and technologies that have both civil and military applications, or may be used in connection with WMD programmes) are an important non-proliferation instrument, since they can prevent such products and technologies from reaching proliferators and a WMD

[76] As defined by the TLT (Teaching, Learning and Technology) Group, http://www.tltgroup.org/blogworkshop/definitions.htm
[77] SIPRI (Stockholm International Peace Research Institute).

related end-use. The EU Strategy against the Proliferation Weapons of Mass Destruction, adopted in December 2003, highlights the importance of export controls. UN Security Council Resolution 1540 of 2004 for the first time creates an international requirement to put effective export controls in place.

Controlling the export of dual-use items requires a comprehensive export control system that includes a policy-setting mechanism, clear and comprehensive legislation, a licensing system, industry outreach, international co-operation and information exchange, and an enforcement system. To deserve the name "system", enforcement must be characterized by clear procedures and allocation of tasks and responsibilities, a solid legal basis for action, and an institutional memory.

In EU countries, enforcement aims to prevent the proliferation of WMD and other export control violations, and to implement the EU acquis and other obligations in the area of non-proliferation and counterterrorism. Enforcement tasks include preventing or detecting violations of national export control laws and regulations, and investigating suspected violations. Arguably, prosecutions are an essential part of an effective system for enforcing export control legislation.[78]

If a country has no or few prosecutions, this can either be attributed to a perfect prevention and compliance record or, more likely, indicate failures to detect or prosecute such violations. Export control prosecutions face particularly strong challenges, such as: (a) unfamiliarity of prosecutors and judges with export control laws/regulations and non-proliferation/security issues, in particular as regards dual-use items, (b) the challenge of dealing with sensitive or classified materials in court; and (c) legal systems requiring proof of intent in all cases, whereas other systems may require "only" proof of knowledge or "reason to believe". Focus on prevention also requires the ability to address attempts to breach export control violations through applying criminal provisions related to conspiracy to commit a crime, which can for example be found in penal codes.

Comprehensive enforcement systems require mechanisms to detect breaches committed out of ignorance, negligence or intent, although the response to these three categories will vary. Ignorant or negligent behaviour should be addressed (both pre-emptively and in response) through raising awareness about the consequences of such actions. Whereas governments may prefer more flexible and varied forms of sanctions in such cases, perpetrators who acted with intent should be brought to justice through successful prosecutions. The special characteristics of WMD proliferation make this even more important. Arguably, the most dangerous proliferator is part of a larger network which works towards developing WMD for a state or a non-state actor. This type of proliferator tends to be indifferent to the deterrent factor of a harsh punishment (general prevention) since he or she is driven by a determination to succeed with the mission. Such a proliferator would need to be removed from the criminal arena to interrupt the proliferation risk (special prevention). General prevention could however play an important role in deterring those negligent proliferators who do not have an actual intent to provide a state or non-state actor with WMD but are for example driven by economic interests.

Prosecutions play another important role in non-proliferation efforts. They attract the attention of the media through which suspects are exposed, their punishments publicized, and thus send a clear message to those involved in the procurement processes for countries or non-state actors trying to develop WMD that their attempts to do so have been discovered.

In conclusion, since voluntary compliance with export controls cannot be assumed from all exporters, it is necessary to have mechanisms to enforce the controls. Examples of enforcement tools include monitoring of telecommunications, undercover operations and computer surveillance. It is necessary to have specific legislation and to define the powers of the agencies that undertake these tasks. Export controls can be undermined by corruption, forgery (the use of false documents) or smuggling (the unauthorized export of controlled items). There have also been cases where controlled items have been diverted to an unauthorized end-user or used in a way that was not authorized.

This background paper seeks to provide an overview of how EU countries approach breaches of export control laws, in particular related to dual-use items. To this purpose, section 2 introduces the legal and political framework for export control sanctions and prosecutions in the EU, as well as the type of sanctions in place in EU member states. In section 3, the paper summarises case studies of both failed and successful export control prosecutions in selected EU countries, from which generic lessons learnt, mistakes to be avoided and elements of best practice are concluded (section 4).

2. Overview of Legal Provisions Related to Export Control Enforcement in The European Union

2.1 *EU dual-use legislation*

The legal structure of the European Union is supported by three pillars. The first of these pillars is European Community (EC) law, which was founded on the Treaty of Rome and relates to economic and monetary union and the single market, inter alia. It is unique in that it constitutes a supranational system. By contrast, decision-making and the instruments applied in the other two pillars—the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA)—have an intergovernmental character.

[78] In this paper, export control prosecutions are discussed in the context of export control enforcement, although prosecutions are not usually considered part of traditional law enforcement.

Accordingly, the member states, through the European Council and the Council of Ministers, have the right to take decisions. Initiatives and decisions related to the second pillar have a largely political, rather than legal value, as they are not binding before the European Court of Justice. Decisions under the third pillar are used for harmonising legislation in member states and are binding on the members but only as to the result to be achieved.

The system governing export controls for dual-use items in the EU involves the European Council, the European Commission and individual member states in their respective capacities. Controls on the export of dual-use items are regulated by European Community law, which means in principle that such products can move freely within the Community. The entry of dual-use items into the EC is subject to customs controls following the provisions of European Council Regulation no 2913/1992 (the Community Customs Code) and European Commission Regulation no 2454/1993 (Implementing Provisions to the Community Customs Code). For items within the Community, it is up to individual member states to control their export from the EU through customs procedures and law enforcement. This also means that individual member states are responsible for developing export licensing procedures for dual-use items and for prosecuting violations of export control laws.

To harmonize the export control systems for dual-use items among EU member states, the European Council adopted Regulation no 3381/1994 in December 1994. The Regulation established the first European Community regime for the control of exports of dual-use goods and technologies. It was intended to protect the security interests of the member states and to help them meet their international commitments related to the control of dual-use exports to countries outside the EU. Another important purpose was to harmonize export control regulations to prevent distortion of competition among the member states. Following a review of EU law and treaties, it was decided that the EU export control system should be based solely on one European Community act. This led to the replacement of Regulation 3381/1994 with Regulation 1334/2000 (referred to hereafter as the EU Dual-Use Regulation).

The EU Dual-Use Regulation provides common rules on the kind of items that require authorization for export. Annex I includes a list of specific dual-use items. This list is based on the control lists agreed in the international export control regimes (Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group and Wassenaar Arrangement) and is updated regularly, most recently by European Council Regulation 394/2006.[79] The EU Dual-Use Regulation further provides a legal instrument to control an unlisted item with immediate effect. The so-called catch-all control, found in article 4 of the Regulation, obliges an exporter to seek permission from the responsible authority before exporting any item to a particular end-user or for a particular programme whether or not the item exported appears on a control list, if: he has been informed by the authorities that the items are, or may be intended in their entirety or in part for a WMD related end-use, for use in connection with a military item on the EU Common Military List in an embargoed destination, or as parts of an illegally exported item. Furthermore, the exporter is obliged to inform the authorities if aware of such an intended end-use. Member states are responsible for effective compliance with the regulation within their territories, for example by deciding on appropriate sanctions.

2.2 *Export control sanctions in EU member states*

Both the EU Dual-Use Regulation 1334/2000 and UN Security Council Resolution (UNSCR) 1540 of 2004 mandate sanctions for export control violations. UNSCR 1540 obliges all UN member states to "take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials". The resolution specifically provides that states shall "develop and maintain effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items . . .". Furthermore, States are required to "establish, develop, review and maintain appropriate effective national export control and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations".[80] UN member states have been requested to submit reports on their implementation of the resolution to the 1540 Committee.[81]

Article 19 of the EU Dual-Use Regulation requires each member state to "take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its

[79] European Council Regulation (EC) 394/2006, which amended Regulation 1334/2000 on export control of dual-use items, was published in the *Official Journal of the European Union,* no L 74, 13 March 2006 and entered into force on 11 April 2006.

[80] Operative paragraph 3, S/RES/1540 (2004).

[81] The reports are available on the website of the 1540 Committee URL <http://disarmament2.un.org/Committee1540/>. The EU has also submitted a report although it is not a member of the UN. It should be emphasized that there was no template to be used by member states for the purpose of reporting to the 1540 Committee, hence the contents of the reports vary.

implementation." It further specifies that the penalties "must be effective, proportionate and dissuasive." If the current revision of the Regulation extends EU wide controls to activities such as brokering and transit, the relevant national laws to penalise violations will also require amending.

It is up to each government to implement these requirements. Generally, a government must decide what constitutes an effective deterrent or other type of preventive punishment to an individual and a company. This in turn requires that sanctions apply to both individuals and companies. To be comprehensive, they should apply to all actors in the supply chain, eg producers, traders, financers, freight forwarders. Possible sanctions (criminal and administrative) include the loss of right to privileges such as use of open licences or a brokering permit, financial penalties, loss of property rights, a prison term or a suspended sentence.

The implementation of the obligation to criminalize breaches of export controls and to decide appropriate sanctions differs between EU member states. A survey of the penalties in place that are linked to export control offences in EU member states shows that they vary both in type and scale. The range of maximum penalties varies from 12 months of imprisonment (Ireland) to 15 years of imprisonment (Germany). The range of minimum penalties varies from fines (most member states) to three years of imprisonment (Lithuania).

