PART 3

REGULATORY IMPACT ASSESSMENT

DRAFT EXPORT CONTROL AND NON-PROLIFERATION BILL

1. PURPOSE AND INTENDED EFFECT OF THE MEASURE

1.1 Issue

This impact assessment relates to the draft Export Control and Non-Proliferation Bill, and the proposed secondary legislation to be made under it. A provisional assessment was published with the White Paper on Strategic Export Controls (Cm 3989). The draft Bill will replace the export control provisions of the Import, Export and Customs Powers (Defence) Act 1939 ("the 1939 Act").

1.2 Objectives

The draft Export Control and Non-Proliferation Bill has six key objectives, and these are as follows:

(i) **To provide for parliamentary scrutiny of the secondary legislation made under it**. This aspect of the legislation will have no direct impact on business.

(ii) **To provide for the purposes of export controls to be set out in primary legislation**. This will not have a direct impact on business.

(iii) **To enable the Government to impose controls on the transfer of technology by intangible means, and the provision of technical services**. At present, certain military technology is controlled if exported in tangible form, eg, on paper or computer disk, but the Government does not have the power to control identical information when transferred by intangible means. This contrasts with the position in respect of dual-use technology, where, following the coming into force in September 2000 of the European Council Regulation No 1334/2000 (and the related Dual-Use Items (Export Control) Regulations 2000), controls apply to the transfer abroad of dual-use technology by electronic means (including email, fax and telephone) as well as to the export of such technology by tangible means. The draft Bill proposes to introduce a new power allowing the Government to control transfers of technology by any intangible means. This power would be used to introduce secondary legislation establishing controls on the export of military technology in line with those already existing on dual-use technology. These will apply to the export abroad of documents, including blueprints, manuals, diagrams, designs etc, by tangible or electronic means or by telephone in line with the European controls on dual-use items.

The power to control the transfer of technology by intangible means will also be used to introduce controls on the transfer of technology by non-electronic intangible means (eg, orally, by means of personal demonstration) and the provision of technical services in circumstances where someone knows or is informed by the Government that the provision of the technology or technical

services will assist a weapons of mass destruction or related missile programme. These controls will implement (though will go further than) the EU Joint Action (2000/401/CFSP), agreed in June 2000, which requires Member States to bring forward legislation to control the provision of technical assistance, involving the transfer of technology by intangible means, including by oral means, as well as the provision of technical services, to countries outside the EU where it is known that this is intended to assist weapons of mass destruction or related missile programmes. The possibility of introducing controls on the transfer of technology by any means and the provision of technical services related to conventional military end-uses to any destination subject to a UN, EU, OSCE or UK embargo are options on which views are being sought in the consultation on the draft Bill, and that includes views on the possible impact on businesses of such controls. The controls would not apply to information that is already in, or is placed in, the public domain.

(iv) **To enable the Government to impose controls on trafficking and brokering**. At present, such activity can be controlled only where this is required by a binding resolution of the UN Security Council requiring States to impose trade sanctions or an arms embargo (or in certain circumstances arising out of an EU obligation). The White Paper proposed that new powers would be used for similar controls for trafficking and brokering in: controlled equipment to countries which are the subject of any other arms embargo adopted by the UK; certain types of equipment for which there is clear evidence of their use in torture; and certain types of missiles. However, in reviewing policy options in the light of the responses to the White Paper, the Government has decided to extend the controls. It is now proposed to introduce controls at a minimum on: all major weapons and weapons platforms; all light weapons and small arms; all ammunition for those two categories; key items of equipment designed to enhance military capability; all security and paramilitary equipment currently subject to export control; and specially designed components of the above. It is for consideration whether these controls should apply to all items in the Military List, and whether they should apply extraterritorially.

(v) **To enable Government to set out export licensing procedures and require exporters to retain and supply certain information to Government and enable the Government to pass that information on to meet international reporting obligations.** It is proposed that most procedures will be set out in guidelines. It is also proposed 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.

(vi) **To prohibit involvement in developing, producing or using weapons of mass destruction or in military preparations or preparations of a military nature intending to use such weapons.** Such activity is already prohibited under the Chemical Weapons Act 1996, and to a large extent under the Biological Weapons Act 1974 and the Nuclear Explosions (Prohibition and Inspections) Act 1998. The new legislation would provide for similar provisions in relation to nuclear weapons and biological weapons to the extent not already covered by existing legislation. The

purpose of this particular objective is to ensure that the Government could act in the event that any such activity took place. This measure should have no impact on reputable businesses or individuals.

