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The *Export Control Bill*

Bill 5 of 2001-02

The *Export Control Bill* was introduced in the House of Commons on 26 June 2001 and is due to have its Second Reading on 9 July 2001.

The Bill will establish a new legislative framework for both strategic export controls and export controls on cultural objects. The Bill aims to improve Government accountability for export controls by setting out their purposes in legislation, and by providing for parliamentary scrutiny of secondary legislation made under the Bill.

The Bill also introduces controls on the transfer of military and dual-use technology by intangible means, and imposes controls on trafficking and brokering of military and dual-use equipment.

This paper provides details of previous export control legislation and developments in strategic export controls since Labour came to office in 1997. It also examines the Bill's measures and discusses responses to the proposals.

Mark Oakes and Tim Youngs

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Summary of main points

The *Export Control Bill* represents the Government's response to the criticisms of the UK's strategic export controls (controls on military and dual use goods) made by Sir Richard Scott in his report of over five years ago.[1]

In general, export controls serve two purposes: to restrict the negative impact of the arms trade and to provide a transparent framework for legitimate exporters. Government legislation exists within the context of these two potentially conflicting aims.

The purpose of the Bill is to improve Government accountability for export controls by:

- setting out the purposes of export controls in legislation (see Chapter IV D);
- providing for parliamentary scrutiny of secondary legislation made under the Bill (see Chapter IV C); and
- requiring the Government to publish annual reports (see Chapter IV C.3).

The Bill also contains new powers to allow for the "creation of an updated and more effective export control regime".[2] The key areas include:

- Powers to impose controls on the transfer of military and dual-use technology by intangible means, and the provision of related technical services (see Chapters IV E and F); and
- Powers to impose controls on trafficking and brokering of military and dual-use equipment (see Chapter IV J).

The Bill would also make some changes to the regime covering the export of cultural objects, primarily to increase the transparency of Government action in this area (see Chapter IV K).

The Bill reflects many of the proposals made in the draft *Export Control and Non-Proliferation Bill* that was published as part of a consultation document in March 2001.[3] The joint Committee ("the Quadripartite Committee") of the Defence, Foreign Affairs, International Development and Trade and Industry Committees gave a detailed examination of the draft Bill and related issues in its report of 1 May 2001.[4]

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1 *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution*, HC115 1995-96, 15 February 1996

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

3 Ibid.

4 Quadripartite Committee, *Draft Export Control and Non-Proliferation Bill*, HC 445, 2000-01, 1 May 2001

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I Background: The Scott Report

Sir Richard Scott's report of February 1996[5] was the result of his lengthy inquiry into defence export procedures following the collapse of the prosecution of senior executives of Matrix Churchill Ltd for alleged export control offences. The report criticised the strategic export control regime (controls on military and dual use goods) for its lack of accountability and transparency, and recommended that a thorough review be carried out. The Report stated:

> A comprehensive review is, in my opinion, required, and long overdue, of the power of Government to impose controls on exports from the United Kingdom. The Government's statutory powers under the 1939 Act are based on wartime emergency legislation lacking the provisions of Parliamentary supervision and control that would be expected and are requisite in a modern Parliamentary democracy. Moreover, the absence of any indication in the empowering legislation of the purposes for which export controls can legitimately be used has led, in my opinion, to a dangerous confusion between the law on export controls and Government policy on export controls. The function of a law enforcement agency, such as Customs, is to enforce the law; enforcement of Government policy may be a product of law enforcement but should not, in a democratic country subject to the rule of law, ever be treated by a law enforcement agency as an end in itself. 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, in my opinion, be replaced as soon as practicable.[6]

In response to the recommendations of the Scott Report, the Labour Party's 1997 general election manifesto pledged that:

> Labour will not permit the sale of arms to regimes that might use them for internal repression or international aggression. We will increase the transparency and accountability of decisions on export licences for arms. And we will support an EU code of conduct governing arms sales.[7]

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5 *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution,* HC115, 15 February 1996 [hereafter "the Scott Report"]

6 The Scott Report, Vol. IV, Chapter 2, para K2.1

7 *New Labour because Britain deserves better,* Labour Party 1997 General Election manifesto

II Developments under Labour

Since May 1997 the Government has undertaken a number of steps to tighten controls on strategic exports. These include the introduction of new arm sales criteria, the adoption of an EU Code of Conduct for Arms Sales, the publication of annual reports detailing strategic export data, and the publication in July 1998 of the *Strategic Export Controls* White Paper.[8] The first three areas did not involve the introduction of primary legislation and could be implemented relatively swiftly, while the White Paper contained the Government's proposals for a new legislative framework regarding strategic export controls.

In an adjournment debate on 14 December 2000, Foreign Office Minister Peter Hain claimed:

> It is three and a half years since the Government embarked on fulfilling their aid policy pledges for a responsible arms trade. Since then, our record of achievement is considerable… We have made our export controls more effective, accountable and transparent than those of almost any other country, and set new standards for others to emulate.[9]

The White Paper was followed by a draft *Export Control and Non-Proliferation Bill* contained in a consultation document of March 2001.[10]

A. New Arms Sales Criteria

Soon after coming to office the Government launched a review of export licensing. The results of the review were promulgated in July 1997 and included a new set of criteria to be used by the Government departments responsible, namely the Department for Trade and Industry (DTI), Ministry of Defence (MOD), the Foreign and Commonwealth Office (FCO), and the Department for International Development (DFID), to determine whether individual export licences should be granted. A decision "will take into account respect for human rights and fundamental freedoms in the recipient country" and the Government "will not issue an export licence if there is a clearly identifiable risk that the proposed export might be used for internal repression."[11]

The Government decided that the new criteria would be applied to all future applications for export licences and to existing applications on which a decision had not yet been

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8 *Strategic Export Controls White Paper*, Cm 3989, July 1998 [hereafter "the 1998 White Paper"]

9 HC Deb 14 December 2000, c33WH

10 *Consultation on Draft Legislation: The Export Control and Non-Proliferation Bill*, Cm 5091, March 2001 [hereafter "Cm 5091" or "the draft Bill"]

11 *FCO Press Release*, 28 July 1997

made.[12] These criteria were consolidated with the EU Code of Conduct for Arms Exports on 26 October 2000 (see Appendix I).[13]

B. EU Code of Conduct for Arms Exports

Early in 1998 the UK and French Governments tabled proposals for an EU code of conduct, which according to Mr Cook were "well received throughout Europe".[14]

The new European Code of Conduct on the export of arms by EU Member States was promulgated in June 1998.[15] The eight criteria of the code of conduct are as follows:

1. Respect for the international commitments of the Member States of the Community, in particular the sanctions decreed by the Security Council of the United Nations and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations;

2. Respect for human rights in the country of final destination

3. The internal situation in the country of final destination, as a function of the existence of tensions or internal armed conflicts;

4. The preservation of regional peace, security and stability;

5. The national security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;

6. The behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances, and respect for international law.

7. The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.[16]

8. The compatibility of arms exports with the technical and economic capacity of the recipient country taking into account the desirability that states should

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[12] Foreign Secretary Robin Cook announced that existing licences that were valid at the time of the election in May 1997 were not to be revoked: "The present government were not responsible for the decisions on export licences made by the previous Administration. We do not, however, consider that it would be realistic or practical to revoke licences that were valid and in force at the time of our election." HC Deb 28 July 1997, c27w

[13] HC Deb 26 October 2000, c199-203w

[14] HC Deb 10 February 1998, c126

[15] HC Deb 16 June 1998 c 193w

[16] *SIPRI Yearbook 1992*, p.295-296

> achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources".[17]

The final code of conduct broadly correlates to the British Government's set of criteria issued in July 1997 and includes the principle that one EU state should inform another when it is considering the acceptance of a contract that the first has turned down, for example, on human rights grounds. If, following consultations, it decides nevertheless to grant an export licence, it must then notify the other, giving an explanation of its decision. The Code and the consultation mechanism are politically rather than legally binding and there is little direct sanction if Member States breach the Code. Indeed, a Member State could still sell arms to a state that had been refused an export licence by another Member State.

The code of conduct has not been without controversy. Some commentators believe the French and British proposals were tabled early to pre-empt attempts by Germany and other states to introduce a legally binding code with tighter restrictions.[18] Critics have pointed to the fact that the sale of equipment to repressive regimes is permitted if it is to be used for the protection of the security forces, and that there is a marked lack of transparency, with insufficient 'end-use' controls to prevent exports being diverted to third countries. Nevertheless, Mr Cook called the code "a substantial step forward towards responsible and effective regulation of the European arms trade."[19]

C. Publication of Strategic Export Controls Annual Reports

On 25 March 1999 the Government published its first *Annual Report on Strategic Export Controls*, covering the period from 2 May 1997 to 31 December 1997.[20]. According to an FCO press release the report represented "the first time the Government has disclosed this level of detail on a global basis about its exporting licensing decisions."[21] Annual reports for 1998 and 1999 have since been published.[22]

In the background notes to the draft Bill of March 2001 the Government claims that the Annual reports have:

> … provided comprehensive and detailed information about export licensing decisions to all destinations, and details of policy developments over the year. The Annual Reports have opened up the Government's export licensing policy and practice to an unprecedented degree of scrutiny and debate both within and

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17 EU Code of Conduct for Arms Exports, available from http://www.basicint.org (House of Commons Library deposited paper 98/532)

18 *Scotsman*, 26 May 1998

19 *BasicReports*, 4 June 1998

20 *Strategic Export Controls Annual Report 1997*, produced by the FCO, DTI and MOD (CS891.1)

21 FCO Press Release, 25 March 1999, FCO website at http://www.fco.gov.uk

22 *Strategic Export Controls Annual Report 1998* and *1999*, produced by the FCO, DTI and MOD (CS891.1)

> outside Parliament. They have provided Parliament with the information needed to carry out regular, thorough scrutiny of export licensing decisions made by the Government.[23]

The Defence Manufacturers' Association (DMA) has welcomed the reports, congratulating the Government for "setting the world-leading standard that other countries should follow".[24] Some observers, however, have criticised the current system for failing to provide sufficient information on defence export licences. In its report of 2 February 2000[25] the Quadripartite Committee[26] made several recommendations on expanding the level of detail in the Annual Reports including quantities of equipment supplied and end-user information. In its response to the Committee's report, the Government promised the following changes:

> Against this background, future Annual Reports, starting with the Report for the year 2000, will in principle specify the number of items of military equipment in the UN Register of Conventional Arms categories covered by the SIELs[27] issued during the relevant period, provided that the relevant contract has come into force. Similarly, future Reports will in principle also give information on the number of small arms covered by SIELs issued during the reporting period. However the Reports will not give this information in cases where, under the Code of Practice on Access to Government Information, the arguments for publication of the information are otherwise outweighed by the harm which this would cause to commercial confidentiality and/or the legitimate security interests of the recipient country. We shall endeavour to keep all such exceptions to the minimum.[28]

Clause 9 of the Bill will commit the Government to the publication of annual reports on a statutory basis. Please see Chapter IV C.3 for more detail on this issue.

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23 Cm 5091, p.1

24 Response of the DMA to the proposals contained within Cm5091, 23 May 2001

25 Defence, Foreign Affairs, International Development and Trade And Industry Committees, *Annual Reports for 1997 and 1998 on Strategic Export Controls*, HC 225, Third, Second, Third, Fourth Reports, 2 February 2000

26 The Quadripartite Committee is the joint Committee of the Defence, Foreign Affairs, International Development and Trade and Industry Committees.

27 Standard Individual Export Licences – see Appendix I for further details.

28 *Government's Response to the Foreign Affairs Committee's Report on the Annual Reports for 1997 and 1998 on Strategic Export Controls*, Cm 4799, para 32, p.11

III Review of Strategic Export Controls Legislation

A. Import, Export and Customs Powers (Defence) Act 1939

The current primary legislation governing strategic export controls is the *Import, Export and Customs Powers (Defence) Act 1939*, which was introduced under emergency procedures at the outbreak of World War II. The Act allows the Board of Trade to make by order

> such provisions as the Board think expedient for prohibiting or regulation, in all cases or any specified classes of cases…[of] the importation into, or exportation from, the United Kingdom… of all goods or goods of any specified description[29],

and Section 1 (5) allows the Board to prosecute an offence under such an order. There is no provision for Parliamentary control over such orders. Section 9 (3) provides that the Act shall continue until "such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end, and shall then expire".

In 1990 the *Import and Export Control Act* was adopted in order to meet concerns that the 1939 Act might be open to legal challenge. The 1990 Act removed the subsection relating to the expiry of the Act on the making of an Order declaring the "emergency" to be over, and in effect made the 1939 Act permanent.

B. 1996 Green Paper

The Scott Inquiry identified a number of limitations in the 1939 Act. These included the lack of parliamentary scrutiny of secondary legislation made under the Act and the absence of any indication of the purposes for which export controls may be imposed. The Scott Report recommended that the Government should:

> publish as soon as practicable a Consultation Paper with proposals both for the content of new empowering legislation in place of the 1939 Act and for an export licensing system and export licensing procedures suitable for the peacetime requirements of a trading nation in the post cold war era.[30]

On 26 February 1996, the then President of the Board of Trade, Ian Lang, announced to the House that:

> We have accepted the criticism about export controls and licensing procedures and have already undertaken to publish a consultation paper on that, as Sir Richard Scott recommends.

