

PART 1

INTRODUCTION BY THE DEPARTMENT OF TRADE AND INDUSTRY TO THE DRAFT EXPORT CONTROL AND NON-PROLIFERATION BILL: STRATEGIC EXPORT CONTROLS

I INTRODUCTION

1. The Government's intention to publish a draft Bill to improve the transparency of export controls and to establish their purposes was announced by Her Majesty the Queen at the opening of this Parliamentary session. This Command Paper explains the background to, and invites comments on, the Government's proposals for an Export Control and Non-Proliferation Bill, and for new associated secondary legislation. The legislation being consulted on will apply to the whole of the United Kingdom. This Introduction to the draft Bill by the Department of Trade and Industry invites comments on issues connected with strategic export controls. The Introduction to the Draft Bill at Part 2 by the Department of Culture, Media and Sport invites comments on issues connected with the export of cultural objects.

II CONSULTATION ON STRATEGIC EXPORT CONTROLS

Previous consultation

2. The Government published its proposals for new primary export control legislation in the Strategic Export Controls White Paper (Cm 3989) ("the White Paper") in July 1998. The White Paper also made proposals for secondary legislation to be introduced under new powers to be included in the primary legislation, in particular on the transfer of technology by intangible means and on trafficking and brokering.

3. The White Paper responded to the recommendation made by Sir Richard Scott¹ (now Lord Scott of Foscote) that a comprehensive review of the primary legislation governing export controls was needed, and set out proposals for a new, more accountable and more modern legislative framework for strategic export controls.

4. Views were invited on the proposals made in the White Paper and a thorough review of these has been carried out, in the light of the comments received². The review has also taken into account other views expressed subsequently, and in particular by the Trade and Industry Committee in their report of December 1998 (HC 65) and by the joint Committee ("the Quadripartite Committee") of the Defence, Foreign Affairs, International Development and Trade and Industry Committees in their February (HC 225) and July (HC 467) 2000 reports. The Government responded to each of those reports while the review of the White Paper was underway. Other representations received from individuals and organisations have also been taken into account in developing policy for the draft Bill.

1 Made in Sir Richard Scott's Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions ("the Scott Report").

2 All responses to the White Paper (with the exception of those for which confidentiality was requested) were published on 30 November 1998 following an announcement in the House of Commons by the then Secretary of State for Trade and Industry. Copies are available from the Department of Trade and Industry (see contact details in paragraph 11)

Scope of this consultation

5. The conclusions of the review of the White Paper proposals are set out in this Introduction and attention is drawn in particular to proposed changes from the White Paper proposals. For those proposals that will be given effect in primary legislation, an explanation is given of how they are reflected in the draft Bill.
6. It should be noted that the draft Bill as published does not contain provisions to give effect to the proposals set out in the White Paper to strengthen existing legislation on weapons of mass destruction. However, it is intended to include these measures in the Bill when it is introduced. An explanation of these measures is contained in paragraphs 78-80.
7. Views are invited on all aspects of the proposals contained in the Introduction to the Bill, on the draft Bill itself and on the Regulatory Impact Assessment. However, views are particularly sought on areas on which we have not previously consulted directly. These are:
 - The possibility of controls on technical assistance for military conventional end-uses in countries subject to embargoes (paragraphs 46-47)
 - The proposal for a licensing regime for trafficking and brokering in weapons and related equipment to all destinations (paragraphs 55-60)
 - The proposals on licensed production overseas (paragraphs 71-77)

Consultation details

8. An electronic copy of this document is available on the website of the Department of Trade and Industry's Export Control Organisation, at <http://www.dti.gov.uk/export.control>, and on the Cabinet Office's website at <http://www.cabinet-office.gov.uk>. Copies of this document are being sent to all who formally responded to the White Paper on Strategic Export Controls.
9. Views are invited from all parties with an interest in strategic export controls, including industry representative bodies and individual businesses, representatives and members of non-governmental organisations, and representatives and members of the academic community.
10. Comments are invited by **Thursday 24th May 2001**.
11. Written comments should be sent to:

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E-mail address for submitting comments:
exportbill.views@dti.gsi.gov.uk

(Attachments sent by email should be in either Word text (txt) or rich text (rtf) format.)

12. In commenting on the draft Bill it would be helpful if you could **specify the clause number on which you are commenting**. It is not necessary to quote at length passages from this document, or to enclose or reproduce any earlier comments you may have made on the subject of strategic export control.

Publication of responses

13. The Government intends to publish responses to this consultation. It will be assumed that respondents are content for their comments to be published unless they indicate otherwise. Consultees who wish their responses to remain confidential should make clear whether they wish to protect their identity, the content of their response (or part of it), or both.