A study on administrative enforcement practices in the EU conducted on behalf of the European Commission shows that nine of the 11 member states surveyed can impose administrative sanctions for export control violations. The way this authority is used varies considerably. In most of these nine countries, customs is the responsible agency. Sanctions include fines, confiscation and revocation of export licences. Warning letters are commonly used in case of first or minor violations.[82]

According to a separate survey of the EU Commission among member states on sanctions related to the EU dual-use regulation, two thirds of Member states have both administrative and criminal sanctions, while one third of member states have only criminal sanctions. Most member states also impose other sanctions including restrictions of use of General Export Authorisations, and most of them have legal provisions for additional penalties that have another legal basis than Article 19 of the regulation. Almost half of the member states have applied their criminal sanctions against exporters violating export control law. One third of Member States regard only intentional violations as criminal offences, whereas the remaining two thirds consider violations as criminal offences in any event.[83]

In the UK, deliberate offences can be punished with up to 10 years of imprisonment and/or an unlimited fine. All goods are liable to forfeiture regardless of whether the breach has been committed without the knowledge or intent of the exporter. Hence, the nature of the offence is strict liability. This is based on Section 68(1) of the Customs and Excise Management Act 1979 (CEMA). Section 68(2) of CEMA stipulates that any offence, deliberate or not, can result in a fine of three times the value of the goods which have been illegally exported or been subject to an attempt of an illegal export. For less serious breaches, traders may pay a compound penalty or restoration fee.

On 18 February 2005, Saroosh Homayouni was convicted by the Southwark Crown Court of 12 specimen counts under section 68(2) of the Customs and Excise Management Act, for knowingly having exported aircraft parts to Iran without an export license in contravention of an export prohibition. The offence resulted in 18 months imprisonment, suspended for two years. The asset worth £70,000 was confiscated. The individual was also banned from being a company director for 10 years.[84]

The question of intent is usually difficult to establish. Each case that reaches the Revenue and Customs Prosecutions Office (RCPO) has to be reviewed to establish whether a prosecution should proceed. The modalities are found in the Code for Crown Prosecutors. In short, the review has to confirm that there is sufficient evidence. This stage also takes the reliability of the evidence into account. The reviewer also needs to confirm that there is a public interest to open prosecution.

It should be pointed out that, despite the need to improve law enforcement, and possibly also to impose harsher sanctions, in many EU member states, one needs to bear in mind the delicate balance between looking after a state's security interests on the one hand and protect the fundamental human rights on the other hand. Article 6 of the European Convention on Human Rights serves to provide every individual with a right to a fair trial.

[82] Raba, T and T Wood, "A Survey of Administrative Enforcement Practices in Selected European Union Member States", presented at International Export Control Conference, Bucharest, 7 March 2007.

[83] Willmann-Lemcke, J, "Enforcement and Sanctions under the EU Dual-Use Regulation and the UNSCR 1540", presentation at Western Balkans outreach seminar, Vienna, 4 May 2006.

[84] URL http://www.egad.org.uk/sw3194.asp.

2.3 *Harmonising sanctions across the EU?*

In December 2006 the European Commission published a communication on the review of the EU Dual-Use Regulation proposing the inclusion of a provision according to which member states must apply criminal sanctions for serious violations of the Regulation. The proposal is a response to the call in the 2003 Thessaloniki Action Plan[85] for a common EU approach regarding the criminalisation of illegal dual use exports and the call by UNSC Resolution 1540.[86] The discussions are at an early stage, but should be seen in the context of broader debates that relate to EU competence regarding third pillar issues.

There have been a number of initiatives aimed at harmonising member states' law enforcement procedures and sanctions relating to EU legislation. At a meeting in Finland in October 1999, member states agreed to create a joint "area of freedom, security and justice" in the European Union that was intended to further develop cooperation between member states as envisaged by the Treaty of Amsterdam. It set up a number of milestones dealing with, inter alia, a "genuine" European area of justice, the Union-wide fight against crime, and stronger external action.[87] In September 2006, Commissioner Franco Frattini proposed removing the national veto under the third pillar, which was opposed by many member states, including the UK.[88]

In the context of efforts to develop a European area of justice, some EU member states signed a Convention on Mutual Assistance in Criminal Matters between member states in 2000 that entered into force on 23 August 2005.[89]

Common EU legislation needs to be enforced in an equally effective manner in all EU member states to maintain credibility. However, this does not require that all national implementation laws should necessarily be identical or that the division of competences between the relevant enforcement agencies be the same. The enforcement system should be adapted to the individual country's legal and political system, industrial structure, geographical location etc. A recent case before the European Court of Justice, which deals with enforcement of environmental laws (C-176/03, Commission v Council), sets a potential new standard by concluding that the Commission has competence to propose appropriate common sanctions if necessary to enforce EC legislation relating to the environment.

Regardless of whether sanctions will be harmonised across the EU, effective investigations and prosecutions require co-operation and information exchange of law enforcement authorities. The EU coordinates cooperation between its member states on issues that relate to law enforcement, prosecution and the judiciary through a number of mechanisms (agencies and networks) that could also help facilitate and support an effective implementation of the current Community legislation within the area of export controls for dual-use items. In the area of police co-operation, these are Europol (criminal intelligence office),[90] the European Crime Prevention Network, the European Police College, and the Police Chiefs Task Force.

Eurojust could assume a role in facilitating cooperation between member states related to prosecuting export control violations. It recently hosted a meeting on this issue.[91] Eurojust is a relatively new EU body established in 2002 to enhance cooperation between those authorities of the member states dealing with investigation and prosecution of serious cross-border and organized crime. The agency is the first permanent network of judicial authorities to be established anywhere in the world. Like Europol, it does not possess any executive power. Its functions include facilitating the execution of international mutual legal assistance, the implementation of extradition request, and hosting meetings between investigators and prosecutors from different states. The office is composed of 27 national representatives, one nominated by each Member State.[92]

[85] European Council, "Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction", Brussels, 10 June 2003, URL <http://ec.europa.eu/trade/issues/sectoral/industry/dualuse/legis/action_plan.htm>.

[86] Communication from the Commission on the review of the EC Regime of controls of exports of dual-use items and technology, 18 December 2006, COM(2006) 828 final.

[87] URL <http://www.europarl.europa.eu/summits/tam_en.htm>.

[88] URL <http://www.euractiv.com/en/justice/uk-leads-eu-veto-system-reform-block/article-160297>.

[89] URL <http://europa.eu/scadplus/leg/en/lvb/l33108.htm>.

[90] It aims at improving cooperation by the competent authorities in the member states in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organized crime. Ensuring that the illicit export of dual-use goods is included in the mandate of Europol requires interpretation of the EU definition of terrorism. URL <http://www.europol.eu.int/index.asp?page=facts>, Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

[91] UK Parliament Quadripartite Committee, Evidence Session, 1 March 2007.

[92] URL <http://www.eurojust.eu.int/>.

3. Lessons Learnt from Specific Prosecutions in Selected EU Countries

This section presents prosecutions of violations of export regulations for dual-use items in four EU member states. The countries that are subject to case studies are Germany, the Netherlands, Sweden and the United Kingdom.[93] The cases represent types of legislations that could be used to prosecute export control violations. The aim to show alternative legislations explains the selection of cases, as does the low number of convictions of export control related crimes in the EU member states.

Since a prosecutor may face many types of perpetrators it is important to have different types of legislation in place. An illegal exporter could either be an actual WMD proliferator belonging to the A.Q. Khan network, a negligent exporter failing to comply with the licensing system or a businessman with financial interests in trading with dual-use products. Since the intent of the different types of perpetrators vary, they may need to be prosecuted under different acts, eg general smuggling acts (Swedish case study), export control legislation (Dutch and German case studies), and terrorist legislation (UK case study). This requires the prosecutor to be familiar with all applicable laws.

3.1 *Sweden*[94]

One of the few export control related convictions relating to dual-use goods in Sweden was first prosecuted in 1999 and appealed the same year. The case illustrates some of the legal challenges that prosecutors all over the world seem to face when a suspected export control violation is brought to their attention.

In 1998, the Iranian born Swedish citizen Ehsan Amouzandeh (E), who was running a pizzeria parallel to studying at college in a southern Swedish city, was contacted by his cousin in Tehran. The cousin claimed to be in need of a thyratrone for his studies at the university. Thyratrones send a high-voltage current through a device and can be used as a nuclear triggering device, but can also be used for medical and scientific purposes. The equipment was listed on the EU dual-use list at the time of the export. E was offered a profit if he agreed to help his cousin.

The cousin advised E to call the thyratrone supplier in the United States; however, the company, Richardson Electronics, referred him to the Swedish subsidiary located near Stockholm. When E was asked about the use of the thyratrone he replied that he needed it for his studies at his Swedish college and assured that the product would remain in Sweden. E falsified the end-user certificate using his mother's, brother's and friend's names and convinced the company that he was able to pay for the equipment (£1,200). The cousin had arranged for the payment through several financial transactions in Frankfurt, New York and London. E had been asked to use a shipping company that would arrange for the whole transport, including clearing the export with the customs service and paying for the terminal freight. E put the name of his pizzeria on the consignment and labelled it "electronic device". One delivery was made in 1998 and another attempted delivery in 1999. However, the second export was detected by customs personnel at Stockholm Arlanda airport before it was sent off to Iran when officers were investigating the activities around the previous export. When customs began to study the export documents of the first delivery, they found that the invoice was "unprofessional", the number provided on the export declaration was listed on the Nuclear Suppliers Group's list, the recipient in Iran had a "red flag" in the risk report as a sensitive recipient of material that could be used in nuclear programmes and that the place of origin of the product was the United States.

Customs were asked to carry out a customs audit including a visit to the pizzeria, in its capacity as exporter. Such audits can be made as an administrative measure without suspicion of crime.

When E was contacted by the Customs Criminal Investigation Division, he claimed that he had been unaware of the dual-use function of the product and had been convinced that his cousin would use it only for civil purposes. The lack of evidence proving E's knowledge of the use of the product limited the choice of laws that could be applied for E's prosecution. In addition, the district prosecutor did not apply the then (1991) Act on Strategic Products, but decided to prosecute using the general Act on Penalties for the Smuggling of Goods (SFS 1960:418) and the penal code including the statute related to falsification of documents (the falsified end-user certificate). E was sentenced to four months in prison by both the lower and the higher court but the latter convicted him for the serious offence as opposed to the former.