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29 *Import, Export and Customs Powers (Defence) Act 1939*, Section 1

30 The Scott Report, Vol.4, para K3.6

> We have already undertaken to consider further and very carefully Sir Richard's comments on the use of wartime export control legislation.[31]

The DTI published a Consultative Document on Strategic Export Controls in July 1996,[32] which invited comments "on all aspects of strategic export control procedures and policy, and on the statutory basis of strategic export control".[33] The Government received 38 responses, just over half of which were from industry and the rest from non-governmental organisations (NGOs).

C. 1998 White Paper

On 1 July 1998 the Labour Government outlined its proposals for new primary export control legislation in a White Paper on *Strategic Export Controls*.[34] In drawing up its proposals, the Government took account of the responses to the previous Government's 1996 Green Paper. The proposals included:

- parliamentary scrutiny of strategic exports;
- the setting down in legislation of the purposes of strategic export controls;
- the extension of the scope of export licensing powers to include controls on:
  - weapons of mass destruction
  - the electronic transfers of controlled technology
  - trafficking and brokering;
- improvements in licensing procedures

The Government received 54 responses, which provided the framework for the subsequent draft Bill and the Bill as presented.

D. Draft *Export Control and Non-Proliferation Bill*

On 6 December 2000 it was announced in the Queen's Speech that a "draft Bill will be published to improve the transparency of export controls and to establish their purpose". The draft Bill[35] was published on 29 March 2001 and comments were invited on the proposals by 24 May 2001. According to the DTI, the proposals in the draft Bill were aimed at modernising the export control regime by:

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31 HC Deb 26 February 1996, c589

32 *Strategic Export Controls – A Consultation Document*, Cm 3349, July 1996 [hereafter "the 1996 Green Paper"]

33 The 1996 Green Paper, Cm 3349, para 1.2

34 The 1998 White Paper, Cm 3989

35 Contained in Cm 5091

- setting out the purposes of export control in legislation;
- providing for parliamentary scrutiny of secondary legislation made under the Bill; and
- requiring the Government to publish annual reports.[36]

The draft Bill also proposed new powers that would allow for the "creation of an updated and more effective export control regime".[37] These included:

- Powers to impose controls on the transfer of military and dual-use technology by intangible means, and the provision of related technical services; and
- Powers to impose controls on trafficking and brokering of military and dual-use equipment.

At the time of writing, the results of the consultation on the draft Bill had not been published.

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[36] Cm 5091, p.1
[37] Ibid.

IV The *Export Control Bill 2001*

In the Queen's Speech of June 2001 the Government announced that it would introduce legislation on this subject. The *Export Control Bill* [Bill 5 of 2001-02] received its First Reading on 26 June. Members are referred to the Explanatory Notes [Bill 5-EN] for a detailed commentary on the clauses.

The Bill covers strategic exports and cultural exports.

The aim of the Bill is to improve Government accountability for export controls by setting out the purposes of export control in legislation and by limiting controls to those purposes. It also provides for parliamentary scrutiny of secondary legislation made under the Bill. These measures address recommendations made in the Scott Report, which is discussed in Chapter I above.

The Bill also includes powers aimed at improving the effectiveness of the export control regime. The Explanatory Notes accompanying the Bill state that the intention is to:

- impose controls on exports from the UK;
- impose controls on the transfer of technology from the UK and by UK persons anywhere by any means (other than by export);
- impose controls on the provision of technical assistance overseas;
- impose controls on the acquisition or disposal of goods that are themselves subject to export control or activities which facilitate such acquisitions or disposals (this is often referred to as trafficking and brokering);
- apply measures in order to give effect to EU legislation on controls on dual-use items (i.e. items with a civil and potential military application);
- prescribe licensing procedures in respect of any of the controls imposed;
- require exporters to supply information to enable the UK to comply with its international reporting commitments and pass such information on to relevant international organisations;
- require the Secretary of State to report annually to Parliament on the controls imposed under the Bill
- enable penalties for export control offences to be imposed, increased or varied to reflect the seriousness of the offences.[38]

Normally, the DTI will have responsibility for strategic export controls, and the Department for Culture, Media and Sport (DCMS) will deal with export controls relating to objects of cultural interest.

The draft Bill was described by the Quadripartite Committee as "largely an enabling Bill" where the "meat of the proposals being made will be in the secondary legislation to be

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[38] *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-2002, para 6

made under the Bill".[39] The DMA told the Committee that the "devil will be in the detail"[40] of the subordinate legislation and the UK Working Group on Arms (UKWG)[41] argued that:

> In the absence of detailed proposals for operationalising the principles set out in the primary legislation, parliamentarians, NGOs and the defence industry will find it impossible to judge the overall impact of the new legislation.[42]

The Committee recommended that:

> … every effort is made to ensure that a draft consultative version of the relevant secondary legislation is published before the House is asked to give the Bill a Second Reading.[43]

Mr Byers told the Committee that:

> I do think we stand a far better chance of having a Bill and secondary legislation which flows from it in a form which is more likely to achieve broad support if there has been a genuine consultation around not just the Bill but any secondary legislation which flows from it. I have been very clear with my own officials that I want the secondary legislation after this consultation period on the primary legislation to be brought together as quickly as possible and then to have an opportunity for there to be a further round of consultation on the secondary legislation.[44]

A number of key elements of the new regime would be covered in the secondary legislation, including the licensing and appeals process, and the question of judicial review. These issues are discussed in Cm 5091[45] and the Quadripartite Committee's May 2001 report.[46] At the time of writing, the draft secondary legislation has not been published. This may hinder a full assessment of the practical implications of the Bill.

A. Export Controls

The provisions for Orders to be made to control exports are contained in **Clause 1**. The term 'exports' is not defined, but the term 'export controls' is. Under Clause 1 (2) export

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39 Quadripartite Committee, *Draft Export Control and Non-Proliferation Bill*, 1 May 2001, HC 445 2000-01, para 11 [hereafter "the Quadripartite Committee May 2001 report"]

40 Ibid. Minutes of Evidence – Examination of Witnesses, p.17, Q 61

41 UKWG consists of Amnesty International UK, BASIC, International Alert, Oxfam and Saferworld.

42 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Memorandum submitted by the UKWG, p.1, para 2

43 Ibid. HC 445 2000-01, para 11

44 Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.36, Q 198

45 Cm 5091, paras 69 and 70

46 The Quadripartite Committee May 2001 report, HC 445 2000-01, paras 54-65

controls means: "the prohibition or regulation of [the] exportation [of goods] from the United Kingdom or their shipment as stores." Under Clause 1 (5)

> export controls may be imposed in relation to the removal from the United Kingdom of vehicles, vessels (as an exportation of goods), whether or not they are moving under their own power or carrying goods or passengers.

It is envisaged that the DTI will use the powers contained within the Bill to consolidate existing secondary legislation. According to the Explanatory Notes this would include the Export of Goods (Control) Order 1994 (as amended) and the greater part of the Dual-Use Items (Export Control) (Regulations) 2000 (made under the European Communities Act 1972). It is indicated that the secondary legislation will, in particular, specify the goods or classes of goods whose export will be subject to control. It is expected that any future secondary legislation will be made under the powers contained in the Bill.

B. The 1939 Act

The Scott Report stated that the 1939 Act lacked "the provisions of Parliamentary supervision and control that would be expected and are requisite in a modern Parliamentary democracy".[47] Pressure groups have anticipated a full replacement of the 1939 Act.

Clause 14 of the Bill would repeal only those provisions of the 1939 Act that relate to the export of goods. The clause does not repeal sections of the 1939 Act concerning the import of goods. The Quadripartite Committee expressed concern in their May 2001 report that: "The rump of the 1939 Act continues to give the Government draconian powers to control imports, for no stated purpose and without parliamentary control…"[48]

Secretary of State for Trade and Industry Stephen Byers defended the Government's approach to the 1939 Act when giving evidence to the Committee on 25 April 2001:

> I think it still does what it was originally intended to achieve in 1939 as far as the import side is concerned, particularly given that most of the provisions now affecting imports will be covered by measures in relation to the European Union where we do have the opportunity in this House to scrutinise them through this particular vehicle… I think had we also wanted to cover the import side then I think there may have been a further delay. Secondly, being very frank with the Committee, it would have been a far bigger Bill as a result and that may well have meant difficulties in terms of securing parliamentary time.[49]

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47 The Scott Report, Vol. IV, para K2.1

48 The Quadripartite Committee May 2001 report, HC 445 2000-01, para 15

49 Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, pp.36-7, Q 200

The Committee, while acknowledging the need to secure the Bill's place in the legislative programme, recommended that:

> the Government commit itself to laying before Parliament import Orders made under the Act as they have with export Orders, and to consult urgently on clauses to be included in the Bill to repeal what remains of the 1939 Act.[50]

C. Parliamentary Scrutiny

The Scott Report criticised the lack of parliamentary scrutiny of strategic exports under the 1939 Act and the subsequent *Import and Export Control Act 1990*. He recommended that subordinate export control legislation should be subject to parliamentary approval. The Report expressed regret that the possibility of at least laying orders before Parliament had not been considered.[51]

After some deliberation, and in response to a recommendation by the Trade and Industry Committee, the Government announced in December 1999 that, prior to the passage of new legislation, Orders under the 1939 Act were to be laid before Parliament.[52] Since then eight Export of Goods (Control) Orders (ECGOs) have been laid by Command. Under this process the Orders are not liable to automatic parliamentary scrutiny. Requests can be made, for instance to refer the Order to a Standing Committee on Delegated Legislation, but it would be for Ministers to agree to such a request. The Quadripartite Committee, while noting that this interim procedure is no substitute for formal parliamentary powers, argued that it has helped by giving EGCOs greater visibility.[53]

1. Secondary Legislation: Negative and Affirmative Procedure

The July 1998 White Paper indicated that any new legislation should provide for parliamentary scrutiny of ECGOs made under it. It stated that:

> with the exception of Orders amending the purposes for which export controls can be imposed, the negative resolution procedure is the most appropriate form of scrutiny, bearing in mind the frequency of EGCO amendments and the fact that most of these are uncontroversial.

It continued:

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50 The Quadripartite Committee May 2001 report, HC 445 2000-01, para 19
51 The Scott Report, Vol.1, C1.78 - C1.82
52 HC Deb 16 December 1999, c239w
53 The Quadripartite Committee May 2001 report, HC 445 2000-01, para 25

> Negative procedure would allow MPs the opportunity to debate and vote on ECGO amendments where they considered this appropriate but would not require such approval for every amendment, including the most routine. The Government therefore regards this as the most appropriate form of scrutiny for export control legislation.[54]

Under the negative procedure a Statutory Instrument (SI) will become law on the date stated on it, but will be nullified if either House (or the Commons only, in the case of instruments dealing with financial matters) passes a Motion calling for its annulment within a certain time. This time period is usually 40 days *including* the day on which it was laid. Any Member may put down a Motion to annul an SI subject to the negative procedure.

The affirmative procedure is less common than the negative procedure, but provides more stringent parliamentary control since the Instrument must receive Parliament's approval before it can come into force. To do this, a Motion approving it has to be passed by both Houses (or the Commons only, in the case of instruments dealing with financial matters) within a period of 28 days (or occasionally 40 days). Either House can reject the Instrument.

Clause 12 of the Bill reiterates proposals in the 1998 White Paper and the draft Bill that parliamentary scrutiny of secondary export control legislation should become a statutory requirement. The clause recommends the use of both affirmative and negative procedures under particular circumstances.[55] The Explanatory Notes state that under the following circumstances the affirmative resolution procedure will apply:

> Subsection (2) [of Clause 12] requires orders that contain provisions made by virtue of clause 3(2) (i.e. orders which impose export or transfer controls and provide for their own expiry in 12 months or less) to be subject to the affirmative resolution procedure of both Houses of Parliament.[56]

And:

> Subsection (4) [of Clause 12] requires that orders that are made under clauses 6(1) (i.e orders on information to be kept and passed to the Secretary of State) and 11 (i.e. orders that amend the Schedule) shall be subject to the affirmative resolution procedure of both Houses of Parliament.[57]

Remaining orders, namely those made under Clauses 1, 2, 4 (controls on provision of technical assistance overseas), 5 (controls on trade in controlled goods) or 15(3)

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54 The 1998 White Paper, Cm 3989, p.8, para 2.1.5

55 For more information on Statutory Instruments and affirmative and negative procedures, see *House of Commons Library Factsheet Series L No 7*.

56 *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-2002, para 45

57 Ibid. para 46

(transitional provisions and savings) of the Bill will be subject to the negative resolution procedure of both Houses of Parliament.

The Government contends that the affirmative procedure is more appropriate for orders introducing or amending the purposes of export controls (Clause 11). This is because the purposes are "fundamental to the scope of the Government's powers and the Government believes that it is right that Parliament should have the opportunity to approve any changes to them."[58] Similarly, for Clause 3 (2) the affirmative procedure was chosen because emergency controls might not fall within the purposes set out in the primary legislation.[59] Clause 6 (1) would give the Secretary of State power to make requirements of businesses to keep records and provide information.