Compliance with the Code of Practice on Written Consultations

14. The Government's criteria for written publications (as set out in the November 2000 Code of Practice on written consultations) are contained in Part 4. These criteria have been followed except that a shorter period has been allowed for consultation than the recommended 12 weeks. An eight week consultation period has been set as most of the proposals in the draft Bill were the subject of earlier consultation. The draft Bill is short and many issues being consulted on relate to secondary legislation. There will be an opportunity for further consultation on issues relating to secondary legislation during the Bill's passage through Parliament.

15. Any feedback on the way in which this consultation has been conducted can be sent to:

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III BACKGROUND ON STRATEGIC EXPORT CONTROLS

Improving Accountability for Strategic Export Controls

16. The Scott Report highlighted the need for Government accountability in the area of strategic export controls and the Government have made a number of improvements to the transparency of, and Government accountability for, strategic export controls. The key steps taken have been:

- the announcement in July 1997 of a new set of UK criteria against which export licence applications would be judged;
- the adoption of a European Union (EU) Code of Conduct on Arms Exports in June 1998 (in October 2000 the Code was consolidated with the July 1997 national export licensing criteria); and

- the publication of comprehensive Annual Reports on Strategic Export Controls, the third of which was published last year, with the fourth currently in preparation.

As explained in Section IV, the draft Bill will further improve accountability by setting out the purposes of export control in legislation and by providing for parliamentary scrutiny of secondary legislation made under the Bill.

Strengthening and improving the effectiveness of strategic export controls

17. The Government has also strengthened the strategic export control regime in a number of important ways.

- We have prohibited certain activities that we view as unacceptable. The Landmines Act 1998 gave effect to the Ottawa Convention³, banning the import, export, transfer and manufacture of all forms of anti-personnel landmines. And in July 1997 we banned the export and transshipment through the UK of equipment which had been shown to be used for torture and other cruel, inhuman or degrading treatment or punishment.
- We have sought to minimise the risk of UK defence exports being diverted to undesirable end-users, by putting in place a number of procedures to strengthen the process of risk assessment at the export licensing stage. We regularly seek additional details of proposed end-use and end-users, including through our overseas posts, to inform this process, and to satisfy ourselves about the end-users' reliability and integrity before issuing a licence.
- The United Kingdom has, with other Members of the European Union, recently agreed two important new measures. In June 2000 a revised European Dual-Use Items Regulation⁴ was agreed. Among other things, this extended controls to the transfer of dual-use technology by electronic means, and introduced a military end-use control. The latter applies controls to dual-use items that would not otherwise be subject to export controls where the items in question are intended for military use in countries subject to an internationally agreed embargo. A Joint Action committing Member States to introduce controls on technical assistance related to weapons of mass destruction, to complement the provisions on the transfer of technology by electronic means in the revised Dual-Use Items Regulation, was adopted on the same date as the Regulation. The draft Bill provides the powers needed to implement the provisions of the Joint Action.
- The United Kingdom has, in the various international regimes and through bilateral exchanges with various countries, worked for more responsible export control policies internationally. We have also played a leading part in contributing to the work of various international bodies to pave the way for the July 2001 UN Conference on Illicit Trade in Small Arms and Light Weapons in All its Aspects.

3 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which was signed by the UK on 3 December 1997.

4 Council Regulation (EC) No. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology.

IV OUTCOME OF THE REVIEW OF PROPOSALS FOR NEW LEGISLATION CONTAINED IN THE WHITE PAPER ON STRATEGIC EXPORT CONTROLS

Import, Export and Customs Powers (Defence) Act 1939

18. The White Paper noted that there were controls other than those on strategic exports operated under the Import, Export and Customs Powers (Defence) Act 1939 (“the 1939 Act”), namely export controls on heritage items, personal firearms and bovine offal and import controls and said that consideration was being given to whether to amend or replace the 1939 Act.

19. The Government has concluded that it makes sense to replace the export control powers in the 1939 Act as a whole, since it is not satisfactory to attempt to distinguish between strategic export controls and other export controls. The draft Export Control and Non-Proliferation Bill therefore replaces in full the export control powers contained in the 1939 Act but leaves the import control powers of the 1939 Act intact. In practice the only export licensing regime currently operated under the 1939 Act separately from that on strategic export controls, is that on cultural items which is the responsibility of the Department for Culture, Media and Sport and this is dealt with in Part 2 of the Introduction to the draft Bill. Export controls on firearms are administered in conjunction with strategic export controls by the DTI and this will continue to be the case under the Export Control and Non-Proliferation Bill. There is no general export regime in place under the 1939 Act for exports that are the responsibility of the Ministry of Agriculture Fisheries and Food. The controls on bovine offal mentioned in the White Paper although enacted, were not used, and have, since publication of the White Paper, been repealed. Nevertheless, while the Bill has been drafted with strategic and cultural export controls in mind, it will be capable of being used for any export controls, subject to the approval of Parliament (see paragraphs 30-31) and compatibility with Community law.