Due to the complexity of export control legislation, it seems necessary to gather export control expertise in special prosecution units to make prosecutions more effective. Sweden established a special unit composed of prosecutors in charge of cases relevant to national security in 2006. It co-operates closely with the Swedish intelligence services.

[93] These preliminary findings are based on research commissioned by the Stockholm International Peace Research Institute (SIPRI) from Anna Wetter (Netherlands, Sweden and the UK) and Klaus-Peter Ricke (Germany). Comprehensive case studies will be published as part of a SIPRI research report.

[94] The Swedish case study is based on information found in the local district court's (Halmstad tingsrätt) judgment, announced on 25 November 1999, and on interviews with the competent authorities. The case number is B 2051-99.

The Swedish case raises one additional concern. The prosecution shows that supplying export controlled products that are illegally exported by a broker (E), with or without the awareness of the supplier (Richardson Electronics), is not punishable according to Swedish law, unless the intent of the supplier to proliferate WMD can be supported by proof. This raises the question whether suppliers should have a bigger responsibility to check end-users and perhaps also be legally liable.

3.2 *Germany*[95]

In 2002, the German businessman Hans-Werner Truppel was found guilty of illegally exporting 22 tons of aluminium tubes to North Korea. The aluminium tubes had a potential use as casings for gas ultra-centrifuges that could be used to enrich uranium to weapon grade. This export control violation derives from a business relationship between Truppel and a former North Korean diplomat. The diplomat had put Truppel in contact with a Chinese company. Truppel and the Chinese company had since then been trading in non-sensitive goods. This explains why Truppel had built up confidence with the local German customs office and why the agency perceived him as a trustworthy trader.

In 2001, Truppel received a proposal from his North Korean contact to order aluminium tubes from a gross steel provider, Bek GmbH. The company had bought the tubes from the Krefal Handels GmbH which is a German subsidiary of British Aluminium Tubes. The tubes were transported to Bek GmbH from the UK in September of 2002 and stored in the German town of Ulm. A few days after the delivery, Truppel presented the required export declaration to the local customs office of export in Aalen, Germany. Without any special questioning, a customs clearance officer approved and stamped the export application form. The customs officer neither ordered a physical examination of the goods nor asked where the tubes could currently be found. In accordance with German customs laws, the tubes had hence been confirmed for export. However, Truppel had not revealed that he had received a fax from the North Korean the same morning stating that the goods were destined for a project in China, with Shenyang as the contract partner.

The German Federal Office for the Protection of the Constitution found out about the sensitive recipient through information from a foreign intelligence service, a day after the export had been cleared by customs. The office responded to the information by contacting the German licensing authority BAFA (the Federal Office for Economics and Export Control) and the German Customs Criminological Office, the Zollkriminalamt (ZKA). Both took immediate action. ZKA confirmed with the local customs investigation office in Stuttgart that it would assure the location of the tubes and inform Truppel that the export could not proceed until BAFA had authorized the export. BAFA began processing the license application. Truppel was told that any attempt to export the goods without a licence would be punishable according to German law. However, since Truppel feared considerable economic loss in case of a denial, he started to look for alternative customers. While BAFA was processing the license application the tubes were stored by the selling company Bek GmbH, but were under surveillance by the ZKA. Four months later, BAFA announced that the application could not be approved. By then, Truppel had found an import-export company in Hamburg that agreed to carry out the export to the initial customer. The company made an offer to transport the tubes to China, stored in a 40-feet container, and to declare the goods at the German customs office. Truppel told Bek GmbH that was storing the tubes that they were to be transported back to the UK, which enabled him to get access to the tubes. The goods were then loaded onto a French cargo ship that was destined to port Dalien in China.

While checking on the goods, the ZKA learned that the tubes had been removed from storage. The office then initiated a criminal investigation and due to good relations with its French counterpart, the ship could be intercepted in the next port, which was located in Egypt. The interception led to Truppel being taken into custody and the return of the tubes to Hamburg, where they were confiscated by German authorities. The Stuttgart district court convicted Truppel under the German War Weapons Control Act to four years of imprisonment, and the import-export company for abetting to the crime to one year and three months of imprisonment.

The case study shows how denial of a license application could turn a legal exporter into an illegal exporter due to fears of financial loss. Hence, it also raises the issue of allowing for preventive confiscation if an exporter is suspected to go ahead with an export in violation of an order. It also highlights the importance of law enforcement agencies working closely with industry.

3.3 *The Netherlands*[96]

On 16 December 2005, a district court in the Netherlands convicted the Dutch businessman Henk Slebos for illegal exports of dual-use goods on five counts. For this, Slebos was given a one year prison sentence which was reduced to four months, and his firms were fined €197,500. In addition, he was ordered to personally pay a fine of €100,000.[97] Slebos is currently appealing the conviction.

[95] The case is based on information found in the regional court's (Stuttgart) ruling announced on 28 May 2004, number 10 Kls 141 Js 28271/04.

[96] The case study is based on the two articles, *The unmaking of a nuclear smuggler*, by Mark Hibbs, published in the Bulletin of the Atomic Scientists, Nov/Dec 2006 and the special report; *The A.Q. Khan network: crime . . . and Punishment?* published in the March 2006 Issue of WMD Insights.

[97] URL <http://www.wmdinsights.com/I3/G1_SR_AQK_Network.htm.

Henk Slebos is also believed to have served as a purchasing agent for the Pakistani nuclear programme in the late seventies and early eighties and has been convicted prior to 2005 for other export violations. Slebos' illegal activities leading up to the 2005 conviction were revealed about seven years prior to the trial, when the German businessman Ernst Piffl was sentenced to 45 months of imprisonment by a German court for having exported centrifuge parts to Pakistan in violation of German export control laws. During trial proceedings Piffl said he regretted having contributed to Pakistan's nuclear programme and decided to start cooperating with Germany's foreign intelligence service. In 2001, he helped reveal that the logistics for one equipment order (bottom bearing pre-forms that can be used in centrifuges) were to be organized by the intermediary Slebos and to be sent to the Institute of Industrial Automation (IIA) in Pakistan. IIA had links to Khan's Research Laboratory (KRL). This information was passed on to the Dutch counterparts since Slebos was a Dutch national living in the Netherlands. The Netherlands Ministry of Economic Affairs, which is responsible for export licensing, responded to the information by issuing a written warning, using the catch-all clause, which stated that Slebos was not to receive authorization to export the products to the IIA. In consequence of the successful international cooperation, which involved mainly British, US, German and Dutch intelligence services, the order could be intercepted and prevented from ending up in the hands of KRL.

After a raid of Slebos' office by Dutch agents in 2004, it was found that in addition to attempts to export bottom bearings in 2001, he had apparently supplied the IIA with thousands of other steel bearing balls that precisely matched the design specifications for the bottom bearings of the Urenco centrifuge known as CNOR.[98] He was never charged for this suspected crime. He was however charged for having transferred "pivot bearings" to the IIA but was acquitted on this charge because the court could not establish that the Dutch government had promptly informed him that the sale was prohibited based on the Dutch catch-all clause. Slebos does not, apparently, dispute the facts of the export.[99] Nevertheless, this alerted the Dutch authorities of the importance to find ways of reaching Slebos with catch-all warnings, also acknowledging that he had ignored the numerous warnings sent to him by the Dutch ministries since the early seventies. The ministries had been unable to do more than issue warnings prior to a prosecution in 1985, since the exported items had neither been listed on the control list at the time, nor had the catch-all clause been introduced. The 1985 conviction concerned an attempt to re-export a US manufactured high-speed oscilloscope to Pakistan via the United Arab Emirates. The product was manufactured in the United States and on the Dutch export control list. Consequently, the Dutch prosecutors could successfully charge him for exporting controlled goods without the required license. For this violation, Slebos was sentenced to one year of imprisonment but after appeal, his sentence was reduced to a fine and a six months suspension since the court of appeal argued that the prosecution had not proven the intent for nuclear end-use and took into account that Slebos had no previous criminal record. Despite Slebos' conviction in 1985 he managed to maintain contact with Khan's network in the 1990s and beyond. A much larger amount of Slebos' products than what could be linked to the intercepted order in 2004 is believed to have been transported to clients in Pakistan.

Due to the presence of intelligence officers and their active participation in the search of Slebos's office in 2001, without authorisation thereof stated in the search warrant, the evidence which was collected in these searches was ruled inadmissible by the court.[100] Hence, one conclusion from the Dutch case is that the lack of evidence may result in minor punishments that seem unlikely to serve as deterrents to future export control violations.

3.4 *The UK*[101]

On 5 January 2003, six North African men were arrested in London on charges of "being in the possession of objects which give rise to reasonable suspicions of the intention of carrying out, preparing or instigating an act of terrorism" and for "trying to develop or produce a chemical weapon", ie describing violations of the UK Terrorism Act of 2000.[102] The investigation was carried out by agents from the Anti-Terrorist Branch of the London Metropolitan Police, Scotland Yard, and the British domestic intelligence agency M15.[103] Following the arrests, authorities discovered traces of ricin in the apartment located in Wood Green in northern London. Castor beans were also discovered as well as equipment for crushing the beans. The arrested men were believed to have ties to a terrorist cell known as the "Chechen network". Members of the cell are supposedly Algerians who have received training in Chechnya and in Georgia.[104] The suspects were arrested after a tip by French intelligence agencies and the ricin that was discovered was thought to be only part of a larger batch that presumably had been removed from the apartment before the arrests.[105]

[98] The CNOR is one of the centrifuges designed by URENCO, which is the place from which AQ Khan stole technology while working there. The CNOR is considered to be the basis for centrifuge design known as P1 that Pakistan supplied to Iran.

[99] URL <http://www.armscontrolwonk.com/941/slebos-bottom-bearing-preforms>.

[100] International Export Control Observer, Issue 3, December 2005/January 2006, published by the Center for Nonproliferation Studies (CNS), Monterey Institute of International Studies, p 16.