With regard to the application of the negative procedure the Government's view is that this procedure is appropriate for:

> … the frequent, usually technical and uncontroversial, amendments to secondary legislation that are required, usually to reflect changes agreed in the various international regimes on export control in which the UK participates. At the same time, the negative procedure would provide Parliament with the opportunity to debate and vote on secondary legislation where appropriate.[60]

Lord Scott told the Quadripartite Committee on 25 April 2001 that while he would have preferred wider use of the affirmative resolution procedure he had been neither surprised nor particularly disappointed that the Government should have opted for the negative procedure:

> … the draft Bill provision for a negative procedure in regard to the Control Orders made is plainly much, much better than the absence of any provisions in the predecessor Act and the emergency Act of 1939. I think it would probably have been too much to have expected that every single Order made under the empowering provisions of the Act would ever have been subject to affirmative procedure because the time involved might have made it difficult… I was very pleased to see that any amendment of the purposes also needs affirmative resolution procedure. Yes, I would have preferred affirmative resolution procedure, as I said in my report… I think it is a fair comment that generally speaking Government prefers a negative resolution procedure to affirmative for the obvious reasons of control and time that are involved… I am not in the least surprised, and not particularly disappointed, that it is not there, I did not really have any huge expectation that it would be.[61]

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58 Cm 5091, para 30

59 Ibid. para 31

60 Ibid. para 21

61 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of the Rt Hon Lord Scott of Foscote, p.31, Q 144

In evidence to the Quadripartite Committee Mr Byers said that,

> provided there is the opportunity for Parliament to deal with these matters then there will be an opportunity if the House feels strongly about a matter then certainly in my experience, whether it is negative or affirmative, then the way can be found for the matter to be dealt with.[62]

If time allowed he was also prepared to show drafts of Orders to be made under the Bill to the Quadripartite Committee.[63] The Committee welcomed this approach and 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.[64]

2. Prior Parliamentary Scrutiny of Export Licence Applications

Several responses to the 1996 Green Paper called for much wider parliamentary scrutiny of defence exports. Suggestions included scrutiny by a parliamentary committee of individual export licence applications for equipment over a certain value or to certain destinations, the introduction of a report to Parliament and an annual parliamentary debate. The Government stated in the 1998 White Paper that it did not support such proposals:

> The Government does not consider that there should be parliamentary scrutiny of individual applications either before or after the decision on whether to grant a licence has been taken. Parliamentary scrutiny before licence decisions are taken would inevitably slow down significantly the process of decision-making on those licence applications. Furthermore, any process involving publication of individual applications, whether before or after decisions have been taken would mean identifying companies and the nature of their planned or actual export business which would be likely to harm their competitive position. Overseas Governments would also have a legitimate concern about the details of their purchases of defence-related equipment being made known to, for example, neighbouring countries. There would be a danger that they would seek in future to buy equipment from countries which would not disclose details of individual contracts.[65]

The issue of prior parliamentary scrutiny of export licence applications has generated significant debate since the publication of the White Paper. The Quadripartite Committee

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62 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.39-40, Q218

63 Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.36, Q 219

64 Ibid. para 31

published a report in July 2000 in favour of the principle of prior parliamentary scrutiny and recommended that responsibility for this should be conferred upon the Committee.[66] The system of prior scrutiny proposed by the Committee was as follows:

> *Stage 1 notification*
>
> All licence applications would be notified to the Committee, including applications for OIELs and dual-use goods. We refer to this as "Stage 1 notification". We would not wish prior scrutiny to be limited to high value exports as in the US system; licence applications for some low value items, for example for goods for internal security purposes, may be potentially contentious. However, the Committee would in due course no doubt identify classes of applications not requiring Stage 1 notification, e.g. for exports to NATO member countries.
>
> The Committee would be notified by the Government of all licence applications received, as soon as reasonably practicable. The Committee would require only minimum information about each application - country of destination, description of item and quantity. The information in Stage 1 notifications would be confidential to the Committee.
>
> *Stage 2 notification*
>
> The Committee would advise the Government of those licence applications on which it would in due course wish to receive a further notification that the Government was intending to grant a licence. We refer to this as "Stage 2 notification". We are confident that Stage 2 notification would be required in only a small minority of cases. The Committee may seek some additional information or clarification in relation to a limited number of Stage 1 notifications to enable it to decide whether or not a Stage 2 notification was required. The Committee accepts that it would be wholly its responsibility to inform the Government in respect of any individual licence application that a Stage 2 notification was required. The Committee would have to have arrangements in place to discharge that responsibility both when the House was sitting and when it was in recess.
>
> The Committee would require Stage 2 notifications not fewer than 10 working days prior to the intended issuing of the licence. The Committee accepts that in a limited number of cases the Government may, for operational and security reasons, have to put Stage 2 notifications to the Committee in classified form. However, under the US system of prior notification, the equivalent to the Stage 2 notifications proposed here are invariably put to Congress as non-classified documents. We would hope and expect the British Government to act similarly.

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65 The 1998 White Paper, Cm 3989, p.9, para 2.1.7

66 Quadripartite Committee, *Strategic Export Controls: Further Report and Parliamentary Prior Scrutiny*, 17 July 2000, HC 467 1999-2000

> On receipt of a Stage 2 notification, the Committee may have observations that it wishes to put to the Secretaries of State concerned in the 10 working days prior to the intended issue of the export licence. That will be a matter for the Committee in each case.
>
> We fully understand and accept that, even with a system of prior parliamentary scrutiny in place, responsibility for strategic export decisions will continue to lie wholly with the Government, who will be accountable to Parliament for those decisions. We also acknowledge that in crises or conflicts, national security and operational considerations may make it impossible for the Government to comply with the prior scrutiny procedure in every case. In such circumstances the Committee would look to the Government to inform it of all licence applications received, and not notified to the Committee before being granted, at the earliest possible date.
>
> Because of the security and commercial sensitivities surrounding strategic exports, the bulk of the work of prior parliamentary scrutiny will necessarily have to be conducted between the Committee and the Government Departments concerned. However, where the Committee had major concerns about a licence that was about to be or had already been granted, it would have the power under existing Standing Orders to make a Special Report to the House. That Report could be debated. In addition, the Committee would be continuing its regular Reports to the House covering both the workings of the prior scrutiny system and strategic export controls generally.[67]

The Committee concluded that:

> …strategic exports by their very nature justify the establishment of a system of prior parliamentary scrutiny, and that such a system should be put in place forthwith. We have made a detailed examination of the systems in place in the only two countries who, to our knowledge, currently operate them, Sweden and the USA. The prior scrutiny system we have proposed will, we believe, contain a much stronger element of prior scrutiny than the Swedish system and will be more comprehensive, more streamlined and more transparent than the US one. Our proposed system poses no threat to either the commercial confidentiality or the competitiveness of British companies. It would introduce no delay of any significance in the granting of export licences. It would not impede in any way the immediate granting of export licences when these are needed in times of crisis or to meet imperative national security requirements. Furthermore, it can be operated by the existing Select Committees making up the Quadripartite Committee, and can be brought into being without either Resolutions of the House or changes to the Standing Orders. We recommend acceptance of our proposals by the four Secretaries of State in time for the new system of

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[67] Quadripartite Committee, *Strategic Export Controls: Further Report and Parliamentary Prior Scrutiny*, HC 467, 1999-2000, 17 July 2000, paras 82-89

> parliamentary prior scrutiny of strategic exports set out in this Report to commence as from the beginning of the next Session of Parliament.[68]

The Government's response to the recommendations of the Committee regarding prior scrutiny of defence exports was that they were unworkable. The main areas of concern were issues of delay and confidentiality. In its formal response to the Quadripartite Committee's report of 17 July 2000, the Government declared that it

> … has given careful consideration to the Committees' recommendations on prior Parliamentary scrutiny of all the 12,000 or so individual export licence applications for military and dual use goods received each year. The Government has concluded that they could not be made to work without causing significant damage to the competitiveness of UK exports and without having a materially adverse impact on the efficiency and effectiveness of the export licensing process. The Government stands by its conclusion in the 1998 White Paper on Strategic Export Controls that such scrutiny would not be right and would moreover cause delays and risk breaching the confidentiality of UK exporters and their legitimate overseas customers.
>
> Involvement of the Committees in the taking of decisions under the existing legislative powers is in any event problematic, in that an extra element would be introduced into the process. This might generate doubt as to whether the decision had been taken properly in accordance with the powers conferred by Parliament.[69]

The Government's response concluded:

> The Government's view remains that there is no role for advance scrutiny of individual casework decisions, which are quintessentially matters for ministerial decision in accordance with delegated powers conferred by Parliament.[70]

At time of writing the Government's formal response to the Committee's proposals had not been published. However, the Committee did receive a "helpful series of answers"[71] from Mr Byers during an evidence session on 25 April 2001. The Secretary of State said:

> I think the proposals that came from the Joint Committee on 14 March seek to address many of the concerns that have been raised… What I can say is that the model contained within the Joint Committee's proposals on 14 March could be introduced without primary legislation. In a sense although the Bill is here, we

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68 Quadripartite Committee, *Strategic Export Controls: Further Report and Parliamentary Prior Scrutiny*, HC 467, 1999-2000, 17 July 2000, para 90

69 *Strategic Export Controls: Further Report and Parliamentary Prior Scrutiny*, Response of the Secretaries of State for Defence, Foreign and Commonwealth Affairs, and Trade and Industry, Cm 4872, December 2000, p.11

70 Ibid. p.11

71 The Quadripartite Committee May 2001 report, HC 445 2000-01, para 32

> do not actually need the Bill to agree amongst ourselves effectively how we intend to adopt these particular matters.[72]

He added:

> We are still looking at it [prior parliamentary scrutiny] because we want to respond as positively as we can to the very genuine proposals which have been put forward. Whether we can meet them or not it would be wrong for me to say, but what I can say is that they are being given detailed consideration.[73]

The UKWG has fully supported the Quadripartite Committee's attempts to encourage the Government to establish a system of prior scrutiny. In written evidence to the Committee, the UKWG argued that:

> The introduction of prior scrutiny would enhance ministerial accountability and would improve the system of checks and balances in the arms export-licensing regime. The UKWG believe this to be an essential element of ensuring consistent application of the UK criteria for arms exports and the EU Code of Conduct, and, once passed into law, the purposes of the Export Control and Non-Proliferation Act.[74]

The UKWG urged the Government to adopt fully the Committee's recommendations.

The defence industry, while welcoming parliamentary scrutiny of secondary legislation, remains opposed to any system of prior parliamentary scrutiny of individual export licence applications. The DMA has recently expressed concerns about the Quadripartite Committees' revised proposals. The DMA's written response to the draft bill states:

> We have sought soundings from Industry on the new, revised proposals, to ascertain whether these allay the fears that companies had expressed to us. The results of our soundings are that the new proposals still do not allay the concerns that Industry has, especially over the preservation of commercial confidentiality and possible further delays in the processing of export licence applications. Industry still seems to be deeply opposed to the question of prior Parliamentary scrutiny on principle. Based on many companies' practical experiences, there is concern about scrutiny by individuals who do not have sufficient technical knowledge to know what the equipment does. We are still unsure as to what additional delays the "revised" process proposed in March 2001 may impose on the export licensing system.[75]

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72 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.39, Q 207

73 Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.39, Q 208

74 Ibid. Minutes of Evidence – Memorandum submitted by the UKWG, p.5, para 22

75 Response of the DMA to the proposals contained within Cm 5091, 23 May 2001

Lord Scott has expressed doubts regarding the practicality of prior scrutiny and questioned its "constitutional propriety".[76] On the latter point, he stated to the Quadripartite Committee on 25 April 2001 that:

> I have always regarded the point of entry of a Committee such as this, and of Parliament, whether the House of Commons or the House of Lords as well, as being in connection with ministerial accountability. Ministers are accountable, Government is accountable to Parliament for the decisions it takes. If you are speaking about prior parliamentary scrutiny you are looking at a stage before any decision has been taken, before any obligation of accountability has arisen. Therefore I slightly doubt the constitutional propriety of it as well as the practicality of it although I do agree it is a very interesting suggestion.[77]

3. Annual Reports

Clause 9 aims to place the annual report on a statutory basis. It states that:

> The Secretary of State shall, as soon as practicable after the end of 2002 and each subsequent year, lay before each House of Parliament a report on the operation during that year of this Act and any order under section 1, 2, 4, 5 or 6(1).

The background notes to the draft Bill indicate that the decision to put the Annual Reports on a statutory basis was in response to a suggestion from Oxfam. The notes state that:

> The Government has considered this suggestion, and concluded that, in view of the vital role played by the Annual Report in providing for Parliamentary and public scrutiny of export licensing decisions and policy, it would be right to place publication of the Report on a statutory footing.[78]

The Quadripartite Committee regarded the consequences of putting the Report on a statutory basis as "apparently slight" and warned that:

> Although we see no harm in putting the Annual Report on a statutory basis, it would be regrettable if it were to oblige FCO to charge for copies; if it had any intended consequences for its availability; or if it were to lead to any further delays in publication.[79]

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76 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of Rt Hon Lord Scott of Foscote, p.30, Q 137

77 Ibid. Minutes of Evidence – Examination of Rt Hon Lord Scott of Foscote, p.30, Q 137

78 Cm 5091, para 24

79 The Quadripartite Committee May 2001 report, HC 445 2000-01, Summary of Conclusions and Recommendations (d)

D. Purposes of Export and Transfer Controls

The Scott report called for the purposes for which export controls might legitimately be used to be set out in legislation. The 1996 Green Paper set out ten suggested purposes. The 1998 White Paper set out a revised list of eight purposes. In addition to these lists there have also been the national criteria announced in July 1997 (see Chapter II A above) and the EU Code of Conduct of June 1998 (see Chapter II B above).