Parliamentary scrutiny of secondary legislation

20. The 1939 Act makes no provision for secondary legislation (ie, Export of Goods (Control) Orders (EGCOs)) made under it to be subject to any form of parliamentary scrutiny. The Scott Report criticised this lack of parliamentary scrutiny. It recommended that “subordinate legislation should be subject to Parliamentary approbation”, and expressed a preference for the type of affirmative resolution procedure according to which the Government can make orders with immediate effect but the orders can only remain in force if given Parliament’s approval within a specified period.

21. The White Paper proposed that secondary legislation made under the Bill (except for that establishing or amending the purposes of export controls) should be subject to the negative resolution procedure whereby the legislation would be introduced and remain in force unless annulled within a specified number of days. The Government’s view was that the negative procedure was right 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. The

Trade and Industry Committee commented that “the negative procedure for orders laid under the new legislation will be found acceptable” (HC 65, recommendation (c)).

22. While scrutiny of secondary export control legislation has already been introduced, as a matter of practice⁵, the draft Bill (clause 11(4)) will make this a statutory requirement. As proposed in the White Paper, the draft Bill makes provision for scrutiny of EGCOs to be by the negative resolution procedure. The draft Bill (clause 11(2)) makes provision, however, for orders amending the purposes to be subject to affirmative resolution procedure (see paragraph 30 below).

Parliamentary scrutiny of export licensing decisions and policy

Annual Reports on Strategic Export Controls

23. The White Paper noted the Government’s intention to enhance transparency in the field of strategic export controls by reporting annually on these controls. The Government published the first Annual Report on Strategic Export Controls in March 1999, covering the period from May to December 1997. This was followed by two further Reports for 1998 and 1999 with the Report for 1999 providing a significantly greater amount of information than the previous two. These Reports, and in particular the landmark third Report, 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 outside Parliament. They have provided Parliament with the information needed to carry out regular, thorough scrutiny of export licensing decisions made by the Government.

24. In its response to the White Paper, Oxfam suggested that publication of the Annual Report should be placed on a statutory basis. 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. The draft Bill (clause 8) therefore includes a provision to require the Government to submit such a Report to Parliament every year.

Consultation with Parliament about individual export licensing decisions

25. As already discussed, the Bill will require parliamentary scrutiny of secondary legislation and will also require the Government to continue to publish Annual Reports, which make possible scrutiny of individual export licensing decisions taken by the Government. In responding to the White Paper, non-governmental organisations argued that Parliament should scrutinise such decisions *before* they were taken. Industry expressed strong opposition to such scrutiny on grounds of potential delay and risks to commercial confidentiality, both of which could result in the loss of overseas contracts.

5 The Government has voluntarily laid EGCO amendments before Parliament since 16 December 1999, when the Government announced its intention to do this in response to a recommendation by the Trade and Industry Committee (HC 65, recommendation (c)). (Official Record, col. 239.)

26. This issue has been much debated since publication of the White Paper. Both the Trade and Industry and the Foreign Affairs House of Commons Committees were initially against such scrutiny. However, in July 2000 the Quadripartite Committee (described above) published a report in favour (HC 467). The Government rejected the Committee's proposals in its written response to that report (Cm 4872), in subsequent debate and in the Foreign Secretary's oral evidence to the Quadripartite Committee on 30 January this year. The Government argued that, in addition to the practical problems raised, Parliament's role should be to scrutinise individual decisions after they have been taken and pointed out that the Government takes export licensing decisions in the full knowledge that they will be looked at very closely by Parliament. The Government will examine the Committee's revised proposals (HC 77) and respond in due course.

Purposes of export controls

Parliamentary control over the purposes for which the Government imposes export controls

27. The Scott Report recommended that "the present legislative structure under which Government has an unfettered power to impose whatever export controls it wishes and to use those controls for any purposes it thinks fit" should be replaced. The Government agreed that the purposes of export controls should be set out in legislation, and the White Paper proposed doing so in secondary legislation. The responses to the White Paper were generally supportive of including purposes in legislation.

28. The Trade and Industry Committee recommended that the purposes be set out in primary legislation (HC 65, recommendation (d)) rather than secondary legislation, as did some responses to the White Paper. Having reviewed this matter, the Government has concluded that there is a good case for including the purposes in the Bill itself, both because this improves transparency, and so that the purposes can be debated by Parliament. The purposes are included in the Schedule to the draft Bill.

29. The draft Bill provides (at clause 3(1)) that an order can only be made for purposes that include one or more of the purposes set out in the schedule to the Bill, unless the order meets certain special conditions which are described in paragraph 31. 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.

30. The White Paper proposed that any orders introducing or amending the purposes should be subject to the type of affirmative resolution procedure which provides for orders to come into force with immediate effect, but which requires approval by Parliament within a set timescale for the orders to remain in force. Although it is now proposed to include the purposes in the Bill, it is still proposed that they should be capable of amendment by secondary legislation (clause 10), and that any such amendments should be subject to the type of affirmative resolution procedure proposed in the White Paper. As explained in the White Paper, the affirmative procedure is appropriate in this instance 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. At the same time, it may be necessary to make changes to the purposes quickly in order to respond to changing

situations. The draft Bill (clause 11(2)) therefore makes provision for the type of affirmative procedure described above.