[101] The UK case study uses public sources.

[102] URL <http://www.opsi.gov.uk/Acts/acts2000/20000011.htm>.

[103] URL <http://www.cps.gov.uk/news/pressreleases/archive/2005/121_05.html>.

[104] Center for Nonproliferation Studies, "Chronology of incidents involving ricin", 3 February 2004.

[105] Center for Nonproliferation Studies, "Chronology of incidents involving ricin", 3 February 2004.

Four men were charged under section 57 of the Terrorism Act to have possessed "articles . . . which give rise to a reasonable suspicion that (this) was for a purpose connected with the commission, preparation or instigation of an act of terrorism".[106] Furthermore, the suspects faced a joint charge under the Chemical Weapons Act of 1996 for being "concerned in the development or production of a chemical weapon", prior to 5 January 2003.[107]

Later the same month another person was charged with conspiring to develop or produce chemical weapons. In addition, he was accused of having a fake French passport and identity card.[108] The possession of these articles made the police suspicious about potential involvement in the commissioning, preparation and instigation of acts of terrorism. A second individual was arrested with the group, who faced two charges under the Forgery and Counterfeiting Act of 1981,[109] and a third person only a week later in Manchester where he had stabbed and killed a police officer in the raid. The latter was also charged for having committed terrorist offences.[110]

Two days after the first arrest, the chief scientist advisor could inform the British anti-terrorism authorities (the Biological Weapon Identification group at Porton Down) that the lab tests did not indicate any presence of ricin.[111] However, another employee claimed that the preliminary finding was incorrect and that it did include ricin. It was this latter information that was passed on to the media and which was also used by the US Secretary of State Colin Powell, to support his presentation to the UN Security Council on 5 February 2003 in which he emphasized a need to militarily intervene in Iraq by claiming that the regime was aiding al-Qa'ida terrorism.[112]

The jury acquitted one of the main suspects of the most serious charge—conspiracy to carry out a chemical attack, on 12 April 2005. Nevertheless, it found him guilty of "conspiracy to commit a public nuisance by the use of poisons or explosives to cause disruption, fear or injury". The suspect was sentenced to 17 years of imprisonment.[113]

Although the concern that weapons of mass destructions were being prepared in the UK could not be supported in this specific case, it shows that terrorism legislation may also be relevant for prosecuting export violations should the products be exported. This usually requires that the prosecutor can prove that the exporter, manufacturer, supplier or broker had the intent to proliferate weapons of mass destruction. This said, it needs be emphasised that there should be distinct boundaries when to prosecute a case under this type of act in contrast to other relevant export control laws.

One conclusion to be drawn from this prosecution is that investigating crimes that involve illegal possession of chemical, biological, radiological and nuclear (CBRN) materials require an investigation team with forensic skills. In other words, procedures at the crime scene should take into account the special features of dual-use materials since such procedures could help to preserve an unbroken chain of evidence.

4. Factors Contributing to Successful Prosecutions[114]

The case studies show that a number of factors increase the chances for a successful prosecution. *First*, comprehensive and clear legislation should be in place, including liability for the different types of activities in the supply chain, such as exporting, shipping, trading, brokering and financing of dual-use goods. One actor may engage in more than one of these activities, and both individuals and companies can carry out the activities. Depending on the type of activity, intent may be more or less difficult to prove, and the character of liability has to reflect this. Moreover, one needs to distinguish between intent to violate export control laws or intent to contribute to a WMD programme.

Legislation should include a comprehensive catch-all clause, which needs to be carefully worded. There should be a link from export control laws to criminal law (or some corresponding arrangement) to enable the possibility to prosecute attempts to violate export control laws, for example. Such a system could also serve as a preventive measure. There should be appropriate sanctions addressed at both individuals and companies. For reasons of prevention, it is crucial to punish attempts to smuggle dual-use items. There also needs to be a regular legal revision to harmonise and streamline laws, which may have become patchwork after successive amendments, and to take political, legal and technological developments, as well as changes in trade patterns and threats into consideration. The need for specific amendments may also become obvious through loopholes detected through prosecutions (in particular failed ones). Ideally, loopholes are detected before a proliferator finds them.

[106] URL <http://www.opsi.gov.uk/Acts/acts2000/20000011.htm>

[107] http://www.guardian.co.uk/ukresponse/story/0,,874287,00.html

[108] URL <http://www.peterboroughtoday.co.uk/viewarticle.aspx?sectionid=55&ArticleID=230531>.

[109] http://www.guardian.co.uk/ukresponse/story/0,,874287,00.html

[110] http://news.bbc.co.uk/2/hi/uk_news/england/manchester/4434533.stm

[111] URL <http://www.globalsecurity.org/org/nsn/nsn-050411.htm, http://cns.miis.edu/pubs/reports/ricin_chron.htm>.

[112] Smith, G, "UK terror trial finds no terror: not guilty of conspiracy to poison London with ricin", *National Security Notes,* 11 April 2005, URL <http://www.cnn.com/2003/WORLD/europe/01/07/terror.poison.extremists/index.html>.

[113] URL <http://www.williambowles.info/spysrus/ricin_plot.html>.

[114] These factors were first developed in the context of a regional seminar for South Eastern Europe on prosecuting export control violations held in Bled, Slovenia, and organised by SIPRI and co-funded by the EU and the US Export Control and Related Border Security Assistance Programme.

Second, national prosecutors need to be not only aware of all existing laws related to export controls of dual-use goods but also trained in how to use them. In addition to training in applying the regular export control laws, specialized prosecutors need to be familiar with the relevant national laws which implement international conventions and treaties related to chemical, biological, radiological and nuclear weapons as well as national legislation providing authority to implement UN Security Council resolutions, including those that impose economic or financial sanctions and resolutions aimed to combat terrorism, all of which may be relevant in an export control prosecution.

Third, in order to detect the smuggling of dual-use goods, enforcement officers need regular contacts with industry and should make regular company audits. A joint strategy for outreach to industry would be the best approach within the enforcement community. The different regulators need to harmonise inspections and exchange information about visits. Risk management should include risk profiles on persons, items, places and routes.

Fourth, to interdict and stop the smuggling of a dual-use product, customs officials, border police and investigators need to have the legal and technical capacity both to stop shipments and to confiscate goods. Preventive confiscation could be considered for specific cases.

Fifth, setting up an effective investigation procedure requires clearly stating the division of legal powers and roles between customs officials, police officers and other potential actors in an investigation. Investigators need the legal competence to search premises, access bank and credit records, and to monitor electronic and telecommunication. It must be clear when the judicial approval to take these measures is required. Investigators need authorisation to cooperate with colleagues in other countries that hold relevant information and powers to facilitate investigations outside national territory. Bilateral agreements related to extradition and mutual assistance in criminal procedures are also essential for this purpose.

Sixth, an effective export control prosecution depends on clear national legislation stating who has the legal competence and duty to prosecute violations of export control laws. Some states (including the UK) have systems which may authorize special customs prosecutors to prosecute export violations. In these countries it is crucial not only that the legislation on who should prosecute is clear, but that this system also works in practice to rule out the possibility that violations fall between chairs of prosecutors. It should also be clear in which country a prosecution should take place if the case includes criminal activities in more than one state. Furthermore, prosecutors need to know what actors could be subject to prosecution under these different laws. This once again highlights the need for special training of prosecutors.

Seventh, appropriate sanctions can be of administrative or criminal nature. Administrative sanctions can include monetary sanctions and the loss of export licences, of the right to privileges (for example simplified procedures) and of property rights through confiscation and destruction of the confiscated product. Criminal penalties can include fines, imprisonment and suspended sentences. Fines have been classified as either administrative or criminal sanctions, depending on factors such as the authority that decides and the laws on which they are based.

Last but not least, the various actors involved in the process need to work effectively together, including those responsible for licensing, customs procedures, investigation and prosecutions of suspected violations of the rules governing exports of dual-use items. Cooperation, coordination and communication are required at the intra-agency, interagency level and international levels. Cooperation at the intra-agency level involves raising awareness and developing special expertise within the different agencies. Interagency cooperation implies facilitating the flow of information (eg of license denials) between all relevant institutions, ie customs, licensing, police, intelligence, the foreign ministry and the prosecutor's office, for example through joint databases. Communication requires the development of routines and procedures for exchanging information and investment in the information technology that can make communication fast and effective. This may also require drawing up agreements on intelligence sharing and opportunities for individuals to meet (eg through an interagency working group). International cooperation with neighbouring countries is essential to combat cross-border crimes and enables countries to share information concerning criminals and suspects. To achieve this objective, formal agreements of mutual assistance in criminal investigations are crucial. Generally, effective coordination requires clear distribution of roles and responsibilities among the various actors. An enforcement system must deserve the name "system", which requires clear procedures and a clear division of responsibilities and tasks. This has to be thought through in advance, not only once a system's effectiveness is tested in practice.

March 2007

Supplementary memorandum from the Foreign and Commonwealth Office

QUESTIONS RAISED BY THE QUAD COMMITTEE DURING THEIR VISIT OF 26 APRIL 2007

1. *Which applications for export licences are not seen by the FCO and why and whether the DTI's sifting assessment is checked by a second officer within DTI?*

The FCO's parliamentary responsibilities in terms of export licensing were set out in Peter Hain's statement to the House of 26 October 2000:

> *"All relevant individual licence applications are circulated by DTI to other Government departments with an interest, as determined by those departments in line with their own policy responsibilities."*

The FCO therefore has the remit to decide which export licence applications (ELAs) it sees. The FCO chooses not to see the following licences under standard circumstances:

No Licence Required (NLR): The FCO does not have the capability or knowledge to analyse or question the technical assessment and subsequent NLR rating that DTI Export Controls Organisation make. The FCO would add no value by seeing these licences.