Under the Bill, **Clause 3** links the controls under Clauses 1 (1) and 2 (1) to the purposes set out in the Schedule. Under Clause 3 (1) orders imposing export or transfer controls may be made only for the purposes in the Schedule:

> While the purposes apply to the making of orders, rather than applying explicitly to the use of the licensing powers to be contained in those orders, the effect of the provisions in the Bill will be that any licensing decision taken which ignores completely the purposes set out in the Bill, is likely to be an improper use of the powers provided in the Bill.[80]

Ted Rowlands, MP, the chairman of the Quadripartite Committee, described the provisions of the Schedule as "ground-breaking", stating that:

> This is going to be the first time in legislation that there is going to be listed a series of purposes for which orders preventing exports taking place will actually be put into legislation.[81]

The purposes for which an order imposing export controls (Clause 1) or transfer controls (Clause 2) may be made, as laid out in the Schedule, are as follows:

- Giving effect to any Community provision.
- Any obligation of the United Kingdom relating to a joint action or common position adopted, or a decision taken, by the Council under Title V of the Treaty on European Union (provisions on a common foreign and security policy);
- Any other international obligation of the United Kingdom;
- The exportation or transfer of goods or technology that may have the following consequences:

National Security of the United Kingdom and other countries

A An adverse effect on:

(a) the national security; or

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[80] Cm 5091, March 2001, para 29

[81] The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of Witnesses, p.6, Q 1

(b) the security of members of the armed forces of the UK (or any dependency[82]), any Member state or any friendly State.

Regional stability and internal conflict

B An adverse effect on peace, security or stability in any region of the world or within any country.

Weapons of mass destruction

C Use of the goods or technology anywhere in the world in connection with the development, production or use of weapons of mass destruction.

Breaches of international law and human rights

D Use of the goods or technology anywhere in the world to carry out or facilitate the carrying out of :

(a) acts threatening international peace and security;
(b) acts contravening the international law of armed conflict;
(c) internal repression in any country;
(d) breaches of human rights.

Terrorism and crime

E Use of the goods or technology anywhere in the world to carry out or to facilitate the carrying out of acts of terrorism or serious crime anywhere in the world.

With regard to provisions pertaining to the Department for Culture, Media and Sport (DCMS), section 5 of the Schedule states that an order may be made for the purpose of "prohibiting or regulating the exportation of objects of cultural interest".[83]

Changes to the draft bill

The schedule to the Bill differs slightly from that published with the draft bill. The Quadripartite Committee recommended that a specific reference within the Schedule be made to "internal conflicts within the country of destination".[84] This has now been made under section B's reference to "within any country". In addition, under the draft bill the Schedule included a section 'F' referring to sustainable development. This imposed

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82 Under the Schedule, "dependency" means the Isle of Man, any of the Channel Islands or a British overseas territory.

83 Under the Schedule "objects of cultural interest" includes objects of historical or scientific interest. See Chapter IV K for more information

84 The Quadripartite Committee May 2001 report, HC 445 2000-01, para 39

controls on exports and transfers where there was a danger of a serious or adverse effect on:

> (a) the economy of any country; or
> (b) the potential for sustainable economic development in any country.[85]

This provision has been removed. The UKWG had welcomed the earlier references to sustainable development as they went some way towards reflecting references made in section 8 of the EU Code of Conduct for Arms Exports (see section II B above). A number of responses to the 1998 White Paper had argued that the 1997 national export licensing criteria and/or the EU Code of Conduct should be incorporated in legislation either in place of, or in addition to, the purposes set out in the schedule. The Government's view is that incorporating these criteria in legislation would introduce rigidity into the way in which licence applications are considered. The notes accompanying the draft bill argue that this rigidity

> … would be as likely to require the Government to grant a licence in a borderline case as to prevent it from granting such a licence…the purposes will set definite parameters for legitimate Government action.[86]

Concerns regarding the loss of references to sustainable development in the Schedule may be allayed by a specific reference made to the consolidated criteria in **Clause 8(4)** (see Chapter IV I below).

Temporary purposes

Clause 3 (2) provides that this restriction to the given purposes does not apply if the order expires or its relevant provisions cease to have effect within 12 months. If such an order is made, an affirmative resolution of each House must be obtained within 40 days, or the order will cease to have effect at that point. The reason for this provision is:

> … to allow the Government to seek parliamentary approval for action, for example, to respond to emergency situations by imposing controls that, exceptionally, would not, or might not clearly, fall within the purposes set out in primary legislation, but where the need for such controls is likely to be short-term and an amendment of the purposes is not therefore warranted. This might be for a purpose completely unconnected with either strategic or cultural export goods.

The powers contained in **Clause 3(2)** have raised a certain amount of concern. The House of Lords Committee on Delegated Powers and Deregulation in its report of 25 April 2001 stated that it did not "find it right in principle, and therefore appropriate to delegate a power to impose controls that a restriction on the freedom to trade should be

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85 Cm 5091, p.55
86 Ibid. para 32

granted in such wide terms."[87] Mr Byers told the Quadripartite Committee that it was there in case of unforeseen circumstances:

> (Mr Byers)…To be honest, it is for things that we do not foresee. The purposes we think are wide enough drawn to have the flexibility but there may be a view, there may be a legal opinion, that that is not the case, in which case we would need to come back to Parliament-
>
> (Chairman – Ted Rowlands) It is a belt and braces catch-all provision?
>
> (Mr Byers) It is really, yes.[88]

The Committee was not convinced of the need for **Clause 3(2)** stating that:

> … it is in principle undesirable to bolt on another procedure for imposing controls which are not within statutory purpose. It is not clear to us why powers are needed to add purposes permanently and temporarily, both subject to the same parliamentary procedure.[89]

The Committee recommended tight control over orders made under **Clause 3(2)** by recommending that "the period of time during which Orders made under Clause 3(2) may remain in effect without parliamentary approval should be 28 calendar days".[90]

Under **Clauses 3 (3)** and **3 (4)** an order made under Clause 1 (1) or 2 (1) which revokes, amends or extends a previous order is restricted to the purposes in the Schedule only if it strengthens the controls in the previous order or imposes controls on goods not controlled under that order. In other words, the removal of some restrictions imposed under a previous order does not entail that the remaining controls be justifiable in terms of the purposes in the Schedule. Under **Clause 3 (5)** these considerations do not apply to the 12 month orders mentioned in Clause 3 (2).

The remainder of Clause 3 deals with the exercise of the licensing function under a control order, and provides that those performing the function must pay regard to any consequences which the export of goods or transfer of technology may have of the kind mentioned in the Table in paragraph 4 of the Schedule, although the licensing authority is not restricted to this.

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87 Lords Committee on Delegated Powers and Deregulation, *Draft Export Control and Non-Proliferation Bill*, Twentieth Report, HL 72 2000-01, 25 April 2001, para 20

88 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of Witnesses, p.40-41, Qq 224-225

89 Ibid. para 47

90 Ibid.

Alteration of purposes

Clause 11 allows the Secretary of State to make an order amending the schedule by affirmative resolution procedure as laid out in **Clause 12(4)** (see section IV B1 above).

E. Transfer Controls

As a member of various non-binding international export control regimes (such as the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group and the Wassenaar Arrangement[91]), the United Kingdom seeks to control the export of certain technologies and software and to prevent the proliferation of weapons of mass destruction. Under the 1939 Act the Government has powers to control only tangible exports of controlled goods by means of the licensing system. As well as weapons or materiels, this may include information such as blueprints, plans or technical manuals sent in hardcopy or on computer disc. However, the Government has lacked the power to control the export of technology and software by electronic and other intangible means. **Clause 2** would address this omission by allowing the Secretary of State to prohibit or regulate transfers of controlled technology by means of fax, e-mail and oral communication, such as the telephone.

There are a number of existing measures aimed at addressing this issue. EC Regulation 1334/2000,[92] which came into force in September 2000, imposed controls on dual-use technologies, software and goods to ensure an export licence is required regardless of whether the transfer is carried out by tangible means, or by electronic means.[93] Furthermore, as the Government indicates in Cm 5091, other legislation is already in existence (such as the Official Secrets Acts) to prevent the transfer of military or dual-use technology irrespective of the means of communication.[94] However, the intention with **Clause 2** is to provide the Government with "general powers [original emphasis] to control the transfer of technology irrespective of the means of transfer".[95]

Of central concern is the proliferation of technology and know-how relating to Weapons of Mass Destruction (WMD). The 1998 White Paper set out two new provisions that the Government intended to introduce to strengthen the controls on WMD:

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91 For more information on these regimes, see the Stockholm International Peace Research Institute (SIPRI) web site at http://projects.sipri.se/expcon/atcontrol_menu.htm

92 Council Regulation (EC) No. 1334/2000 of 22 June 2000; Dual-Use Items (Export Control) Regulations 2000 (SI 2000), No 2620

93 The Regulation also introduced a military end-use control. The issue of end-use controls is addressed in Chapter V C.

94 Cm 5091, para 39

95 Ibid. para 39

- the creation of a new offence or aiding, abetting, counselling or procuring a foreigner overseas to develop, produce or use a chemical weapon, or to engage in military preparations, intending to use a chemical weapon:

- to extend to biological and nuclear weapons the more comprehensive provisions of the 1996 Chemical Weapons Act[96] extended as above, and with an exemption for involvement in the official nuclear weapons programmes of NATO countries.[97]

In Cm 5091 the Government declared that, although such clauses had not been included in the draft Bill, the intention was for them to be introduced in the *Export Control Bill*.[98] On the face of the Bill there is no explicit reference to these two provisions. Under **Clause 7(1)(d)**, indictable offences may be created under the Orders for which the Bill provides.

Concerns over Transfer Controls

Some observers, particularly within the defence industry, are concerned about the potential impact the proposed transfer controls may have on business. The DMA declared in evidence to the Quadripartite Committee that it was too early to judge the full impact of the European restrictions on the transfer of dual-use technology by electronic means.[99] The Government believes that the experience gained since the introduction of the European dual-use regime, coupled with the use of open licensing, will facilitate the process and reduce the anticipated burden on business.[100]

In response to the 1998 White Paper, the academic community, in the form of Universities UK,[101] expressed concern that the "indiscriminate extension of powers to cover intangible exports posed an unacceptable threat to the operation and standing of UK higher education."[102]

In response to these concerns, the Government indicated in Cm 5091 that a licence would only be required "where the provider of the information knows or is informed by Government that the activity in question is intended for use in connection with a WMD or related missile programme". The original proposal in the 1998 White Paper stipulated that a licence would be required where the provider *suspected* the activity in question was

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96 For more information on the Chemical Weapons Convention, see Library Research Paper 95/116, *The Chemical Weapons Bill*, 21 November 1995

97 The 1996 Green Paper, Cm 3349, paras 3.1.1-3.1.3

98 Cm 5091, March 2001, para 80 and para 1.2 (vi)

99 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of Witnesses, p.17, Q 62

100 Cm 5091, p.29, para 4.1

101 Prior to December 2000, known as the Committee of Vice-Chancellors and Principals (CVCP).

102 Cited in the Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Memorandum submitted by Universities UK, p.25, para 3

intended for use in connection with a WMD or related missile programme. The Government also proposed that this control would not apply to information in the public domain and said it was considering specific provision in the secondary legislation to exempt academic activities.