31. The draft Bill (clause 3(2)) also provides for orders to be made that are not subject to the purposes but these orders must be made using the affirmative resolution procedure already described, and can only remain in force, if approved by Parliament, for a period of no more than 12 months. They can be renewed by the same procedure if circumstances require it. The object of 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 controls.

32. Some responses to the White Paper argued that the 1997 national export licensing criteria and/or EU Code of Conduct on Arms Exports should be incorporated in legislation either in place of, or in addition to, the purposes set out in the White Paper. The criteria in what is now the consolidated EU and national export licensing criteria already set out a clear statement of Government policy against which all decisions on licence applications covered by the criteria are made. The Government considers that incorporating the criteria in legislation would simply introduce rigidity into the way in which licence applications are considered against the criteria. This 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. As noted above, however, the purposes will set definite parameters for legitimate Government action.

The purposes of strategic export control as expressed in the draft Bill

33. The purposes set out in the Schedule of the draft Bill reflect the purposes as described in the White Paper. The non-binding international commitments which the Government enters into from time to time as a consequence of the UK's membership of various international export control regimes (the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group and the Wassenaar Arrangement) are reflected through all the purposes. The Government noted that some of the responses to the White Paper recommended a specific reference to human rights, in addition to internal repression. The Government agrees that an explicit reference to human rights would be desirable and this is therefore included at Paragraph D of the Table of Consequences in the schedule. Explicit reference is also made here to the international law related to armed conflict (e.g., Geneva Conventions).

34. Paragraph 4 of the schedule allows orders to be made under the Bill relating to the export of cultural goods (see Introduction by the Department of Culture, Media and Sport at Part 2).

The transfer of technology by intangible means

The current position

35. An export licence is needed to export certain technologies, including the technology required for the development, production and use of equipment that is itself subject to

export control, and certain software. Controls on the export of technology and software derive mainly from the various international export control regimes (cited in paragraph 33 above). These controls mean that an export licence is required where, for example, blueprints, plans or technical manuals containing the relevant information are exported.

36. For technologies and software subject to national control, principally military technology⁶, an export licence is currently needed only where the technology or software is exported in physical form, such as on paper or computer disc, but not where it is exported by electronic or other intangible means. This is because the 1939 Act, under which this technology and software is controlled, provides the Government with powers to control only tangible exports.

37. Dual-use technologies and software, together with dual-use goods, are subject to control under Community law and an export licence is needed whether the export takes place by tangible means such as on paper or computer disc, or by electronic means, such as by fax, email or telephone. In the case of transfers by telephone, however, a licence is needed only where the transfer involves reading out the contents of a document containing controlled technology or describing its contents in such a way as to achieve the same result. Controls on the transfer of dual-use technology and software by electronic means were introduced in September 2000 when the revised EC Dual-Use Items Regulation came into force⁷.

38. As well as being exported in physical form or electronically, technologies can also be passed abroad—in effect exported—in non-documentary form, such as orally or through personal demonstration. The communication by which such transfers occur may take place abroad or in this country. Closely related to the communication in person of technology is the provision of technical services such as the installation, maintenance, repair and upgrading of equipment. Where such services are provided, this may, but need not, involve the transfer of knowledge.

39. While there is already legislation in place that would prevent the communication of certain military or dual-use technology irrespective of the means of communication, including in particular the Official Secrets Acts⁸ which are used to prevent the transfer of classified information about weapons designs, the Government does not have general powers to control the transfer of technology irrespective of the means of transfer or the provision of technical services overseas.

6 The technology subject to national control is that listed in Part III of schedule 1 to the Export of Goods (Control) Order 1994 (as amended).

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

8 Other relevant legislation includes Orders implementing sanctions or embargoes under the United Nations Act 1946 which cover the transfer of technology by any means and provision of technical services where this is required by the terms of the UN Security Council Resolution. And where the introduction of such controls was an obligation for all Member States under an embargo imposed by the EU, these would be implemented under the European Communities Act 1972.

New general power

40. The White Paper proposed that new export control legislation should provide the Government with the power to impose controls on the transfer of technology, whatever the means of transfer. It was intended that this power should be broad enough to allow the introduction also of controls on the provision of certain technical services. The controls on intangible transfers themselves, as for export controls, would be set out in secondary legislation.

41. Clause 2 of the draft Bill contains the general power to impose controls on transfers of technology. This power, like the general power to control exports, is subject to the controls being imposed for the purposes set out in the schedule to the draft Bill (unless the order meets the conditions described in paragraph 31 above). Again, as for orders introducing export controls, those introducing controls on the transfer of technology will be subject to Parliamentary scrutiny. Clause 4 provides a power to control the provision of technical assistance overseas. This power can be used only to control technical assistance provided in relation to goods or technologies that are themselves subject to export control. Given this, there is no need for the legislation to specify that such orders are to be made subject to the purposes in the Bill.