Licence Required—End Use (LR-END): The FCO routinely assesses Weapons of Mass Destruction (WMD) related ELAs that are caught by the Multi-lateral Control Regimes eg Wassenaar, MTCR, NSG. However, other ELAs for WMD-related material, which fall outside of the regimes, but are "Licence-required" because of concerns about the end user, are not seen. With such ELAs the decision to refuse is dependent on a technical assessment of the goods, coupled with intelligence which gives reason to believe that the end user, is, or may be, involved in a WMD programme. The FCO is entirely dependent on MOD and DTI input in these areas and would add no value to the assessment process. We have therefore decided not to see these applications, unless specifically requested to do so by other Government Departments. FCO ministers have agreed this policy.

Dealer to Dealer OIELs: The FCO does not assess these applications. The EC Weapons Directive allows, with an export licence, UK dealers to ship small arms and ammunition to their counterparts in EU member states. The Exporter must inform the Home Office of the details of the shipment at least 48 hours prior to export. The Home Office passes these details on to the appropriate Ministry in the recipient country. The FCO does not believe that it would add anything to this process because of the safeguards already in place and the low risk associated with these destinations.

The FCO will make an assessment of any ELA when requested to do so by another Government department. In practice other Government departments still seek our advice, where it is appropriate, on more contentious cases. Interdepartmental consultation within the export licensing community is increasingly close, and other Government departments are well aware of FCO interest. The FCO continues to attend the export licensing community refusals meeting. All possible refusals for ELAs, including those for WMD-rated goods (see paragraph 4), are discussed at this meeting.

Licensing supervisors in the DTI assess which cases need to be circulated, against a number of criteria. Team leaders in the DTI also carry out a check on all cases to sensitive destinations to ensure that they have been processed correctly before the finalisation of a case.

2. *Whether the Government's discretion to revoke an export licence is fettered in any cases by the need to pay compensation to the exporter?*

HMG has complete discretion to revoke an export licence. Subject to due process and proper consideration, this discretion is not fettered in any way, including the possibility that compensation may need to be paid.

3. *Whether, excluding countries subject to an embargo, are there any countries whose human rights records are so bad that the UK will not grant any exports?*

As the Committee will know, all export licences are assessed on a case by case basis at the time of application. There are no "blanket bans" on exports from the UK. As set out in Criterion 2 of the Consolidated EU and National Export Licensing Criteria, we will recommend refusal of any export licence where we believe there to be a clear risk that the goods to be exported might be used for internal repression.

May 2007

Joint memorandum from HM Revenue and Customs and Revenue and Customs Prosecutions Office[115]

1. *The value of the goods which were subject to the two prosecutions (Q144)*

The table below shows the cases prosecuted over the last two years, the goods and their value (where available) and the approximate cost of the prosecution to RCPO. These figures do not include HMRC's investigation costs.

Year	*Case*	*Goods and value*	*Fine + costs*	*Approximate cost of prosecution*
2005–06	Praetorian Associates	Body armour	£2,500	£2,600
	Vestguard	Body armour £128,000	£10,500	£3,300
2006–07	PKI	Body armour and helmets £23,000	£11,600	£11,500
	Winchester Procurement	Helmets and flak jackets £48,260	£8,500	£7,200

2. *The lack of awareness in academia of the Export Control Act 2002 and the awareness-raising which the Government is undertaking (Qq 151–2)*

HM Revenue and Customs has not arranged or participated directly in any of the awareness-raising initiatives led by DTI Export Control Organisation with the academic community, although we have taken part in some policy discussions at meetings where representatives of academia were present. We would, however, respond positively if asked to do so. In our oral evidence we said that we were surprised at the statement about a lack of awareness in academia, given the following activities or initiatives that have taken place:

- The ECO consulted representative bodies for the academic community in the run up to the introduction of the new controls in 2004.
- The ECO has undertaken a number of compliance visits to higher education establishments.
- "Universities UK" is a standing member of the Export Control Advisory Committee and is involved in discussions regarding export control issues.
- Separately, the FCO has worked with the academic community to introduce a compulsory pre-entry screening system known as ATAS (Academic Technology Approval Scheme) for non-EU students intending to take PhD-level (and some Masters-level) research in limited, specific areas that may have military applications.

Further information on ECO's activities in this area is in their memorandum of December 2006 (QM 26) questions 18–23, made in response to questions arising from the Westminster Hall debate.

HMRC would aim to investigate any evidence of a breach of the export licensing regime by members of the academic community.

3. *Whether any lessons for the UK have been learned from the recent Eurojust meeting (Q 170)*

In summary, RCPO learned that:

- The other four jurisdictions represented do not necessarily have a wide experience of prosecuting such cases.
- The complex investigative background to such cases can easily cause similar difficulties to the sort of disclosure questions that we face in the UK.
- Procedures for dealing with such issues vary considerably from country to country. Inability to disclose sensitive matters can sometimes lead to trials collapsing.
- The ability to implement a very strict licensing regime and impose civil penalties often results in early disposal of breaches.
- There are a number of issues that would warrant a more detailed discussion than we were able to have.

[115] RCPO responses are italicised.

— That ability to have a forum to meet prosecutors and investigators involved in similar work and to share experiences is a valuable experience and well worth developing further.

This meeting did not involve any HMRC officials, but we note RCPO's final point about the merits of such a forum and would be prepared to support and contribute in future.

4. *Whether the trafficking controls apply to a person with UK residency rights but not citizenship operating outside the UK (Q 189)*

The relevant legislation, with RCPO's highlighting, is as follows:

Export Control Act 2002

"United Kingdom person" means a United Kingdom national, a Scottish partnership or a body incorporated under the law of any part of the United Kingdom.

(2) *For the purposes of the definition of "United Kingdom person" a United Kingdom national is an individual who is—*

(a) *a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen;*

(b) *a person who under the British Nationality Act 1981 (c 61) is a British subject; or*

(c) *a British protected person within the meaning of that Act.*

The Trade in Goods (Control) Order 2003

Citation, commencement and extent

1.—(1) *This Order may be cited as the Trade in Goods (Control) Order 2003 and shall come into force on 1 May 2004.*

(2) *Articles 3(1) and 4 apply to any person within the United Kingdom and article 3(2) applies to any person elsewhere who is a United Kingdom person as defined in section 11(1) of the Export Control Act 2002.*

Supply or delivery of restricted goods

3.—(1) *Subject to the provisions of this Order, no person shall directly or indirectly—*

(a) *supply or deliver;*

(b) *agree to supply or deliver; or*

(c) *do any act calculated to promote the supply or delivery of,*

any restricted goods, where that person knows or has reason to believe that his action or actions will, or may, result in the removal of those goods from one third country to another third country.

(2) *Subject to the provisions of this Order, no United Kingdom person shall directly or indirectly—*

(a) *supply or deliver;*

(b) *agree to supply or deliver; or*

(c) *do any act calculated to promote the supply or delivery of,*

any restricted goods, where that person knows or has reason to believe that his action or actions will, or may, result in the removal of those goods from one third country to another third country.

(3) *Paragraph (1) applies to any act, or any part of any act, done in the United Kingdom.*

(4) *Paragraph (2) applies to any act, or any part of any act, done outside the United Kingdom or the Isle of Man.*

Transfer, acquisition or disposal of controlled goods

4.—(1) *Subject to the provisions of this Order, no person shall—*

(a) *arrange the transfer of controlled goods from one third country to another third country; or*

(b) *acquire or dispose, or agree to acquire or dispose, of any controlled goods, where that person knows or has reason to believe that such an acquisition or disposal will or may result in the removal of those goods from one third country to another third country.*

(2) *Subject to the provisions of this Order, no person shall—*

(a) *arrange or negotiate; or*

(b) *agree to arrange or negotiate,*

a contract for the acquisition or disposal of any controlled goods, where that person knows or has reason to believe that such a contract will or may result in the removal of those goods from one third country to another third country.

(3) *Subject to the provisions of this Order, no person shall in return for a fee, commission or other consideration—*

(a) *do any act; or*

(b) *agree to do any act,*

calculated to promote the arrangement or negotiation of a contract for the acquisition or disposal of controlled goods, where that person knows or has reason to believe that such a contract will or may result in the removal of those goods from one third country to another third country.

(4) *Paragraphs (1), (2) and (3) apply to any act, or any part of any act, done in the United Kingdom.*

The Trade in Controlled Goods (Embargoed Destinations) Order 2004

Supply and delivery of controlled goods

3.—(1) *Subject to the provisions of this Order, no person shall directly or indirectly—*

(a) *supply or deliver;*

(b) *agree to supply or deliver; or*

(c) *do any act calculated to promote the supply or delivery of,*

any controlled goods to any person or place in an embargoed destination.

(2) *Subject to the provisions of this Order, no United Kingdom person shall directly or indirectly—*

(a) *supply or deliver;*

(b) *agree to supply or deliver; or*

(c) *do any act calculated to promote the supply or delivery of,*

any controlled goods to any person or place in an embargoed destination.

(3) *Paragraph (1) applies to any act or any part of any act, done in the United Kingdom.*

(4) *Paragraph (2) applies to any act or any part of any act, done outside the United Kingdom or the Isle of Man.*

In respect of acts done wholly outside the UK, the Trade in Goods (Control) Order 2003 prohibits acts by United Kingdom persons in respect of restricted goods, but not controlled goods. Thus, extra-territorial controls only apply to a limited class (some security and paramilitary equipment; missiles and their components with a range greater than 300 km).

United Kingdom persons are defined by reference back to the Export Control Act 2002 and are, essentially, British citizens, subjects, protected persons or UK companies. These definitions are quite precise and are extensively detailed in the British Nationality Act 1981 and associated Home Office guidance.

This means that a person who has rights short of a status listed in the Export Control Act 2002 would not be liable under the extra-territorial provision. Thus, a person with leave to remain in the UK or with a different type of status short of those listed in the Export Control Act would only be liable for acts done wholly or partially in the UK.

