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

HC 117

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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)

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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

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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

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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;

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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]

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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]

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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]

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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]

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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.

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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.

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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

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Thursday 1 March 2007

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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*)