Controls to be introduced under the new power

42. The Government proposes to introduce controls on the transfer by any electronic means, including fax, email and telephone, of all technology controlled under national legislation (i.e. technology on the “Military List”⁹). Controls on transfers by telephone will apply where a document containing controlled technology is read out over the telephone, or described in such a way as to achieve substantially the same result.

43. This proposal is consistent with the White Paper proposal that the transfer abroad of all documents containing controlled technology should be subject to export licensing requirements whether exported physically or in electronic form. However, the revised European Dual-Use Items Regulation has already introduced controls on the export of dual-use technology by any electronic means, so it is not necessary to make provision for controls on the transfer of dual-use technology by electronic means in national legislation. In addition, the controls on military technology will be modelled on those already introduced in the Regulation for dual-use technology. The Government will use open licensing where appropriate on the same basis as for the export of technology by tangible means.

44. The White Paper¹⁰ proposed the introduction of controls on activities which it was known or suspected could assist a weapons of mass destruction or long-range missile programme. This was intended to ensure that all transfers of technology, including those communicated in person, and the provision of technical services, intended for a weapons of mass destruction or related missile end-use were subject to a licensing requirement. Many responses to the White Paper accepted the case for controls on these types of activities when provided in connection with weapons of mass destruction and missiles.

9 Military, security and para-military goods, ammunition and related material entered in Part III of Schedule 1 to the EGCO 1994 (known as the “Military List”) are subject to export controls.

10 Paragraphs 3.1.4 and 3.2.1.

Concerns, however, were expressed, especially by the academic community, that the proposals as set out in the White Paper could hinder freedom of speech and cause difficulties for universities in their recruitment and teaching of foreign students. In response to these concerns, the Government has concluded that a licence should be required only where the provider of information knows or is informed by Government that the activity in question is intended for use in connection with a weapons of mass destruction or related missile programme, and not, as proposed in the White Paper, where the provider suspects this. The Government also proposes that this control would not apply to information in the public domain.¹¹ The Government is considering further whether it would be appropriate for the secondary legislation introducing these controls to make any additional and specific provision to exempt academic activities and will consult with the academic community on this issue.

45. In line with the proposal in the White Paper, the United Kingdom agreed with other Member States of the European Union in June 2000 a Joint Action¹² on the control of technical assistance related to weapons of mass destruction. This obliges Member States to bring forward legislation, where they have not already done so, 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. The United Kingdom was pleased to support this initiative as a common EU approach in this area helps ensure more effective action to counter proliferation of weapons of mass destruction. The proposals outlined in paragraph 44 will implement the Joint Action in the UK. While the Joint Action requires controls on technical assistance to be introduced only in respect of activities undertaken outside the EU, Member States are at liberty to introduce these controls on activities that take place within the EU and the Government proposes to do so.

46. In addition to obliging Member States to introduce controls on technical assistance provided to weapons of mass destruction and related missile programmes, the Joint Action commits Member States to consider applying such controls to technical assistance provided 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 Security Council of the United Nations.

11 Export controls do not normally apply to information in the public domain although the existing weapons of mass destruction and related missiles end-use control (contained in Article 4 of the Dual-Use Items Regulation) is an exception. Information in the public domain is defined in the 1994 Regulation and the ECGO as technology or software “which has been made available without restrictions upon its further dissemination (copyright restrictions do not remove “technology” or “software” from being “in the public domain”).“ This definition derives from the international export control regimes.

12 Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (2000/401/CFSP).

47. Views are accordingly invited on whether the new powers set out in the draft Bill and described at paragraphs 40-41 should be used to introduce such controls on the provision of technical assistance to any destination subject to a UN, EU or OSCE embargo even where the terms of the particular embargo do not require this. It would also be for consideration whether to introduce the same controls in relation to destinations subject to UK national embargoes. Views are sought in particular on the implications for the competitiveness of UK industry of introducing controls on technical assistance to embargoed destinations unilaterally, given that the controls could prevent companies from meeting contractual obligations which may have been entered into before the embargo was imposed.

48. As already noted the Government already has powers to introduce controls on the transfer of technology by any means, or on the provision of technical assistance where this is required by the terms of a binding UN or EU embargo. Such controls would of course be introduced whenever the UK had an obligation under the terms of an international embargo to do so.

Trafficking and brokering

The current position

49. The Government has the power, under the United Nations Act 1946, to impose controls on activities relating to supply from an overseas country, where such controls are necessary to implement a binding decision of the Security Council of the United Nations. In addition, the Chemical Weapons Act prohibits the transfer of chemical weapons by UK persons and similar measures will be introduced in respect of biological and nuclear weapons (see paragraphs 78-80). But the Government currently has no general powers to impose controls on or prohibit involvement in supplies of weapons or other related equipment between overseas countries.