The Trade in Controlled Goods (Embargoed Destinations) Order 2004 similarly creates an extra-territorial control applicable to United Kingdom persons, but does not incorporate the definition in the Export Control Act 2002. In RCPOs view, however, a court would interpret the 2004 order consistently with the 2003 order, given that they are aimed at a similar type of offence and offender. As they are both penal provisions, they would be construed restrictively and as a result the 2004 Order is unlikely to be interpreted as being effective against a wider class of persons than the 2003 Order.

5. *Whether HMRC and RCPO will be part of the review of the Export Control Act 2002 led by the DTI (Q 190)?*

HMRC are participating fully in the review, seeking RCPO input where appropriate on evidential and wider criminal justice issues.

6. *Whether there are any gaps or shortcomings in the powers in respect of WMD (Q. 192)?*

HMRC assess that there are no gaps or shortcomings in the powers that we derive from customs legislation and from legislation relating to WMD.

7. *An update on the WMD case raised by Sir John Stanley MP last year (Q 193)*

As agreed, RCPO shall submit a separate briefing to the Attorney General, to enable him to brief the Committee on a confidential basis in whatever terms he considers best.

8. *The monitoring arrangements in place for the end use of imported firearms (Q. 204)*

Further to HMRC's oral answer to Qq195–204, there is to our knowledge no single authority that takes oversight of the end-use of all imported firearms. As firearms are prohibited in the UK, end use of imports by Registered Firearms Dealers (as opposed to supplies for police or military purposes) effectively boils down to either deactivation or re-export. The primary responsibility lies with local police firearms licensing officers and their controls are applied in relation to any domestic transaction between one RFD and another. The monitoring arrangements are that:

- HMRC FXOs (Firearms and Explosives Officers) verify that imported weapons are entered into the RFD's Firearms Register; that the weapons fall into the correct section of the Firearms Act the import licence was issued and that the RFD is authorised to deal in such weapons; that additionally weapons that are imported from another EU Member State are covered by an EU Transfer licence; and that serial numbers on documents and weapons match up.
- Police firearms licensing officers control the weapons from that point onwards. They ensure that weapons are securely stored and that any disposal or other onward transaction by the importing RFD is properly accounted for in each dealer's Firearms Register in order that onward transfers or sales to other RFDs remain under control.
- By agreement between HMRC, Home Office and ACPO, the FXO can extend their audit beyond the importing RFD in certain circumstances through to final disposal where there are suspicion of illegal disposal of imports, for example by illegal diversion from re-export onto the domestic market.

Further Questions

Q1. *In their memorandum HM Revenue and Customs state that, recognising the need to improve deterrence, HMRC has identified strict liability cases with aggravating features and reported them to the Revenue and Customs Prosecutions Office. These are cases prosecuted under section 68(1) of the Customs and Excise Management Act 1979 where there is no requirement to prove intent to avoid export control. Should the Committee expect to see more prosecutions? What are the aggravating features HMRC refers to in the memorandum?*

We cannot predict how many strict liability cases we would formally investigate but our broad expectation is that there might be between 7 and 10 cases reported to RCPO in any given year. The number of cases that might be prosecuted under s68(1) may also reduce in the future if conditional cautions became available for dealing with export control cases.

The features that HMRC would regard as aggravating circumstances and thus lead to an export controls investigation include the following:

- That the goods are not on any Open Licences;
- Presentation of an incorrect licence;
- The export was to a sensitive destination;
- The goods were particularly sensitive;
- The exporter has a previous poor compliance history; or
- The exporter did not apply effective internal controls;

HMRC will also take into account other features that can occur in any customs offence cases (albeit they may not occur in export controls cases) such as involvement in other customs related offences (for example smuggling of other goods at the same time), assault of a Customs officer, or a particularly novel and serious method of smuggling. HMRC do not regard this list as entirely prescriptive or exhaustive.

In the session Members asked about the answer to the question Susan Kramer MP received on 13 September 2006 (Column 2335–6W) and would like to know what were the gross figures on which the percentages were based (Q 148)

The gross figures are in column D of this table and we have repeated the percentages in column E for convenience. Information in columns A to D was originally provided in an answer to a PQ tabled by John Bercow MP on 22 March 2006 (*Official Report*, column 427W).

Financial Year	*No of Seizures*	*No of Referrals from DTI*	*Total number of breaches (B + C)*	*percentage of breaches (col D) as per reply to Susan Kramer PQ*
A	*B*	*C*	*D*	*E*
2000–01	120	30	150	80%
2001–02	80	27	107	88%
2002–03	67	21	88	92%
2003–04	63	31	94	84%
2004–05	37	28	65	83%

Q2. *The Committee understands that a questionnaire has been circulated within the EU about export control sanctions and penalties in EU Member States. Has it been completed? Could the Committee have a copy?*

HMRC contributed to the Government's response to this questionnaire. We understand that the DTI will be submitting a copy of the UK's response to the questionnaire to the Committee in due course.

Q3. *In its evidence to the Committee in December the UK Working Group on Arms suggested that as more jurisdictions introduced controls in arms traffickers, brokers were tending to "reinvent" themselves as transporters to stay one step beyond the law but that regulating the activities of transporters would help to address this problem. The Group suggested that tracing transportation was more straightforward than tracing brokering paperwork. As the enforcement agency for export control what is HMRC's view of the practical aspects of this proposal?*

HMRC do not agree with the notion that introducing new regulations on the activities of transporters would help to address the issue of any arms trafficker or broker who reinvents themselves or otherwise reclassifies their business activity from one of trading in military goods to that of transport operator. This is for two reasons:

— Our enforcement capabilities and powers are not affected; and

— It is not so much about enforcement officers' access to different types of paperwork, but more about what that paperwork says in terms of evidence.

In our view an attempt by a trader to "reinvent" themselves would not put them beyond the law, and nor would the introduction of new regulatory controls on transporters make a material difference in terms of documentary evidence.

May 2007

Memorandum from Mark Thomas

SECTION 1

On The 24th of May I Found a Company Offering, Displaying and Demonstrating Electro Shock Weapons at IFSEC, the UK Police and Security Fair.

(1) On the 24th of May I attended IFSEC at the Birmingham NEC. Stall number 21193 in the exhibition programme is listed as being hired by Zhejiang Kangle Group Co Ltd. The stall was staffed by Mr Sam Shar (later he gave his name to be Jingua Xia) working for Echo Industrial Co. Ltd from Wenzhou, China.

(2) On the display shelf at the back of the stall were three electro-shock items on public display. See below fig. 1- the stun weapons are the 2 black boxes and black torch like object standing upright on the shelf behind Mr Shar/Xia. [not printed]

(3) Mr Shar also displayed a stun gun display chart on the wall of his stall during the first two days of the fair. The display chart was entitled "Stun gun" and featured over photos and details of over 24 different types of stun weapon. See below fig. 4. [not printed]

(4) Mr Shar also had a pile of booklets for visitors to take on the front desk of his stall, which also displayed electro shock torture equipment. See fig. 5. [not printed]

(5) On the 24th Mr Shar offered to show me the stun weapons and discharged them in the fair. Electro shock weapons make a distinct and loud noise. Anyone walking past would easily have seen the blue electrical flashes. See fig. 6. [not printed]

(6) Mr Shar then gave details of the battery requirements of the weapons and told me that the cost of two stun guns was $6.50 if I was ordering a quantity of 10,000. He also said a 5% discount might be available. The manufacture time was about a month for 10,000. We also discussed that it would take about a month to ship from China to Europe.

(7) Mr Shar also indicated that he had no problem with the Chinese authorities and paperwork or export licences as "we" had described them previously as "torches" and therefore did not need to get any form of arms export licence.

(8) On reporting this to the fair organisers CMP Information Ltd I asked to speak to the duty customs officer. They replied that the nearest customs official was at Birmingham airport. The onsite private security did respond rapidly once I had informed them that electro shock was being discharged in the fair.

(9) Mr Shar/Xia was arrested and held by police. According to the police press office he pleaded guilty at Solihull magistrate court to the "the sale of prohibited weapons". He is to be sentenced at Warwick Crown Court on the 22nd of June.

SECTION 2

(1) Though it is ironic that illegal equipment should be on display throughout the fair when so many police officers were attending it (indeed the Assistant Commissioner for the Metropolitan Police, Tarique Ghaffur, was presenting a seminar there) what is of concern is that the QSC's last report specifically identifies trade fairs and restricted weapons as an area of concern.

(2) Electro shock has been in effect banned by UK government since 1997, ten years on the enforcement of this law should be reasonably effective in cases of such obvious breaches.

(3) The fact that there was no duty customs officer present could be a factor in this scenario. If a duty customs officer had been present could Mr Shar/Xia's stun weapons have been detected earlier, rather than on the final day of the fair and only after being tipped off? Why was there no duty customs officer present at the fair?

(4) What practicable measures did CMP the fair organisers take to ensure companies knew of UK laws? Were the foreign companies attending the fair given the correct information in appropriate languages? Were the penalties for breaking the law spelt out clearly to those attending? Given an obvious breach of the law occurred what measures are the fair organisers taking to ensure this does not happen in the future?

(5) What work did Customs do prior to the fair to work with the organisers and exhibitors to ensure compliance with the law?

June 2007

Memorandum from David Hayes

A PROPOSAL FOR THE ESTABLISHMENT OF AN AGENCY TO ENFORCE EXPORT CONTROL COMPLIANCE

Background

During 2005 the DTI examined the possibility of outsourcing that part of its activity which deals with export licensing, the Export Control Organisation (ECO). This provoked a unified response from industry, Parliament (in the shape of the Quadripartite Select Committee (QSC), which exercises oversight of export controls, and the Non-Governmental Organisations (NGOs) operating in this arena. Such was the opposition, not to mention the legal obstacles, to this ill-conceived idea that it was dropped. Licensing is largely routine but, in sensitive cases, requires the balancing of often competing interests with political and national security ramifications. Such decision making is properly the role of Government, although it must be conceded that the back-office functions may be a less controversial area for outsourcing.