While welcoming some of the reassurances given by the Government in Cm 5091, Universities UK continued to express concern in oral and written evidence to the Quadripartite Committee in April 2001 and called on the Government to do more to protect academic freedom. In particular, Universities UK suggested a series of additional elements for **Clause 2**, including the express exclusion of the following areas from control:

- All information in the public domain, whether it is in the public domain before transfer or whether it is transferred by being put in the public domain;
- All information exchanged in the ordinary course of academic teaching or research, with the exception of information which the provider of the information knows or is informed by Government is intended for use in connection with a weapons of mass destruction or related missile programme; and
- All transfers of information within the UK, except information which the provider of the information knows or is informed by Government is intended for use in connection with a weapons of mass destruction or related missile programme.[103]

The declared intention of Universities UK was to ensure that the protection of academic freedom "should be set out in the primary legislation" and not "be dependent on the restraint with which Ministers exercise statutory powers."[104]

The Bill contains no such provisions. Mr Byers indicated in evidence to the Quadripartite Committee that:

> We certainly do not want to [bring academic research to a halt in certain fields]. I am sure that we can have provisions either on the face of the Bill or as it goes through its parliamentary process to make sure that those concerns can be addressed.[105]

However, the Quadripartite Committee noted in its May 2001 report that there were legitimate concerns over the free transfer of academic expertise relating to Weapons of

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[103] The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Memorandum submitted by Universities UK, p.26, para 8

[104] Ibid. Minutes of Evidence – Memorandum submitted by Universities UK, p.26, para 10

[105] Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.45, Q 260

Mass Destruction, and that, consequently, there was "no case for complete exemption of academic activity from export controls."[106]

There has also been debate over the definition of 'publicly available information', particularly in relation to the internet. The need for a carefully drafted definition of what constituted information in the public domain (which would be exempt from controls) was acknowledged by the Secretary of State in evidence to the Quadripartite Committee.[107]

F. Controls on the Provision of Technical Assistance Overseas

In June 2000 EU Member States agreed a Council Joint Action on the control of technical assistance related to weapons of mass destruction:[108]

> This obliges Member States to bring forward legislation… imposing controls on "technical assistance" which it is known is intended for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of weapons of mass destruction or of missiles capable of their delivery. Technical assistance as defined in the Joint Action means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service and may take forms such as instruction, training, transmission of working knowledge or skills or consulting services and includes oral forms of assistance. As such it encompasses both the transfer of technology by any means including orally, and the provision of technical services.[109]

The proposals contained in **Clause 4** of the Bill are intended to provide the Government with the powers to implement the Joint Action in the UK. **Clause 4 (1)** would give the Secretary of State order-making powers to prohibit or regulate the participation in the provision of technical assistance outside the United Kingdom. **Clause 4 (2)** defines technical assistance as "services which are provided or used, or which are capable of being used, in connection with the development, production or use of controlled goods or controlled technology."[110] Therefore, the powers contained in the Bill could be used "only to control technical assistance provided in relation to goods or technologies that are themselves subject to export control."[111]

Clause 4 (5) would ensure that such controls could be imposed outside the UK where the "activity subject to control is conducted by a UK person or a person acting under the

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106 The Quadripartite Committee May 2001 report, HC 445 2000-01, para 75
107 Ibid. para 76
108 Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (2000/401/CSFP)
109 Cm 5091, para 45
110 *Export Control Bill*, Bill 5 2001-02, Clause 4 (2)
111 Cm 5091, para 41

control of a UK person."[112] An example of this would be the provision of technical assistance abroad by a foreign employee of a UK company.

The Joint Action requires Member States to impose controls on technical assistance only in relation to activities outside the EU, although the Government has indicated its intention to exercise the option of introducing these controls on activities that take place within the EU.[113] Furthermore, the Joint Action commits Member States to consider applying such controls on technical assistance to conventional military end-uses in any destination subject to an arms embargo imposed by the EU, OSCE or by a binding resolution of the UN Security Council.[114]

In some instances, UN, EU or OSCE embargoes already restrict the provision of technical assistance to embargoed destinations. Where this is the case, the Government already has powers to introduce controls on the provision of technical assistance. However, where the embargo contains no explicit restriction on technical assistance, the Bill would enable the Government to introduce controls unilaterally if it so desired.

There has also been some debate on the impact such unilateral controls would have on companies, particularly in terms of meeting contractual obligations that were entered into prior to the imposition of an embargo. The Quadripartite Committee noted in its May 2001 report:

> The introduction of controls means that a licence would be required for technical assistance, not that it would be refused. For example, the UK is reported to have continued to supply equipment to China for which there was a contract in force after the 1989 EU embargo. Technical assistance is no different.[115]

Nonetheless, Mr Byers acknowledged in evidence to the Committee that: "The introduction of an embargo may affect the contractual relationship",[116] and the Government sought views on this issue as part of the consultation process within Cm 5091.

The DMA has also expressed concern over the possible introduction of US-style Technical Assistance Agreements, which impose strict controls on the dissemination of information to foreign nationals, even if employed by the company concerned.[117]

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[112] *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-02, para 29
[113] Cm 5091, para 45
[114] Ibid. para 46
[115] The Quadripartite Committee May 2001 report, HC 445 2000-01, para 89
[116] Ibid. p.46, Q263
[117] Ibid. Minutes of Evidence – Examination of Witnesses, p.17-18, Qq 66-69

Impact of Technical Assistance Controls on Government

Under the existing licensing regime, government-to-government transfers can still take place outside the licensing regime and in theory outside the purposes set out in the Schedule. This raises the question of the extent to which the *Export Control Bill* will bind the Crown.

Equally, some observers have warned that **Clause 4** could restrict the United Kingdom's freedom to act in situations similar to that seen recently in Sierra Leone, where British forces have provided military assistance to the Sierra Leonean Government in the form of training of its armed forces.[118]

The draft Bill does not include any explicit provisions to bind the Crown. By contrast, **Clause 7 (2)** of the *Export Control Bill* would allow for some orders to bind the Crown, although only where required to ensure compliance with international legal obligations, such as European Community legislation.[119] This might allow the Government to provide future assistance similar to that given to Sierra Leone.

Nonetheless, Mr Byers noted in evidence to the Quadripartite Committee that:

> One would hope within the spirit of what the Government has legislated for that the Government itself would adopt those principles in relation to its own dealings.[120]

The Quadripartite Committee commented in its May 2001 report that: "The transparent reporting of Government transfers offers some reassurance that Governments will indeed abide by the principles governing non-governmental arms transfers", but recommended that "consideration be give to the desirability of ending the blanket exemption from controls of Government and its agencies as exporters of licensable goods and technology."[121]

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[118] See for example, *Financial Times*, 27 June 2001

[119] *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-02, para 41

[120] The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.41, Q 229

[121] Ibid. para 53

G. Power to Require Information

International obligations require that the United Kingdom provide information to a number of different international bodies and registers, such as the United Nations Conventional Arms Register and the Wassenaar Arrangement.[122] To ensure the UK can comply with its obligations, **Clause 6** would give the Secretary of State powers to make orders

> to require persons carrying on activities that fall within the scope of any of the powers conferred by the Bill (except that in section 3(2) [see Chapter IV D]) to keep records of their activities and to provide an authority specified in the order with information about their activities.[123]

In Cm 5091 the Government suggested that:

> Exporters will be required to supply the Government with information necessary to meet its international reporting obligations, rather than it being voluntary as at present. This would pose no new extra burden on exporters who currently comply with the Government's requests for information on a voluntary basis, so this will simply formalise an established practice.[124]

H. Penalties and Enforcement

Clause 7(1)(d) also includes a provision to increase the maximum penalty for export control offences from 7 years to 10 years imprisonment. This is to "ensure greater consistency across the spectrum of export control offences so that individual maxima reflect the seriousness of the particular offence."[125]

In Cm 5091 the Government stated that:

> The proposed Bill would not affect the existing maximum penalty of life imprisonment for offences related to weapons of mass destruction (under the Chemical Weapons Act 1996, the Nuclear Explosions (Prohibitions and Inspections) Act 1998 and the Biological Weapons Act 1974).[126]

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[122] The Wassenaar Arrangement is a voluntary and political agreement aimed at promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies.

[123] *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-02, para 38

[124] Cm 5091, para 1.2 (v)

[125] *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-02, para 40

[126] Cm 5091, Part 3, p.34, para 9

The Government has indicated that enforcement of the Bill's provisions would fall mainly to HM Customs and Excise, although there would also be some enforcement responsibilities for the police in respect of offences related to the transfer of technology by intangible means.[127]

I. Guidance

Clause 8 is a new clause, which states that the Secretary of State may issue guidance about matters to be taken into account in licensing decisions under any powers in the Bill. Subsection (3) states that a copy of any guidance issued under **Clause 8** shall be laid before Parliament and published in such a manner as the Secretary of State may think fit. Subsection (4) makes specific reference to the role in guidance of the EU and national arms export licensing criteria stating that:

> The consolidated criteria relating to export licensing decisions announced to Parliament by the Secretary State on 26th October 2000, and any other published guidance relating to export licensing which is capable of applying in relation to the exercise of functions under an order under section 1 or 2, shall (until withdrawn or varied under this section) be treated as guidance under this section.

This reference is intended to ensure that the licensing procedure takes account of the consolidated criteria and the purposes set out in the Bill. As the Quadripartite Committee commented:

> The imposition of export controls is in practice exercised not only through secondary legislation on the definition of goods and technology requiring a licence, but through the actual process of granting or refusing particular licences for particular destinations in particular circumstances. The draft Bill is silent on the licensing process. There are no statutory criteria for licensing decisions, nor any requirement that licensing decisions should follow any guidelines.[128]

The Committee recommended that:

> … consideration be given to putting on the face of the Bill the assurances given in the explanatory paragraphs accompanying the draft Bill and in evidence to us, that licensing decisions should have due regard to the general purposes for which controls can be imposed, as set out in the Schedule to the Bill.[129]

The purpose of **Clause 8** is therefore to ensure that the licensing process operates within the parameters established by the Government.

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[127] Cm 5091, Part 3, p.34, para 9
[128] *Export Control Bill Explanatory Notes*, Bill 5-EN, 2001-02, para 50
[129] The Quadripartite Committee May 2001 report, HC 445 2000-01, para 51

J. Trafficking and Brokering

One of the most controversial issues that the Bill attempts to address is the activities of arms brokers and traffickers. The Government defines trafficking as the "involvement in buying and/or selling goods" and brokering as "acting as an agent in putting a deal together between supplier and customer or making the practical arrangements for the supply of the goods".[130] Essentially an arms broker or trafficker can be summarised as a company or an individual that engages in any of the following activities:

- buying and selling of arms;
- mediation in, or facilitation of, arms transfers;
- promotion or marketing of arms; and/or
- transportation of arms.[131]

For the purposes of this paper, the term 'arms brokering' and 'arms broker' will be used to include all the above activities.

There is increasing evidence that significant amounts of arms, flowing into regions of conflict, are being transferred there by arms brokers. The 1939 Act allows the Government to control only physical exports from and imports to the UK. The Act does not allow the Government to impose controls on the involvement of persons in the UK or UK persons abroad in trafficking in goods between overseas countries or in brokering such deals.

Two important cases in the 1990s involving UK companies trafficking arms in contravention of UN embargoes raised public awareness of the issue of arms brokering and trafficking. In 1995 Mil-Tec, an Isle of Man based company, was involved in supplying arms to Rwandan rebels based in Zaire, and in 1997-98 the company Sandline was involved in the supply of military equipment from Bulgaria to Sierra Leone.

Current Restrictions

The Government can control trafficking and brokering under the *United Nations Act 1946* where this is necessary to implement a binding United Nations decision. Also, the Chemical Weapons Act 1996 (CWA) which implemented the Chemical Weapons Convention in the UK, outlawed involvement in the transfer of chemical weapons. The Government proposes to extend this ban to the transfer of nuclear and biological weapons (see Chapter IV H).

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[130] The 1998 White Paper, Cm 3989

[131] BASIC, *Weapons Trade – Arms Brokering*, from the Basic web site at http://www.basicint.org

1998 White Paper Proposals

The main proposals with regard to trafficking and brokering of controlled goods are set out in paragraph 3.3.2 of the 1998 White Paper and can be summarised as follows:

> Restrictions should be extended to include:
>
> a) Controlled goods to countries subject to other embargoes, such as non-binding UN decisions, EU, OSCE or national government embargoes.
> b) Controlled goods, trading in which is the subject of widespread national and international condemnation, such as torture equipment: and
> c) Missiles capable of a range of at least 300km.[132]

Responses to the Proposals

The Government sought written comments on the White Paper by the end of September 1998. The 54 responses from various sources such as industry, charities, and academia were made publicly available on 30 November 1998. Several of the groups that responded to the White Paper, while welcoming its aims, were keen to see a much broader control of trafficking and brokering. Amnesty International UK (AIUK) in their submission stated that:

> AIUK recommends that **All** proposed transactions of military, security, police and dual-use equipment - including brokering and trafficking - should be subjected to the licensed approval of the government. An important first step would be the establishment of a register of arms brokers.[133]

The British American Security Information Council (BASIC) said that the "Government's proposals fall well short of the necessary measures needed to address this [brokering] problem".[134] BASIC recommended that:

> a) Legislation should be enacted requiring all arms brokering agents and arms shipping agents domiciled in the UK to be registered.
> b) The UK and its partners should closely study the US regulations governing brokering as well as international regimes for curbing the drug trade.
> c) The UK Government should ensure that customs officials at transit ports and airports should be provided with sufficient resources and empowered to inspect physical cargoes and check such cargoes match validation documentation.

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[132] Trade and Industry Committee Second Report, *Strategic Export Controls*, HC 65 1998-99, 2 December 1998

[133] 'Amnesty International UK Section Response to the DTI White Paper on Strategic Export Controls', September 1998

[134] 'Response to the Department of Trade and Industry White Paper on Strategic Export Controls', BASIC, September 1998

d) All transactions conducted by registered arms brokers and shippers in the UK and partner countries should require prior licence authority from the Government.
e) All arms transfers, including those conducted by brokers, should be subject to the provision of a valid end-use certificate.
f) Information on illicit transfers should be pooled in a central agency with the assistance of Interpol.[135]

The Trade and Industry Select Committee produced a report on the Strategic Export Controls on 2 December 1998, which took into account many of these responses. The Committee welcomed the proposals on trafficking and brokering contained in the White Paper and made the following recommendations:

1. That any extension to the limited proposals on trafficking and brokering in the White Paper should only be considered 'once experience has been gained of enforceability'.