New general power

50. The Government proposed in the White Paper to take a general power in new primary legislation to impose controls on trafficking and brokering in goods for any of the purposes of strategic control as set out in the legislation. Clause 5 of the draft Bill accordingly contains a general power to introduce controls on activities related to international trade in equipment whose export is controlled. Given that this power can be used only to control trade in goods or technologies that are themselves subject to export control, there is no need for the legislation to specify that orders introducing these controls are to be made subject to the purposes in the Bill.

51. As was explained in the White Paper, the goods and/or destinations subject to controls on trafficking and brokering will be laid down in secondary legislation. This will be subject to the negative resolution procedure.

Controls to be introduced under the new power

52. The White Paper proposed that the new power be used to introduce controls as follows:

- On trafficking and brokering by persons in the UK or UK persons abroad in controlled goods to destinations subject to arms embargoes as a result of non-binding decisions of the UN or decisions of the EU, OSCE or UK Government.
- On trafficking and brokering of equipment whose export the Government had already banned because of evidence of its use in torture. The equipment referred to was that listed in the Foreign Secretary's announcement of July 1997.
- Missiles capable of a range of at least 300km.

53. The White Paper stated that these controls would apply to the activities of all persons in the UK or UK persons abroad and would apply to involvement in buying and/or selling goods, acting as an agent in putting a deal together between supplier and customer or making the practical arrangement for the supply of the goods. These proposals were widely welcomed in responses to the White Paper, though some argued for more extensive controls to be introduced.

54. The Government proposes to introduce these controls under orders to be made under clause 5 of 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.

55. In September 2000 the Secretary of State for Trade and Industry announced the Government's intention to introduce a system for licensing arms trafficking and brokering. This announcement reflected the Government's decision, as part of its review of the White Paper proposals in the light of the comments received, that there was a case for using the new powers 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 view is that this is justified in order 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. The following paragraphs set out the proposed details of the new controls. As these are new proposals, views are particularly invited on them.

56. It is proposed that the new licensing system should apply at a minimum to the following equipment:

- all major weapons and weapons 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.

57. It is for consideration whether these controls should apply also to less sensitive military equipment, i.e. whether controls should be introduced in relation to all items of equipment on the “Military List”¹³ or just the categories of equipment mentioned above and views are accordingly specifically invited on this issue.

58. It is proposed that a licence should be required to acquire or dispose of this equipment between overseas countries, to transfer it, as owner, between overseas countries or to negotiate any such transaction or transfer. The aim of the licensing regime will be 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 are not permitted. To that end, the Government would use open licensing, as it does for export controls, where appropriate.

59. It is proposed that a licence would be required for carrying out any part of these activities anywhere in the United Kingdom, even if part of the activity in question is carried out abroad. It is for consideration whether the new licensing system should also apply in respect of the activities of British citizens or companies, where the activities are carried out wholly abroad; there is understandable public concern about activities carried out by certain British nationals overseas. We believe that any new extraterritorial licensing requirements would need to be workable and clear to our citizens operating abroad who are engaged in legitimate exports from their countries of residence. Views are accordingly specifically invited on this issue.

60. The Government proposes to register information on all those applying for licences, both for exports and for the activities described above, thus creating a database available to be used for licensing and enforcement purposes, including as appropriate on an international basis. Information would come from licence applications. In addition, certain information might be asked for only upon first application from a person or company for a licence, with a requirement to provide updated information subsequently if it had changed. The Government plans to take forward the registration requirements in parallel with the development of a new computer system which is intended to allow for the submission of licence applications via the Internet, in line with the Modernising Government agenda. The new computer system is expected to be introduced in 2002. The draft Bill will allow the establishment of such registration requirements.

Prospects for multilateral agreement on trafficking and brokering

61. There is a growing consensus internationally about the desirability of multilateral agreement on regulation of trade in defence equipment to allow for legitimate trade to continue while combating illicit trafficking and brokering to conflict regions. The Government will be supporting efforts at the UN to reach a common understanding of how arms brokering might be controlled when this issue is discussed at the UN 2001 Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects in July. The Government is also supportive of renewed attempts within the EU to agree on appropriate common measures for the regulation of trafficking and brokering of arms.

¹³ Military, security and para-military goods, ammunition and related material entered in Part III of Schedule 1 to the EGCO 1994 (known as the “Military List”) are subject to export controls.

Under the powers in the Bill, it will be possible to adapt the controls on trafficking and brokering to give effect to any future international understandings or commitments in this area, as well as for other reasons.

Export licensing procedures

62. Section 4 of the White Paper on export licensing procedures dealt with six issues, namely prescribing procedures in legislation; ratings advice; introducing a power to require companies to provide information for the UK's international reporting obligations; time limits for processing licence applications; giving reasons for refusing export licences; and appeals. These are dealt with below.