The Opportunity

Because export control is a high-profile, legislative function, it must continue. However, the current three year review of UK export control legislation and the doubts surrounding the continuation of the DTI as a whole mean that a unique opportunity exists for an innovative approach, perhaps in conjunction with the private sector.

The concept involves the establishment of a new, possibly privately operated, body to effectively enforce existing legislation. Some years ago, Mike Coolican, then Assistant Secretary at DTI with responsibility for export controls, estimated that 35% of UK companies which required export licences were actually applying for them, ergo the remaining 65% were (and still are) exporting illegally. More recent, quantifiable data seems, at least on a prima facie basis, to corroborate this estimate—herein lay the opportunities.

The Export Control Act 2002 (the Act) is the primary legislation covering exports from the UK. It is very broadly drafted, enabling legislation and allows great latitude to HMG to enact secondary legislation. Already the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 confers rights of inspection of export records on "any person authorised by the Secretary of State (DTI) or the Commissioners (HM Revenue & Customs)", i.e. this can be a private body, so authorised. All that is lacking to facilitate this proposal is the mandating of compliance by exporters with requests from a newly constituted body to provide information and copies of documents and the establishing of a fixed penalty regime where those documents reveal non-compliance or are not provided. Both of these are seemingly well within the scope available to HMG under the Act, requiring only secondary legislation.

Recommendation

A new body, "The Compliance Agency" (the Agency), be established to enforce the legislation. The basic premise is that the Agency is established to examine exports by means of targeted, ex post facto documentary checks. The important difference from current compliance checks is that the new checks would be carried out not solely from the "coalition of the willing", i.e. checking only those companies which currently use export licences, but from the vast bulk of the total population of export transactions recorded in New Export System (NES) (an IT tool operated by HMRC which records almost all exports from the UK). This means that, for the first time, a systematic approach will be taken to examining a far higher percentage of the totality of UK exports than is currently achievable. The export paperwork can then be examined, remotely from the exporters' premises, and any violations identified and penalised, such penalties being shared between HMG and the Agency on a yet to be determined basis. The imposition of penalties will have the political advantage of showing that HMG is taking export controls seriously as an aspect of global security and the "war on terror" and is addressing the current high level of political concern which exists globally in relation to export controls, particularly in relation to Weapons of Mass Destruction (WMD), most of the technologies and components of which are controlled as dual-use and not military items.

Non-compliance exists for two reasons; ignorance of the controls coupled with a lack of consequences arising from non-compliance. An argument can be made that the business cost of compliance, in terms of resource and expertise, so far outweighs the likely cost of non-compliance that *ceteris paribus* the responsible commercial decision is to be non-compliant. The corollary is that improving compliance requires that the commercial equation be changed.

Legislation

HMG would need to enact secondary legislation under the Act authorising the Agency to require copies of documents to be supplied and establishing a framework for imposing fixed or variable penalties for non-compliant exports. It is not anticipated that exports will be stopped or delayed; the checks may actually take place after goods have been exported. However, this minimises any burden on business whilst providing a penalty regime to sanction non-compliant exports and a deterrent effect, which could be maximised by HMG publicising the new activity. To draw an analogy, speed cameras only catch people who break the speed limit within the range of the camera but a deterrent effect is still claimed and the revenue generated is substantial, even in government terms.

An appeal mechanism would be required. However, the number of appeals is likely to be small and an appropriate mechanism should not present any significant difficulty.

Funding & Performance

Funding for the Agency would initially have to come from Govt and/or the private sector but it should very quickly become self-financing and generate a significant surplus, to be shared between the participating parties on a basis yet to be determined.

The financial performance of the Agency will be dependant upon the levels of penalty which HMG considers appropriate and enacts in the secondary legislation and on the Agency's own effectiveness in correctly targeting non-compliant exports from the large volume of export transactions conducted daily. The latter will depend on the quality of the initial core of personnel and their possessing the appropriate skills within the export control arena, which are very specialised.

Conclusion

The timing has never been better to offer a solution which will enable HMG to claim that it is taking effective action to enforce export controls, improve national security and deter transgressions; whilst at the same time generating significant revenue. Some officials of the United States Department of State (which is responsible for all military exports from the US) privately take the view that the only UK companies who currently take export controls seriously are those with significant US interests. This is a valid assessment, based on the self-evident fact that it is primarily those companies which currently possess a significant export control compliance capability. The affected companies do this because the cost of non-compliance with US

controls, even for a non-US company, is commercially unacceptable. The business opportunity lies in making the same thing true in respect of UK export controls, the political opportunity in being seen to take effective action against persistent offenders who seek commercial advantage over compliant companies by acting illegally and increase the risk of the strategic materials falling into the hands of terrorists or "rogue" states. The appendix sets out estimates of the likely scale of unlicensed, controlled exports and the possible penalty income to be generated, based on example penalties.

APPENDIX

Likely Scale of Unlicensed, Controlled Exports

The UK exported £188 billion of goods and services in 2003, the proportion of these which were subject to export controls is difficult to determine but defence exports are quoted in various sources as being in the order of £4bn, or 2.1% of the total. However, it is increasingly being recognised that, whilst the defence industry is largely compliant in the area of export controls and is, quite rightly, heavily scrutinised by Parliament and the NGOs, the dual-use sector raises significant concerns and probably accounts for the bulk of the missing 65% referred to by Mike Coolican.

Analysis of the number of Standard Individual Export Licences issued in 2003 (the first year after the Export Control Act came into force, so at a time of heightened awareness) shows that military licences exceeded dual-use by 1.9 times. A later analysis, after the secondary legislation came into force, for the quarter Jul-Sep 2005 (reports were by this date compiled quarterly) shows that military licences exceed dual-use licences by 1.6 times. In each case EU and Community General Export Authorisation countries, as they existed at that time, were removed to improve the parity of comparison. Given the scope of the dual-use controls, which cover everything from chemicals to machine tools and electronics to gas turbine engines, it is inconceivable that all dual-use exports are being carried out under the correct licensing regime, even when one takes into account the fact that virtually everything military requires an export licence. To some extent this factor is offset by the ability of the UK government to create OGELs for military exports, a national legal competence. More OGELs exist for military exports than exist for dual-use. Can it really be accepted that an industry with 2% of GDP accounts for 66% of export licences and there is not an export control compliance problem with the industries accounting for the remaining 98% of GDP?

Activity Levels in Relation to Controlled Exports

Standard Individual Export Licence (SIEL) applications number about 8000 per year (the last full year for which figures are available is 2004). However, by definition these licences cover the most sensitive goods and/or the most sensitive countries and hence account for only a small percentage of exports (by number of shipments). Numerically, the greatest number of export shipments are made under open licences (either Open Individual Export Licences [OIELs], Open General Export Licences [OGELs] the Community General Export Authorisation [CGEA]) or are intra-EU transfers of Annex 1 dual use items made under Article 21(7) of EC Regulation 1334/2000.

Reliable figures for numbers of export shipments are difficult to obtain because available statistics, such as those available from the Civil Aviation Authority, are based on weight not number of discrete shipments. An informed estimate would be that the number of exports under open licences is at least two orders of magnitude greater than the figure for SIELs (in one major exporting company the known figures are that over 250 times more exports are made under open licences than are made under SIELs).

Extrapolation of the 8000 per annum figure for SIELs to there being (conservatively) one hundred times this figure under open licences gives a figure of 800000 shipments under open licences, if this is (again conservatively if Mike Coolican's estimate of 35% of exporters who require licences actually use them is used as the baseline) taken to represent 50% of the total of all shipments which should actually be under licence (N.B. the "Coolican estimate" related to companies NOT to export shipments and the companies with the best compliance programmes tend to be the major defence exporters—the general consensus being that dual-use controls are largely ignored), the target population of single instances of export could be estimated as being 1.6 million transactions per annum. Given that the defence industry is largely compliant, a reasonable estimate would be that 85% of defence exports are compliant and 50% of dual-use; thereby giving an estimate of 520000 ([800000 x 15%] + [800000 x 50%]) unlicensed controlled exports[116].

To be even more conservative, assume that this population is actually $\frac{1}{2}$ million unlicensed, controlled exports. The expected percentages occupying various groups or types of potential non-compliance are shown in the table below, together with illustrative penalties.

Based on the illustrative penalties and biasing the penalties towards the lower end (i.e. assuming 50% of violations relate to dual-use transfers within the EU and attract only a £200 penalty), the potential penalty income would be £155 million per annum. Even a 2% successful detection rate would therefore generate a penalty income of over £3 million per annum, based on these assumptions.

[116] includes unauthorised intra-EU transfers of Annex 1 dual-use items.

A further step would be to penalise what are referred to as "validity failures" by companies making customs entries which do not correctly match the tariff schedule, i.e. cases where HMRC knows that the line entry is wrong. If this were to be included, based on £200 per entry and performed only for exports (inside and outside the EU) this would add another £40 million to the penalty figure. The same process could be performed on imports and add another £20 million. This would give an overall potential penalty income in excess of £200 million p.a. based on conservative estimates.

Type of Export	*Description of Non-Compliance*	*Penalty GBP*	*Comments*	*Assumed % of Non-Compliant Population*
Intra—EU transfer of dual-use items (Annex 1)	Article 21(7) statement not on shipping paperwork	200	Note: Article 16(8) of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 provides for a fine of up to level 3 on the standard scale (currently £1000) for this offence.	50
Annex 1 dual-use items to CGEA country	CGEA not cited on shipping paperwork	300		20
Dual-use items to non-EU, non-CGEA country	No licence quoted/ used	400		10
Military List items eligible for OGEL	No licence quoted/ used or used outside of eligibility	400		15
Military List items non-OGEL to non-embargoed country	No licence quoted/ used	1000		5
Military goods to embargoed country	No licence quoted/ used	—	Refer to HMRC Fee to Agency	Negligible
Failure to comply with information request from Agency within time limits (to be set)		1000 and a further 100 per day for which requested information remains outstanding		Additional to above

June 2007

Supplementary memorandum from HM Revenue and Customs

This is in reply to your email of 13 June to Scott Hudson in which you asked: "does HMRC have powers—for example under anti-terrorism legislation—to seize non-controlled goods where WMD end-use is suspected but the exporter is unaware of the potential end-use?"