2. That Ministers should 'explore further within the EU and the Wassenaar Arrangement the benefits and potential pitfalls of some multilaterally agreed form of licensing or registration of arms dealers.'[136]

However, the Committee recognised the problem of effective enforcement of any extension to the limited controls proposed. They argued that most offences will take place abroad and will therefore be beyond the control of Customs and Excise regulations, and that in order to bring successful prosecutions some sort of international agreement on trafficking and brokering might be required.

In its report of 17 July 2000, the Quadripartite Committee reiterated its call for "a more stringent national policy and a clear statutory framework to control brokering and trafficking of arms".[137] It argued that such an approach would "command general consent and act as a spur to international action".[138]

1. Bill Proposals

The Bill essentially replicates the proposals made under the draft bill which outlined wider controls on the activities of traffickers and brokers than those proposed in the White Paper. Clause 5 of the Bill contains a "general power to introduce controls on activities related to international trade (trafficking and brokering) in equipment whose

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[135] 'Response to the Department of Trade and Industry White Paper on Strategic Export Controls', BASIC, September 1998
[136] Trade and Industry Committee Second Report, *Strategic Export Controls*, HC 65 1998-99, 2 December 1998
[137] Quadripartite Committee, *Strategic Export Controls: Further Report and Parliamentary Prior Scrutiny*, 17 July 2000, HC 467 1999-2000, para 64
[138] Ibid. para 64

export is controlled".[139] The goods and/or destinations subject to controls on trafficking and brokering would be set down in secondary legislation. According to the notes accompanying the draft bill:

> A licence would be required for any of the activities specified but would not in practice be granted for the supply of equipment whose export is already banned, and would not be granted for the supply of controlled goods to embargoed countries other than in exceptional circumstances, such as to allow controlled equipment to go to peacekeeping forces.[140]

2. Licensing System for Arms Trafficking and Brokering

As part of its review of the 1998 White Paper proposals the Government decided there was a case for using the new powers under Clause 5 to introduce a more general licensing regime regulating trafficking and brokering of arms in addition to the controls proposed in the White Paper. The Government's rationale for this wider power was to "help combat trafficking and brokering to regions of conflict, particularly during the period when problems may be emerging but before imposition of a full embargo is justified".[141]

This new approach was announced by Mr Byers at the Labour Party Conference on 28 September 2000:

> The arms industry in the United Kingdom employs many thousands of workers. It is an important part of our manufacturing base.
>
> But Conference, there is a dark and unacceptable side to the arms trade. That is the irresponsible and immoral trafficking and brokering of arms to conflict zones and areas of instability.
>
> In this country you need a licence to marry, to go fishing, to drive a car. You even need a licence to run a raffle. Yet you don't need a licence to broker and traffic in arms. This cannot be right. This has to change and I'm pleased to tell Conference that our government has decided to introduce a system of licensing for arms brokering and trafficking.[142]

The announcement was welcomed by charities campaigning against arms brokering. The Oxfam director, David Bryer, said:

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[139] Cm 5091, March 2001, para 50
[140] Cm 5091, March 2001, para 54
[141] Ibid. para 55
[142] Stephen Byers' Labour Party Conference Speech, 28 September 2000, from the Labour Party web site at http://www.labour.org.uk

> As soon as this commitment is put into action, it will make a real difference to countless people in developing countries whose lives are wrecked by bullets and guns sold by British arms brokers.[143]

The draft bill proposed that the new licensing system should apply at a minimum to the following equipment:

- All major weapons and weapon platforms,
- All light weapons and small arms,
- All ammunition used in the above,
- Key items of military equipment designed directly to enhance military capability (e.g simulators for use in training in the use of firearms and imaging equipment),
- All security and paramilitary equipment currently subject to export control requirements,
- Specially designed components of the above.[144]

The purpose of the licensing regime was stated as:

> to enable legitimate trade by defence companies to end-users and destinations that give no cause for concern to continue, whilst ensuring that supplies that would give rise to concerns under the consolidated EU and national export licensing criteria [see Appendix I] are not permitted.[145]

The draft bill proposed that details of those applying for licences, both for export and the activities listed above, would be placed on a register. This register would act as a database for licensing and enforcement purposes. It was indicated that this could also be made available on an international basis.

3. Extra-Territorial Controls

The response to the proposals on trafficking and brokering made in the draft bill were welcomed by the UKWG which stated that, "The proposals on arms brokering set out in conjunction with the draft Bill represent a significant improvement on those set out in the White Paper."[146] The UKWG did call, however, for the extension of controls to extend to the activities of British citizens or companies, where the activities are wholly on foreign soil. Dr Ian Davis of Saferworld put forward the case for extra-territorial controls during the UKWG's evidence session with the Quadripartite Committee on 25 April 2001:

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[143] *The Daily Telegraph*, 29 September 2000
[144] Cm 5091, March 2001, para 56
[145] Ibid. para 58
[146] The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Memorandum submitted by UKWG, p.1, para 3

> …if you do not take full extra-territorial measures, we feel that the danger is that British citizens will just simply evade the controls by simply stepping into another country…So the brokering legislation, as we see it, is severely compromised by the fact that we do not have this currently laid out fully for the extra-territorial question.[147]

He attempted to address the practicalities of policing this approach:

> There are several aspects to the question of policing. Firstly, by criminalising this process, you are putting this forward as a deterrent to deter individuals from doing it.
>
> …
>
> Secondly we need to see trafficking of arms in the context of wider issues to do with trafficking of other goods, the trafficking of humans and of drugs and the increasing co-operation that is taking place against organised crime through groups like Interpol and the increasing use of joint intelligence operations. I think it can be enforced at the international level through greater cooperation in policing.[148]

There do not appear to be any additional measures to address the issue of extra-territoriality under the present Bill.

4. Shipping

The UKWG also raised the question of how the activities of shipping agents in the supply of arms could be controlled. They pointed to occasions in recent years where UK companies have been implicated in the shipment of arms into regions of conflict. In their submission to the Quadripartite Committee on 25 April 2001 the UKWG stated:

> The UKWG is of the opinion that arms brokers should be required to disclose information on the companies they will be using to transfer arms, including relevant sub-contractors, and to disclose details of the travel routes and special flight plans for all shipments. Where arms transfers are organised or brokered by non-UK actors, but the shipment of those arms is carried out by UK individuals or companies, the shipping agents should be required to apply for a licence which should be considered on the same basis as are licences for direct arms sales or brokered transfers. In addition, any UK company wishing to ferry arms between destinations overseas should be registered with HMG as a carrier of arms.[149]

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147 Ibid. Minutes of Evidence – Memorandum submitted by UKWG, p.7, Q 12

148 The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Memorandum submitted by UKWG, p.7, Q 12

149 Ibid. Minutes of Evidence – Memorandum submitted by UKWG, p.3, para 8

The UKWG called for controls on shipping agents to be included in the secondary legislation:

> Clause 5 of the draft Bill allows for the regulation of shipping agents in secondary legislation. The UKWG urges HMG to include provision for the control of UK passport-holders and companies involved in transporting arms in the secondary legislation which is to be formulated to regulate the activities of arms brokers.[150]

Stephen Byers gave some indication of his approach to this issue when speaking to the Committee on 25 April 2001:

> I think there are two possible situations here. One is when shipping is part of the overall contract in which case, yes it can be considered as part of the requirement for registration and licensing. If, however, there is a sort of freestanding shipping company that is not party to the contract itself but is the one who then has the responsibility for delivering the goods…. I am not convinced yet that we should be identifying the logistical aspect if it is a freestanding element.[151]

5. Definition of brokering

The DMA have emphasised the need for clearer definitions of what is meant by the term 'broker', expressing concern at how new controls could impinge on the activities of legitimate arms agents employed by most major defence companies. Major General Alan Sharman told the Quadripartite Committee on 25 April that:

> It is also very common practice – in fact, essential in some countries – to employ agents. If the definition is not carefully defined then agents could then be brokers, and the consequence of this could be enormous.[152]

Alan Sharman called for a further consultation period for the secondary legislation relating to trafficking and brokering.

Stephen Byers reassured the Committee that the issue of clear definitions was going to be addressed in the secondary legislation:

> It is not going to be easy. I think most of us know what we mean by someone who brokers a deal in that we know it when we see it. The question is how, in secondary legislation, we can put that down in a way which is going to be legally watertight.[153]

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[150] The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Memorandum submitted by UKWG, p.3, para 8

[151] Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.45, Q 253

[152] Ibid. Minutes of Evidence – Examination of Witnesses, p.19, Q 80

[153] Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p. 43, Q 245

He added:

> My understanding is that we are going to be pretty much ahead of the game if we set up a system in the way in which we intend to do it, so we are breaking new ground a bit in terms of how we define who a broker is in this particular context. We are on our own a bit because we are moving ahead of everybody else.[154]

K. Export Controls on Cultural Objects

The *Export Control Bill* is unlikely to result in major changes to the current regime covering cultural objects.[155] As the consultation document on the draft Bill comments:

> In practice, it is not intended to change significantly the export control regime for cultural goods currently established under the Import, Export and Customs Powers (Defence) Act 1939. The purposes [of export controls] in the draft Bill have been included to aid transparency and are intended to cover all of the reasons that are necessary for the Government to exercise controls on the export of cultural objects. As clause 3(5) shows, however, a power is provided to make orders of limited duration which will not be subject to the purposes. Such orders will primarily deal with emergency situations and are unlikely to be exercised in relation to cultural objects.[156]

The DCMS received few responses in respect of cultural objects, and these were broadly supportive.[157]

In exercising her functions in respect of export controls on objects of cultural interest, the Secretary of State for Culture, Media and Sport is assisted by the Reviewing Committee on the Export of Works of Art. This Committee "considers applications for export licences on cultural items where the relevant expert adviser objects to the proposed export on the grounds of national importance. It also makes recommendations to the Secretary of State about policy and procedures in relation to the export control of cultural items."[158]

A concordat between the DCMS and the Scottish Executive made clear that the former would continue to hold responsibility for issuing and authorising export licences for all cultural objects located within the UK. Scottish organisations continue to influence the

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[154] The Quadripartite Committee May 2001 report, HC 445 2000-01, Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p. 43, Q 249

[155] The section on Export Controls on Cultural Objects was provided by Grahame Danby of the Home Affairs Section.

[156] Cm5091, March 2001

[157] Source: DCMS spokeswoman 2 July 2001

[158] http://www.culture.gov.uk/role/ndpb/ndpb_heritage1.html

Reviewing Committee by virtue of their membership of the Advisory Council on the Export of Works of Art.[159]

Expert advisers on the Council refer objects to the Committee, which considered 29 cases in 1999-2000; 13 of these were recommended for deferral[160] by the Committee, of which 10 (valued at some £4,551,381) were not exported. Further details, including information on individual works, are given in the Reviewing Committee's annual report.[161]

Last year, the House of Commons Culture, Media and Sport Committee published a report, *Cultural Property: Return and Illicit Trade*.[162] It provides the following summary of United Kingdom export controls:

> 97. Along with most other countries in the world, the United Kingdom operates a special export régime for cultural property. We have not examined the operation of this régime in detail, but have considered its effectiveness with regard to combatting the illicit trade. The United Kingdom operates two export licensing systems in tandem, one aiming to give special protection to items of outstanding importance and the other seeking to give effect to general European Community controls for exports to third countries.
>
> 98. The general export system for the United Kingdom was established following the Report of the Waverley Committee in 1952 and is based on the principle that undue hindrance should not be placed on the trade in cultural material, but that an opportunity ought to be provided to prevent the sale abroad of items of particular cultural or historical importance. The system was specifically intended not to erect barriers to the export of objects recently imported into the United Kingdom so as not to jeopardise the British art market. As such, the system was unsurprisingly not designed with contemporary concerns about the illicit trade in cultural property in mind.
>
> 99. With the introduction of the European single market, new arrangements were introduced which effectively require all Member States to operate certain common controls on exports of cultural property to third countries. In consequence, some objects require an export licence to ensure they are vetted in relation to the Waverley controls and some objects require a licence under the terms of the EC licensing régime as implemented in United Kingdom law. Licences are issued by the Export Licensing Unit of the Department for Culture, Media and Sport. No licence will be issued for an object which has been illegally exported from another Member State on or after 1 January 1993 and proof of legal export is required in the case of objects which entered into this country after

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[159] http://www.scotland.gov.uk/concordats/dcms-00.asp (House of Commons Library deposited paper 99/1890, 1999)

[160] A temporary bar on export

[161] *Export of Works of Art 1999-2000* Cm 5019, December 2000

[162] Culture, Media and Sport Committee, *Cultural Property: Return and Illicit Trade*, 18 July 2000, HC 371-I 1999-2000