Prescribing procedures in legislation

63. The Scott Report recommended that export control legislation should “include provision for Government to prescribe procedures whereunder applications for export licences will be dealt with expeditiously and with fairness to exporters”. The White Paper accepted that there might be a case for setting out the basic elements of the licensing process in statutory form, but not the detailed procedures. In fact the draft Bill provides the Government with broad powers to make provision in connection with the imposition of controls and this will allow for procedures to be prescribed by means of secondary legislation as appropriate. The Government considers it desirable, however, for detailed procedures to be set out in guidance, as at present.

Ratings advice

64. The ratings service provides advice to exporters on whether or not their proposed export would require a licence on the basis of information supplied by the applicant. The Scott Report recommended that procedures should be established in legislation for dealing with enquiries as to whether specified goods are subject to control. The Government indicated in the White Paper that it did not favour making the advice given by the ratings service legally binding, and remains of that view. The White Paper did, however, suggest that there might be a case for decisions given in writing in response to an export licence application that no licence was required (“NLR decisions”) being made legally binding, but only where the application had provided complete and accurate written information, and subject to there being no change in the law relevant to the application. It was suggested that this would enable the recipient or third party to rely on such decisions in any civil proceedings, particularly in cases of dispute concerning the legality of contracts in relation to export controls. However, in reviewing this matter the Government has concluded that there would not be any substantial benefit either to exporters or to the Government in changing the current status of NLR decisions.

Requiring companies to provide information for the UK's international reporting obligations

65. The UK has obligations to report certain information connected with export controls and defence exports to international bodies. This currently includes obligations under the UN Conventional Arms Register and the Wassenaar Arrangement, but may in future include other obligations. It was proposed in the White Paper that new export control legislation should enable the Government to require the reporting of information needed to meet international obligations and to pass it on. In response to these

proposals, some exporters wanted to ensure that the requests to supply information were kept to a minimum. While mindful of any potential burden on business, the Government must ensure that it is able to continue to contribute to the important work of international organisations and to meet its commitments. The draft Bill (clause 6) therefore provides for orders to be made to require exporters to retain specified information and when requested to pass it on to Government. There is power also to enable the passing of that information to others so that it can, for instance, be sent to the relevant international organisations.

Time limits for processing licence applications

66. The Scott Report recommended that export licence applications should be deemed granted unless refused within a prescribed time limit. The Government explained in the White Paper that, after having considered this issue, it had concluded that licensing by default should not be adopted as it would introduce a risk of licences being “granted” that were contrary to the UK’s international obligations or the Government’s own policy, as now expressed in the purposes contained in the schedule to the draft Bill. Industry responses to the White Paper tended to favour licensing by default, while non-governmental organisations opposed such a practice. The Trade and Industry Committee also concluded that licensing by default had “little merit” (HC 65, paragraph 63). The Government does not propose to consider this issue further.

67. The time taken to reach decisions on export licence applications is clearly a matter of priority for exporters. It is also a priority for Government. As explained in the White Paper, the Government has set a target to process 70% of standard individual export licence applications in 20 working days. Since publication of the White Paper, DTI has undertaken a comprehensive review of its export licensing procedures with a view to improving processing time, and has set out its commitments to exporters in a Service and Performance Code. Performance is reported on in the Annual Report on Strategic Export Controls.

Giving reasons for refusing export licences

68. The Scott Report recommended that where an export licence is refused, the reasons for refusal should be given in writing. The White Paper pointed out that this was already done subject to any limitations to the amount of information that might be given, for example on grounds of national security. The Government will continue to give reasons in writing for refusals of licences.

Appeals

69. The Government has procedures whereby senior officials from DTI, FCO and MoD and, where appropriate, DfID, all of whom are involved in export control matters within their Departments but not involved in the assessment of the original application, consider appeals against the refusal of licence applications. These appeals take the form of an administrative review of the original decision. Any decisions to refuse an export licence at ministerial level are subject to review and decision at that level. If the decision is to uphold the refusal of an export licence, reasons are again given to the applicant. This review procedure is consistent with Scott’s recommendation that “the representations for and against the refusal of [an export licence application] should be

made to and considered by a small committee of senior officials from the interested departments (but not including the officials who dealt with the original application).” Applicants wishing to lodge such an appeal are expected to do so within 28 days. The Government proposes to establish the review procedure in secondary legislation made under the draft Bill.

Penalties

70. Currently, the maximum penalty for export control offences is seven years’ imprisonment. The draft Bill (clause 7) will allow this to be raised to 10 years’ imprisonment, reflecting the potential seriousness of the offences involved.

Licensed production overseas of military equipment

71. Following publication of the White Paper the Government undertook to consider whether, as some responses from non-governmental organisations had argued, there was a need for any changes to the export control regime to deal with the issue of the production overseas of military equipment under licence from UK companies.