HMRC do not have powers to seize non-controlled goods in cases where the exporter is not aware of nor suspects WMD end-use.

Where HMRC identify non-controlled goods that we suspect might be destined for WMD end-use, we have the power to detain them under Article 20 of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 whilst DTI decides whether or not to invoke the end-use catch-all control.

If DTI decide that goods require a licence on end-use grounds, they inform the exporter and HMRC. We detain the goods until the exporter either obtains an export licence, or withdraws the goods from export.

The only cases where HMRC could seize the goods (and, as we said in our first Memorandum, take offence action) would be where there is evidence that the exporter already had grounds to suspect that the goods were for a WMD use, or, having been informed by the DTI that the goods cannot be exported without a licence, the exporter subsequently attempted to do so.

Finally we should clarify that the control is not so much based on the potential end-use of the goods but the actual circumstances of the particular export.

June 2007

Further memorandum from Mark Thomas

TORTURE EQUIPMENT AT THE IFSEC EXHIBITION MAY 2007

(1) The police arrested and detained Mr Xia on the 24th of May 2007 after it was reported that he was discharging electro shock equipment at his stall in the exhibition.

(2) I was phoned twice on that day by the police, whom I told I had filmed the conversations with myself and Mr Xia (AKA Mr Shar). The conversations Mr Xia offered to demonstrate the batons, discharged them and then discussed costs—quoting prices and discounts available, manufacture lead times and shipping details.

(3) I phoned the police on the 4th of June to speak to find out what was happening with Mr Xia. After several calls the press office finally told me Mr Xia had pleaded guilty to a charge of possession of prohibited section 5 firearms, and would be sentenced on the 22nd of June.

(4) Inspector Grant from Solihull CID phoned later and asked if I had footage of the conversation I had with Mr Xia, wherein he quoted prices etc. Inspector Grant then asked if I could come up and see him, he asked for the footage (which I was happy to hand to him) and he also asked for copies of the relevant legislation. I went to Solihull police station on the 11th June, showed Inspector Grant the footage and promotional materials Mr Xia had.

(5) I transferred the tape onto DVD and handed it to officers from Solihull later in the week and gave a witness statement.

(6) On the 22nd of June Inspector Grant phoned me and said that Mr Xia was not being charged with brokering or attempting to sell prohibited weapons. CID had he assured me handed the film and statement to the CPS who had "decided not to bring charges, as they regarded Mr Xia as just a stool for the big boys." Mr Xia was deported, after serving a month on remand and having pleaded guilty to possession of prohibited firearms.

(7) There remains significant questions of the CPS as to why they did not bring a case when the evidence was obviously there. Once again the chance to enforce the legislation has been missed.

June 2007

Letter from the Chair to the Secretary of State for Defence, Ministry of Defence

You will recall that we had an exchange of correspondence last year about allegations of bribery directed at the Defence Export Services Organisation (DESO) and its predecessor, the Defence Sales Organisation (DSO). You will also remember that the MoD has supplied the Quadripartite Committee with memoranda in June 2003 and June 2006 refuting the allegations, both of which we published. I am writing to seek your response to further allegations which have appeared in the media in the past few days.

As I am sure you will appreciate, the Committee takes allegations of bribery and the response of those to whom the allegations are directed very seriously. When in 2003 and 2006 we received written evidence alleging that bribes had been paid by the DSO to senior Saudi Arabian officials to obtain defence contracts, we put the allegations to MoD and attached weight to its responses. In particular, in the memorandum in June 2003 the MoD stated it was a principle that: "Officials should not engage in, or encourage, illegal or improper actions whether in their relations with UK or overseas firms" and that the "MoD no longer employs agents nor pays commissions in its Government-to-Government defence export programmes".

We also asked the Government how the payment of commissions and DESO's activities more generally had been affected by the coming into force of Part 12 of the Anti-Terrorism, Crime and Security Act and the MoD replied in the June 2003 memorandum:

"The Corruption Act of 1906 applied to acts committed in the UK. This position changed with the implementation of the Anti-Terrorism Crime and Security Act 2001 that provided extraterritorial reach in respect of acts of bribery by UK citizens overseas. It has, however, been the position for many years that, even prior to the introduction of the power in the 2001 Act, UK civil servants were already subject to extra territorial jurisdiction for criminal offences if all the elements of the offence were committed overseas.

Section 31, sub-section (1) of the Criminal Justice Act of 1948 provides that where any British subject employed by HMG in the UK, when in a foreign country and acting in the course of his employment, commits an offence which if committed in England would be punishable on indictment, then that individual shall be guilty of an offence and subject to the same punishment as if that offence had been committed in England."

Following the announcement on 14 December 2006 of the decision to call off the Serious Fraud Office's investigation, allegations have been made by the BBC and the Guardian that MoD officials processed quarterly "invoices" from Prince Bandar, who was, allegedly, seeking payment for "support services" for his role in the al-Yamamah arms deal. It has been alleged the officials involved in handling any such payments were based at DESO and that BAE have said it made the payments with the "express approval" of the MoD. ("MoD accused over role in Bandar's £1bn: BBC says officials processed payments Goldsmith refuses to answer questions", *The Guardian*, 12 June 2007, and Panorama: Princes, Planes and Pay-offs, BBC, 11 June 2007)

In the light of the statements that have been made by the MoD in its memoranda the Committee would welcome a further memorandum responding to these fresh allegations. We are approaching the final stages of the preparation of our Report and it would assist us if you were able to let us have the memorandum by the end of June.

June 2007

Letter to the Chair from the Secretary of State for Defence, Ministry of Defence

Your Committee sought a further Memorandum from the Ministry of Defence responding to recent allegations that have appeared in *The Guardian* and on the BBC in the wake of the decision by the Serious Fraud Office to terminate its investigation into allegations of corruption involving BAE Systems and its sub-contractors. The most recent allegations, as you point out, concerned payments for support services in connection with the Al Yamamah Programme.

I have nothing further to add to the memoranda already provided to the Committee. I agree that any allegations of corruption should be taken seriously and I can confirm that the MOD cooperated fully with the SFO investigation.

June 2007

Supplementary memorandum from the Foreign and Commonwealth Office

Thank you for your letter of 1 May about exports to Sudan, in which you raised a number of questions about exports to Sudan following an article in the *Sunday Times* of 22 April 2007 about a British firm allegedly breaking the Sudan arms embargo. I apologise for the delay in responding to you.

The Committee asked what investigations have been made into Dallex and its activities, and whether it has breached the Export Control Act 2002. The Committee also asked what action the authorities have taken. I hope that the Committee will understand that by Law, I am unable to give any details on companies that may or may not be under investigation.

You also asked what assessment the UK Government has made of the origin and volume of arms supplied to Sudan and whether China is supplying arms in breach of the UN embargo. While, we are not aware of China supplying arms to Sudan in breach of the arms embargo, the People's Republic of China does not publish details of its arms exports, and last submitted data to the UN Register on Conventional Arms covering its exports in 1996. It is not therefore possible to ascertain accurate figures on either the total number or value of Chinese arms exports to Africa. We continue to support vigorous implementation of the embargo and the work of the United Nations Security Council's Sanctions Committee for Sudan in monitoring implementation and compliance. Within our dialogue with China, we encourage them to improve their export controls, including by increasing their transparency of their arms exports. This includes encouraging regular submissions to the UN Register, as well as encouraging positive participation in the UN process to take forward the initiative for an international Arms Trade Treaty.

You also asked whether, with the UN and EU embargoes in place, the supply of Land Rovers to the Sudanese Government is subject to UK export controls. As you will already be aware, under the EC Dual-Use Regulation (EC Reg 1334/2000, as amended) and our own domestic legislation, the UK does not control the export of complete civilian specification Land Rovers. However, components for civilian specification Land Rovers could be controlled under the Military End-Use Control, as set out in EC Reg 1334/2000, if they are to be incorporated into a military vehicle for onward supply to an embargoed destination (which includes, but is not restricted to, Sudan) and if those facts were known at the time that civilian specification components were exported from the UK.

In respect of Land Rover, you are aware that in the light of concerns about supplies to Otokar in Turkey, which were later used in Uzbekistan, special arrangements were agreed with Land Rover UK to more closely monitor supplies made by them to Otokar. Land Rover also agreed to ensure that Export Control Organisation (ECO) was consulted prior to onward supplies being agreed by Otokar. These arrangements were put in place to ensure that any intention to supply Sudan via Otokar would be brought to the attention of ECO at the earliest stage.

Since that time, BERR have also remained in close touch with Land Rover UK, who have also assured us that they have ceased to supply Sudan. We have been shown Land Rover internal instructions to staff which support this statement. However, what neither BERR, nor any other arm of government can guarantee, is that Land Rovers supplied prior to these arrangements being agreed are not being used in Sudan; nor that in future, an ubiquitous vehicle such as a Land Rover, will not find its way there, perhaps through a series of transactions and re-sales over which the UK can have no influence. This means that whilst the BERR will of course follow up reports of Land Rovers being used in Sudan or other embargoed destinations, such reports do not necessarily indicate any weakness in UK export controls.

The remaining questions in your letter give rise to a number of complex issues, which the BERR are looking into. The ECO will respond directly to you once the issues have been clarified.

In the meantime, I hope the information provided here is useful.

July 2007

Printed in the United Kingdom by The Stationery Office Limited
8/2007 362536 19585