> that date. Where there is reason to believe that an object for which a licence is sought has been stolen, this is reported to New Scotland Yard. There is therefore potential for this dual export licensing régime to detect objects which have been illicitly traded.
>
> 100. Some evidence questioned whether the export licensing régime was particularly effective in this regard in practice. Dr Brodie considered that there was "evidence of widespread misunderstanding or evasion of its requirements". There are a number of recorded instances where British antiquities have appeared on the international market without a necessary export licence having been obtained. Between 1996-97 and 1998-99 HM Customs and Excise made seizures of 200 separate consignments of cultural goods worth a total of £79 million lacking the appropriate export licence. There have been no recent cases of prosecution for deliberate evasion of the controls. Although some cultural goods require an export licence for export to another EU State, there are no systematic Customs controls affecting such exports.
>
> 101. Both Lord Renfrew and Dr Neil Brodie argued that changes could be made to the export licensing system to reduce the possibility of the United Kingdom being a centre for the "laundering" of illicit antiquities. It was suggested that further information about provenance could be sought before export licences were issued. These suggestions are, of course, linked to the wider case for greater provenance requirements for objects to be sold on the legitimate antiquities market.
>
> 102. We are not persuaded that the case for change to United Kingdom export controls on cultural property has been established. We are not certain it would be appropriate to impose further information requirements on exports which do not apply to domestic trade in objects such as non-United Kingdom antiquities. We are also not convinced that it would be appropriate for the United Kingdom to express sympathy for the development of more liberal export régimes in other countries, as Mr Howarth did in oral evidence, while also seeking to make United Kingdom export controls more restrictive. **We do not wish to recommend any changes to the United Kingdom's current controls on the export of cultural property.**

As the previously mentioned consultation document notes, the export control regime is unlikely to be affected substantially by the Bill. Much of the practical detail appears in secondary legislation, specifically the *Export of Goods (Control) Order* SI 1992/3092. Among the group of prohibited goods, for which some kind of export licence is required,[163] are antiques, these being defined in Schedule 1 as:

> Any goods manufactured or produced more than 50 years before the date of exportation except:

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[163] These can include Open General Export Licences and Open Individual Export Licences which limit the need to obtain individual licences for all but the most significant objects

> (1) postage stamps and other articles of philatelic interest;
>
> (2) birth, marriage or death certificates or other documents relating to the personal affairs of the exporter or the spouse of the exporter;
> (3) letters or other writings written by or to the exporter or the spouse of the exporter; and
>
> (4) any goods exported by, and being the personal property of, the manufacturer or producer thereof, or the spouse, widow or widower of that person.

Amending export control orders are often made, to add other categories. There is evidence that cultural property is sometimes used as a "currency" in illegal arms deals.[164]

Paragraph 5 of the Schedule to the *Export Control Bill* states:

> (1) An order may be made for the purpose of prohibiting or regulating the exportation of objects of cultural interest.
>
> (2) In this paragraph "objects of cultural interest" includes objects of historical or scientific interest.

As the draft bill consultation document notes, this explicitly allows the Secretary of State to make export control orders to control the export of "goods of significance to the culture of the UK and Europe."[165] Now that the Government has decided to accede (with reservations) to the *1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of cultural property*,[166] orders could also be made under **Clause 1** to give effect to this particular international commitment. The Culture, Media and Sport Select Committee summarised the provisions of the Convention thus:

> 71. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was the first worldwide treaty on illicit traffic in cultural property. The Convention is based on the principle that the unauthorised import, export and transfer of cultural property should be "illicit". It prescribes measures State Parties should take to protect their own cultural heritage and to prevent the wrongful import or acquisition of designated cultural property stolen in or illegally exported from other State Parties. It includes provision for return of certain stolen or illegally exported cultural property requested by another State Party. It is not retrospective in effect. In April 2000, there were 91 State Parties to the Convention.

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[164] Culture, Media and Sport Committee, *Cultural Property: Return and Illicit Trade*, 18 July 2000, HC 371-I 1999-2000, para 14

[165] Cm5091, March 2001

[166] HC Deb 13 March 2001, c 568W; HL Deb 20 Mar 2001, cc 1279-80. The full text of the convention is at http://www.tufts.edu/departments/fletcher/multi/texts/BH572.txt

> 72. The United Kingdom is not one of these. The last Government opposed accession, considering its provisions "unrealistic and totally disproportionate to the end ... which it is designed to achieve"…

These concerns were probably based on the contention that the UK would apply the letter of the Convention scrupulously, whereas the Director of the International Standards Unit of UNESCO has reportedly noted that it is left to individual States to determine what cultural goods are covered.[167]

Additional commentary on the UNESCO Convention, and arguments in favour of its ratification, appear in a report commissioned by the International Council of Museums (UK) and the Museums Association, *Stealing History: the illicit trade in cultural material*.[168] This report also describes the interaction of UK and EU export controls on cultural goods. The latter are primarily embodied by EC Regulation 3911/92 (as amended)[169] which governs the issue, by the DCMS, of an EC export licence for certain objects (age and value are determining features) originating in other EU States. An aim of the Regulation is to prevent external States playing on differences between export regimes within the EU. Orders made pursuant to **Clause 1** of the Bill will have to defer to the EU Regulation.

L. Financial Effects of the Bill

The Government does not expect the new controls proposed by the Bill relating to the transfer of technology (clause 2), provision of technical assistance overseas (clause 4) and international trade in controlled goods (clause 5) to have any significant public expenditure implications. It does expect additional costs to be incurred by the DTI as the licensing authority, and by other Government Departments who are consulted about licence applications (mainly the MOD and FCO). There will also be additional enforcement costs incurred by HM Customs and Excise. There are not expected to be any additional costs for the DCMS and no significant costs to DFID.

The Government does not "envisage that the overall impact on public expenditure as a whole would exceed an increase of £800,000 in the first year and £570,000 per annum thereafter".[170] A breakdown of the costs by department is provided on pages 32 and 33 of Cm 5091.

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[167] Culture, Media and Sport Committee, *Cultural Property: Return and Illicit Trade*, 18 July 2000, HC 371-I 1999-2000, para 77

[168] Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: the illicit trade in cultural material*, 2000

[169] Council Regulation (EC) 974/2001 amending REG(EEC)3911/92 on the export of cultural goods. Adopted 14 May 2001

[170] *Export Control Bill Explanatory Notes*, Bill 5-EN, para 54

V Other Issues

A. Small Arms and Light Weapons (SALW)

The proliferation of small arms (designed for use by individuals) and light weapons (designed for carrying and use by a team or crew), and their destabilising effect on regions of conflict, has caused concern in the international community. This proliferation has increased significantly since the end of the Cold War, with lower defence budgets and the downsizing of armies resulting in the offloading of stockpiles of these weapons, and the prevalence of conflicts involving non-state actors resulting in new sources of demand. It is estimated that the number of SALW currently in existence range from 500 million to one billion, and that one half of the world trade in small arms is represented by illicit trafficking.

Recent decades have seen the introduction of a number of agreed global norms and standards against weapons of mass destruction. However, prior to 1995 there had been few moves to reduce what the UN called "the excessive and destabilising accumulation of small arms and light weapons, [which] are responsible for large numbers of deaths and the displacement of citizens around the world".[171]

1. UN Initiatives

In December 1995 the UN General Assembly requested that the Secretary General prepare a report on the proliferation of small arms and light weapons. A UN Panel of Governmental Experts on Small Arms was set up to compile the report, which was published in August 1997. A definition of SALW was produced by the Panel, categorising the types of weapon as follows:

> **Small arms**: revolvers and self-loading pistols; rifles and carbines; submachine-guns; assault rifles; light machine-guns.
>
> **Light weapons**: heavy machine-guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; mortars of calibres of less than 100mm.
>
> **Ammunition and explosives**: cartridges (rounds) for small arms; shells and missiles for light weapons; mobile containers with missiles or shells for single action anti-aircraft and anti-tank systems; anti-personnel and anti-tank hand grenades; landmines; explosives.[172]

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[171] *General and Complete Disarmament: Small Arms* A/52/298, 27 August 1997

[172] *Small Arms and Light Weapons (SALW): A Global Problem*, FCO Focus International, December 2000

Among its findings the Panel's report included the following recommendations:

- to strengthen international and regional co-operation in combating the illicit trade of small arms,
- to encourage the adoption and implementation of regional and sub-regional moratoria on the transfer and manufacture of small arms,
- to consider convening an international conference on the illicit arms trade and
- to promote post-conflict initiatives aimed at the disposal and destruction of weapons.[173]

The Government supported the report's findings and stated in a Written Answer on 28 November 1997 that the Government "endorse[d] the panel's recommendations and urge[d] other States to do likewise".[174]

The UN General Assembly decided in December 1999 to mandate a Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. This conference is scheduled to take place in New York in July 2001 and will aim to:

- strengthen or develop norms at the global, regional and national levels that would reinforce and further co-ordinate efforts to prevent and combat the illicit trade in SALW in all its aspects.

- develop agreed international measures to prevent and combat illicit trafficking in, and manufacturing of, SALW and to reduce excessive and destabilising accumulations and transfers of such weapons throughout the world, with particular emphasis on the regions of the world where conflicts come to an end and where serious problems with the proliferation of SALW have to be dealt with urgently;

- mobilise the political will throughout the international community to prevent and combat illicit transfers in, and manufacturing of, SALW in all their aspects, and raise awareness of the character and seriousness of the inter-related problems associated with illicit trafficking in, and manufacture of, SALW and the excessive and destabilising accumulation and spread of these weapons;

- promote responsibility by States with regard to the export; import; transit and retransfer of SALW.[175]

Details of British Government preparations for the conference were provided in a Lords Written Answer on 29 January 2001:

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[173] *Report of the panel of governmental experts on small arms*, United Nations 1997, pp.21-23
[174] HC Deb 28 November 1997, c680-1w
[175] *Small Arms and Light Weapons (SALW): A Global Problem*, FCO Focus International, December 2000

> Her Majesty's Government are actively engaged in preparations for the July 2001 UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. We attach great importance to a successful outcome to the conference, which we view as a milestone in international attempts to combat the proliferation of small arms. It should provide an ideal opportunity for nations and regional groups to unite in giving political impetus, under the UN, to their efforts in this area. Our aim is to agree political commitment to global norms, standards and a forward-looking conference action plan aimed at reducing the levels of illicit trade in-and destabilising accumulations of--small arms.
>
> In pursuit of a successful outcome, the UK will hold a policy brainstorming seminar for around 30 countries at Lancaster House, London, on 13-14 February. This will look at possible conference outcomes and where participants assess the small arms debate ought to have progressed to in, say, five years. The Foreign Secretary plans to open the seminar.
>
> Further in line with our commitment to the success of the conference, we are working in partnership with governments, business and the NGO community, including BASIC, Saferworld and International Alert through support for their Biting the Bullet project. This aims to facilitate debate, provide research, briefings and seminars and work closely with IANSA, the International Action Network on Small Arms.[176]

2. EU Initiatives

In June 1997, the EU Member States adopted a "Programme for Preventing and Combating Illicit Trafficking in Conventional Arms". The Programme stated that:

> EU Member States will strengthen their collective efforts to prevent and combat illicit trafficking of arms, particularly of small arms, on and through their territories. In particular, they will vigilantly discharge their national responsibility to ensure the effective implementation of obligations resulting from Conventions and Joint Actions adopted in this field.

The programme was developed under the UK Presidency of the EU in January-June 1998. During its Presidency the UK also helped develop the EU Code of Conduct on Arms Transfers (see Chapter II B above).

In December 1998, the EU *Joint Action on SALW* committed the EU to promoting international consensus on a number of basic policy principles and measures for tackling SALW proliferation. Its key objectives include:

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[176] HL Deb 29 January 2001, WA34

- to combat and contribute to ending the destabilising accumulation and spread of SALW;
- to contribute to the reduction of existing accumulations of these weapons to levels consistent with countries' legitimate security needs;
- to help solve the problems caused by such accumulations.

3. UK Initiatives

The UK has played a long and active role in the small arms debate. In an adjournment debate on 14 December 2000, Foreign Office Minister Peter Hain stated:

> We have made our commitment to tackling small arms proliferation clear. We are playing a major role in the process leading to the United Nations conference on small arms next year. We are also in the lead in taking practical steps to reduce the number of small arms in areas of conflict.[177]

UK policy has three main strands:

- to prevent the illicit trafficking of SALW;
- to pursue a responsible and transparent policy on legal transfers of SALW, encouraging other countries to follow suit; and
- to promote the removal of surplus SALW from affected societies, and, where possible their destruction.[178]

The UK has been particularly active in attempting to tackle the problem of small arms proliferation and illicit trafficking in Africa. Such proliferation is a particular problem in conflict situations in Central Africa, affecting Burundi, Rwanda, Uganda, the Democratic Republic of Congo, Angola and the Republic of Congo. Instability in this region has implications for neighbouring states in West Africa, the Horn and Southern Africa.