The current position

72. If a company is to license production overseas of its products, it will need to transfer abroad the technology needed to produce that equipment. The licensing company may also export components and production equipment needed in the overseas production. 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. As has already been explained, 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 other goods on the export control lists. The key items needed to establish licensed production overseas are therefore already subject to export control requirements. In addition, the new military end-use control contained in the Dual-Use Items Regulation that came into force on 28 September 2000 requires a licence to be obtained for the export of equipment and technology that would not otherwise be subject to export control requirements, where these are for use in the production of military equipment in destinations subject to UN, EU or OSCE arms embargoes.

New measures proposed

73. Views are particularly invited on the Government’s proposals on licensed production overseas as these are new proposals.

74. Applicants for export licences are currently asked for details of both the end-user and the end-use of intended exports. Where the end-use is overseas production, this should be stated by the applicant, but the Government considers it would be useful to make this a more explicit requirement. It therefore plans to amend the licence application form at the next convenient opportunity to include a specific question on

whether an export is for use in production overseas under licence from a UK firm and, if so, to give a full description of the goods to be produced.

75. The consolidated EU and national export licensing criteria already referred to require the Government, when assessing export licence applications, to take account of the risks of diversion within a buyer country or the risk of re-export under undesirable conditions. Where a licence application is for the export of technology, production equipment or components for use in overseas production, the Government considers both the risk of the equipment produced overseas being used for purposes contrary to these criteria in the producing country and the capability of the producing country to exercise effective export controls and thus minimise the risk of diversion to an undesirable end-user. The Government believes that there would be benefit in achieving EU wide agreement to similar high standards through an explicit reference in the EU Code of Conduct on Arms Exports and proposes to take a lead in consulting with EU partners to that end.

76. The most effective, and indeed the only sure, means of exercising control on licensed production overseas, is through decisions about the export of technology and equipment needed to establish and maintain that production. An issue with licensed production overseas, however, is that the production may take place over many years after initial exports have been licensed, and situations may change. Often, there will be a continuing requirement for the export of components and possibly updates of technology from the UK in order to allow licensed production to continue. In deciding whether to permit the export of the components and other items for use in overseas production, the Government would take into account any concerns about the end-use of the equipment being produced.

77. The timing and indeed existence of exports from the UK needed to maintain overseas production will, however, of course vary depending on the terms of the licensed production arrangement. The Government is concerned 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. Views are invited on ways of achieving this. Options include:

(a) The introduction of a legal requirement on UK companies to include a clause in their contracts with overseas producers for the licensing of production overseas that provides that the finished products will not be exported to destinations subject to embargoes imposed by the UN, EU or the OSCE. If the Government concludes that a requirement to include such clauses in contracts should be imposed on UK companies, it would introduce the necessary power needed to make that provision in the Export Control and Non-Proliferation Bill.

Or

(b) The introduction of a requirement that when technology and other items are to be exported for the purposes of licensed production overseas, the exporter must obtain an end-use undertaking from the overseas producer not to export the finished products to destinations subject to UN, EU or OSCE embargoes. Export licences

for such exports would be granted only if these undertakings were provided. New legislation would not be needed to introduce such a requirement.

The Government recognises that either of these options (and especially the first) would have an impact on companies' commercial arrangements, particularly where companies are not contracting directly with end-users. Views are therefore invited on the legal and practical implications of introducing either option. Views are also requested on whether either measure should be adopted on a unilateral basis, or only in concert with EU partners, and on whether such measures should also be applied where UK national embargoes are imposed.

Strengthening existing legislation on weapons of mass destruction

78. The White Paper proposed strengthening the controls on weapons of mass destruction. In addition to the proposed controls on the transfer of technology and the provision of technical services intended for weapons of mass destruction described in paragraph 44 above, the following specific proposals were made:

- (a) in respect of **chemical weapons**, adding to the provisions of the Chemical Weapons Act 1996 to create a new offence for anyone in the UK or a UK person abroad to aid, abet, counsel or procure a foreigner overseas to develop, produce or use such a weapon;
- (b) in respect of **biological weapons**, to introduce measures having equivalent effect to those already in the Chemical Weapons Act 1996 together with the enhancements proposed above;
- (c) in respect of **nuclear weapons**, to do the same as for chemical and biological weapons except that provision will need to be made for an authorisation regime to permit activities connected to the UK's role as one of the five official nuclear weapon states.

79. The White Paper also proposed, for consideration, making it an offence for anyone in the UK or a UK person abroad to aid, abet, counsel or procure a foreigner overseas to engage in military preparations or preparations of a military nature, intending to use a chemical weapon.

Such an offence would apply also to biological weapons and, where appropriate, nuclear weapons, with the exception of activities related to the United Kingdom's position as one of the five official nuclear weapon states.

80. These proposals were generally welcomed. The Export Control and Non-Proliferation Bill will implement the measures proposed in the White Paper, including that of making it an offence to engage in military preparations or preparations of a military nature intending to use a weapon of mass destruction. Provision will be made to take account of the United Kingdom's role, within NATO, as an official nuclear weapon state. Draft clauses are not included in the draft Bill at present to do this, but will be included in the Bill which is introduced to Parliament.