During its EU Presidency the UK sponsored a programme for officials from South Africa and EU countries to identify ways of dealing with these problems in Southern Africa. On 22 November 2000, the Secretary of State for International Development, Clare Short, summarised the Government's action in attempting to halt the spread of small arms in Africa:

> We have supported the implementation of the Moratorium on the Import, Export and Manufacture of Light Weapons in West Africa through funding concrete programmes in conjunction with the UN. We have provided direct support for the Southern Africa Development Corporation (SADC) Action Plan against the proliferation of small arms in that region and helped to fund some of their projects. We have also actively supported the Nairobi declaration on the problem

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[177] HC Deb 14 December 2000, c33WH

[178] *Small Arms and Light Weapons (SALW): A Global Problem*, FCO Focus International, December 2000

> of the Proliferation of illicit Small Arms and Light Weapons in the Great Lakes Region and in the Horn of Africa and we are assisting in the development and implementation of an Action Plan in support of this Declaration. We plan further efforts to stem the proliferation and misuse of small arms and light weapons.[179]

On 15 April 1999, Tony Lloyd, in reply to a Written Question, provided further details of the Government's policy on small arms, specifically with regard to the area covered by the Economic Community of West African States (ECOWAS):

> **Mr. Cohen:** To ask the Secretary of State for Foreign and Commonwealth Affairs what support his Department is giving to the moratorium on the import, export and manufacture of light weapons adopted by the Economic Community of West African States in October 1998.
>
> **Mr. Tony Lloyd:** The Government fully support the ECOWAS moratorium on light weapons. The moratorium applies to the import, export and manufacture of pistols, rifles, submachine guns, carbines, machine guns, anti-tank missiles, mortars and howitzers up to a calibre of 85mm and ammunition and spare parts for the above. A Code of Conduct was agreed by ECOWAS Member States on 24 March 1999 regarding the implementation of the moratorium. If an ECOWAS Member State believes it has a valid reason for an exemption to the moratorium, the Code states that the ECOWAS Executive Secretariat should be involved in the consultation process. Similarly for proposed imports of weapons for peacekeeping operations, the Code states that the ECOWAS Secretariat should be notified. The Government will take the provisions of the moratorium and the ECOWAS Code of Conduct fully into account when assessing relevant export licence applications. The summary of Government Commitments on the application of Strategic Export Controls has been updated to reflect the moratorium and copies have been placed in the Library of the House. The UK will brief participating states to the Wassenaar Arrangement on the moratorium, and our policy towards it, at the next Wassenaar Arrangement General Working Group meeting. The UK is also financially supporting the moratorium. The Department for International Development has pledged $500,000 over three years to assist the UNDP in the implementation of the moratorium. We are also considering how the UK might help ECOWAS administer the moratorium.[180]

A summary on the Government's policy on small arms was provided by Mr Hain in October 1999:

> **Mr. Bercow**: To ask the Secretary of State for Foreign and Commonwealth Affairs if he will make a statement on policy towards the controlled export of small arms.

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[179] HC Deb 22 November 2000, c186-187w
[180] HC Deb 15 April 1999, c341-2w

> **Mr. Hain**: Pursuing a responsible and transparent policy on legal transfers of small arms from the UK, and encouraging other arms exporting countries to do likewise, is one of the main elements of our approach to combatting the problem of small arms proliferation. All licence applications to export goods and technology on the UK Military List, including small arms, are assessed on a case-by-case basis against our national export licensing criteria and those in the EU Code of Conduct on Arms Exports. If there is a clear risk that the proposed export might be used for internal repression or international aggression, or would provoke, prolong or aggravate existing tensions or conflicts in the destination country, the application is refused. We also carefully consider the risk of the goods being diverted to an undesirable end-user and the effect of the proposed export on regional stability. We have encouraged non EU-member states to respect the principles of the EU Code of Conduct in their exports of military equipment, including small arms. We have also supported moves to address the issue of legal exports of small arms in the Wassenaar Arrangement for Export Controls on Conventional Arms and Dual-Use Goods.
>
> The EU Joint Action on Small Arms of December 1998 commits the UK and other member states to work for international acceptance of the principle that small arms specially designed for military use should be exported only to governments.[181]

B. Licensed Production Overseas

Licensed production overseas refers to the manufacture of goods which if produced in the UK would require licensing. An example of this is the licensed production of Land Rover based vehicles in Turkey. The problem presented by such arrangements is the possibility that UK companies wishing to export to destinations which the UK would not permit may seek to establish a licensed manufacturing operation abroad under a different and potentially more permissive regime.

The draft bill reiterates the point that key items required to establish licensed production overseas are already subject to export control requirements and summarises them as follows:

> An export licence is required under current legislation for the export of the technology required for the development, production or use of military equipment and other equipment which is itself subject to export controls…although at present a licence is needed for military technology only when this is exported in tangible form, in future a licence will also be required for exports of such technology by electronic means. An export licence is also needed for the export of production equipment and components specially designed for the production of military goods and for goods on the export control lists.[182]

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[181] HC Deb 21 October 1999, c631-2w

[182] Cm 5091, para 72

However, the notes to the draft bill also express concern that "exports of military equipment produced overseas under licence from a UK company should not be used to undermine international embargoes to which the United Kingdom is a party".[183] The Quadripartite Committee report of 1 May 2001 summarises the proposals under the draft bill as follows:

> - to make more explicit the need to declare when applying for a licence if the goods are for use in production overseas, and if so to describe the goods to be produced;
>
> - to take the lead in consulting with EU partners on inserting an explicit reference in the EU Code to common standards on consideration of applications for the export of production equipment or technology;
>
> - to consider *either* taking legal powers to impose on UK companies a contract clause prohibiting export of products produced under licence from being exported to international or possibly national embargoes *or* requiring an end-user undertaking to that effect before the granting of a licence.[184]

The UKWG have proposed a restrictive system controlling licensed production which would give UK authorities powers to set the volumes of production and would require UK permission for any re-export. Such an approach reflects current US practice. On the other side of the argument the DMA have expressed concern at the impact of the competitiveness of the UK defence industry of UK exporters imposing restrictions on customers which most of its competitors would not.

The Quadripartite Committee commented that:

> 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.[185]

It recommended 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 if a non-statutory regime is shown to have failed.[186]

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[183] Cm 5091, para 77
[184] The Quadripartite Committee May 2001 report, HC 445 2000-01, para 102
[185] Ibid. para 106
[186] Ibid. para 106

C. End-use

There has been considerable debate in recent years surrounding the monitoring of the end-use of defence exports to ensure that equipment is not diverted to third countries or used for other purposes than those originally envisaged at the time of licensing.

The current process involves risk assessment of the proposed destination at the export licensing stage, and detailed enquiries and monitoring, often through UK diplomatic posts overseas. There has been some pressure, particularly from UKWG, for a more systematic approach, both in terms of a standardised end-user documentation system and a comprehensive system of end-use monitoring in the country of destination. The Quadripartite Committee argued in its May 2001 report that a standardised end-user documentation system should be incorporated "in the proposed statutory basis for current administrative procedures."[187] With regard to end-use monitoring, the Committee expressed doubts as to whether there was any need for legislation, although it declared that

> There is a good case for some public assurances that post-export end-use monitoring is carried out thoroughly and systematically, and for an explicit commitment to recognise the importance of that task when, for example, assessing the staffing requirements of overseas posts, including defence staff.[188]

In evidence to the Committee, the Secretary of State for Trade and Industry, Stephen Byers, said:

> I think there are a number of ways in which we can improve our operation in this area. I am very keen that, for example, we use our posts and our embassies and so on in countries to look very closely that end user conditions are being satisfied and are being met. It may be something that we have not done as well in the past as perhaps we should have done. It may not have been seen as as much of a priority as I think it should be. There are particular parts of the world where we do require very strict end user requirements to be signed up to because of our concerns and I think in those areas in particular we do need to monitor very effectively that those end user requirements are being met.[189]

Mr Byers also assured the Committee that he had sufficient legal powers to revoke a licence where there has been a breach of end-use conditions.[190]

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[187] The Quadripartite Committee May 2001 report, HC 445 2000-01, para 111
[188] Ibid. para 111
[189] Ibid. Minutes of Evidence – Examination of the Secretary of State for Trade and Industry, p.42, Q 240
[190] Ibid. para 112

Appendix I: Consolidated Criteria

Criterion One
Respect for the UK's international commitments, in particular sanctions decreed by the UN Security Council and those decreed by the European Community, agreements on non-proliferation and other subjects, as well as other international obligations.

The Government will not issue an export licence if approval would be inconsistent with, inter alia:

(a) the UK's international obligations and its commitments to enforce UN, OSCE and EU arms embargoes, as well as national embargoes observed by the UK and other commitments regarding the application of strategic export controls;

(b) the UK's international obligations under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;

(c) the UK's commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;

(d) the Guidelines for Conventional Arms Transfers agreed by the Permanent Five members of the UN Security Council, the OSCE Principles Governing Conventional Arms Transfers and the EU Code of Conduct on Arms Exports;

(e) the UK's obligations under the Ottawa Convention and the 1998 Land Mines Act;

(f) the UN Convention on Certain Conventional Weapons.

Criterion Two
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.

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, as long as force is used in accordance with the international human rights standards described.

Criterion Three
The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

The Government will not issue licences for exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

Criterion Four
Preservation of regional peace, security and stability.

The Government will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim. However a purely theoretical possibility that the items concerned might be used in the future against another state will not of itself lead to a licence being refused.

When considering these risks, the Government will take into account inter alia:

(a) the existence or likelihood of armed conflict between the recipient and another country;

(b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;

(c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;

(d) the need not to affect adversely regional stability in any significant way, taking into account the balance of forces between the states of the region concerned, their relative expenditure on defence, the potential for the equipment significantly to enhance the effectiveness of existing capabilities or to improve force projection, and the need not to introduce into the region new capabilities which would be likely to lead to increased tension.

Criterion Five
The national security of the UK, of territories whose external relations are the UK's responsibility, and of allies, EU member states and other friendly countries.

The Government will take into account:
(a) the potential effect of the proposed export on the UK's defence and security interests or on those of other territories and countries as described above, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;

(b) the risk of the goods concerned being used against UK forces or on those of other territories and countries as described above;

(c) the risk of reverse engineering or unintended technology transfer;

(d) the need to protect UK military classified information and capabilities.

Criterion Six
The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law.

The Government will take into account inter alia the record of the buyer country with regard to:

(a) its support or encouragement of terrorism and international organised crime;

(b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non- international conflicts;

(c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para (b) of Criterion One.

Criterion Seven
The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

(a) the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;

(b) the technical capability of the recipient country to use the equipment;

(c) the capability of the recipient country to exert effective export controls.

The Government will pay particular attention to the need to avoid diversion of UK exports to terrorist organisations. Proposed exports of anti-terrorist equipment will be given particularly careful consideration in this context.

Criterion Eight
The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

The Government will take into account, in the light of information from relevant sources such as United Nations Development Programme, World bank, IMF and Organisation for Economic Co-operation and Development reports, whether the proposed export would seriously undermine the economy or seriously hamper the sustainable development of the recipient country.

The Government will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid, and its public finances, balance of payments, external debt, economic and social development and any IMF- or World bank-sponsored economic reform programme.

Other Factors
Operative Provision 10 of the EU Code of Conduct specifies that member states may where appropriate also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the criteria in the Code.

The Government will thus continue when considering export licence applications to give full weight to the UK's national interest, including:

(a) the potential effect on the UK's economic, financial and commercial interests, including our long-term interests in having stable, democratic trading partners;

(b) the potential effect on the UK's relations with the recipient country;

(c) the potential effect on any collaborative defence production or procurement project with allies or EU partners;

(d) the protection of the UK's essential strategic industrial base.

In the application of the criteria, account will be taken of reliable evidence, including, for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations.

Appendix II: Export Control Licensing Terms

According to the *Strategic Export Controls Annual Report 1999* there are four main types of licence:[191]

- Standard Individual Export Licences (SIELs)
- Open Individual Export Licences (OIELs)
- Special categories of OIELs
- Open General Export Licences (OGELs)

1/ SIELs

SIELs generally allow shipments of specified goods to a specified consignee up to the quantity specified by the licence. Such licences are generally valid for two years where the export will be permanent; where the export is temporary, for example for the purposes of demonstration, trial or evaluation, the licence is generally valid for one year only and the goods must be returned before the licence expires.

A licence is not required for the majority of transhipments, providing certain conditions are met, through the United Kingdom en route from one country to another. Most other transhipments can be made under one of the Open General Transhipments Licenses in force, provided in all cases that the relevant conditions are met; where this is not the case, an individual transhipment licence is required.

2/ OIELs

OIELs cover multiple shipments of specified goods to specified destinations or specified consignees. Exporters holding OIELs are not asked to provide details of the value of goods they propose to ship under an OIEL and it is therefore not possible to provide information on the total value of applications for OIELs issued.

3/ Special categories of OIELs

There are two special categories of OIELs:

a) *Media OIELs*

Media OIELs authorise the export of protective clothing and equipment, mainly for the protection of aid agency workers and journalists, for example when working in areas of conflict. They are valid for two years, and cover the export to all destinations of items such as military helmets, body armour, bullet-proof or bullet-resistant clothing, flak suits

[191] *Strategic Export Controls* Annual Report March 1999

and specially designed components for any of these goods. Goods exported under a Media OIEL must be returned to the UK when they are no longer required for personal protection.

b) *Continental Shelf OIELs*

Continental Shelf OIELs authorise the export of controlled goods to the UK sector of the Continental Shelf for the use only on, or in connection with, offshore installation and associated vessels.

4/ OGELs

OGELs allow the export of specified controlled goods by any company, removing the need for exporters to apply for an individual licence, provided the shipment and destinations are eligible and the conditions are met. Exporters must register with the Export Control Organisation before they make use of most OGELs.