As objectives (i), (ii), (v) and (vi) will have a minimal impact on normal business activity, they are not discussed further in this assessment. The focus of this assessment is therefore (iii) and (iv). It should also be noted that this assessment is based on the provisions included in the draft Bill, and the proposals for secondary legislation to be made under it. It does not take account of options on which views are being invited as part of the consultation on the draft Bill. Those options relate to: licensed production overseas (ie, either requiring British companies to include a standard contractual term in overseas production arrangements, or obtaining an end-use undertaking from the overseas producer, to ensure that the finished products would not be exported to embargoed destinations); whether all items in the Military List should be subject to the proposed trafficking and brokering licensing regime and whether those controls should apply extraterritorially; and also whether controls should be introduced on technical services for conventional military end-uses in UN, EU, OSCE or UK embargoed countries. Views are invited on the cost implications of those options.

1.3 Risk assessment

Without the proposal to impose the same export controls on documents containing technology exported by electronic means, as by tangible means, there is a risk of existing export controls on technology being increasingly undermined, particularly as the use of email is now an established means of communication. The proposals for more comprehensive controls on all types of technology transfer relating to weapons of mass destruction and certain missiles are intended in particular to reduce the risk of countries of proliferation concern developing indigenous production capabilities. So far as trafficking and brokering in controlled goods is concerned, without the proposals outlined above (in paragraph 1.2 (iv)), it would continue to be possible to arrange to supply military equipment to countries subject to arms embargoes (other than binding UN embargoes), or to other regions of conflict, provided it was not exported from the UK. Introducing a system of licensing for trafficking and brokering in controlled goods will enable the Government to exercise greater control over such trade from the UK in order to help ensure that such activities do not undermine UK foreign and defence policy and our international commitments.

2. OPTIONS

The options are:

(a) continue to rely on the 1939 Act, which would mean the Government's powers would remain limited to controlling physical exports only; or

(b) implement new export control legislation that does not allow for the introduction of controls on the transfer of military technology by intangible means or trafficking and brokering of controlled goods; or

(c) implement new export control legislation to achieve the objectives set out above.

Option (a) would fail to achieve the objectives set out above, and would also fail to implement the Scott Report recommendations in respect of parliamentary scrutiny of

secondary legislation and setting out the purposes of export controls in legislation. Option (b) would omit two of the most significant aspects of the proposals in the White Paper. Failure to introduce controls on the electronic transfer of military technology would result in a significant inconsistency with the controls that have applied to dual-use items since September 2000. Options (a) and (b) would also not enable the UK to implement the EU Joint Action on controlling technical assistance for weapons of mass destruction, to which the UK is committed. Option (c) is the only one that would achieve all the objectives set out above.

3. BENEFITS

The proposed legislative changes will achieve a number of benefits. In particular:

- By providing for parliamentary scrutiny of secondary legislation, the Bill will introduce proper Government accountability to Parliament for that legislation.
- By specifying the general purposes for which export controls may be exercised, the Bill will also achieve greater accountability to Parliament and additional transparency as to the purposes for which Government operates export controls.
- By extending controls to the intangible transfer of military technology, this will help prevent export controls on military technology from being undermined and ensure parallel controls on both military and dual-use goods and technology.
- By introducing powers to control trafficking and brokering of controlled weapons and related equipment, the Government will be able to ensure that this equipment is not supplied to regions of conflict, and will enable the UK to meet any UN, EU or other international agreements on regulating such activities.
- The Bill will introduce strengthened and more consistent legislation on activities related to weapons of mass destruction, as well as enabling the EU Joint Action on controls on technical assistance in respect of such weapons to be implemented.
- The Bill will allow consolidation of secondary export control legislation which is currently made under both the 1939 Act and the European Communities Act 1972.

4. COMPLIANCE COSTS FOR BUSINESS

This assessment focuses on the new controls proposed to be introduced under the draft Bill, not the controls that already exist and which will be re-enacted under the new Act. These are the new controls on the transfer of technology by intangible means and trafficking and brokering in controlled goods. The White Paper invited views on the expected impact of the controls on intangible technology transfers and on trafficking and brokering, and the responses to this are mentioned below (under section 7). The controls proposed on intangible technology transfer are broadly those set out in the White Paper. However, it is now proposed to introduce more extensive controls on trafficking and brokering than those mentioned in the White Paper, and this will mean additional costs

to business, but as indicated below it is estimated that the additional costs will be modest. It is recognised that there are difficulties both for Government and industry in seeking to arrive at precise estimates of the impact of the new controls. As new controls — or rather the extension of the scope of existing controls — there is little hard data available about the likely impact on export businesses. However, some limited information is available on the basis of the controls on the intangible transfer of dual-use technology, introduced in September 2000.

4.1 Controls on the intangible transfer of military technology (ITT)

A significant and growing proportion of communications now take place electronically, indicating the scope for *controlled* technology to be transferred by such means. Few responses to the White Paper gave any quantification of the extent to which electronic means were used for transmitting controlled technology, but there was some scepticism about the estimates shown in the provisional Regulatory Impact Assessment published with the White Paper, which suggested that the increased requirements for export licences resulting from extending controls to ITT were unlikely to impose a significant burden on industry on the basis of the small number of tangible exports of military and dual-use technology. However, in their evidence to the Trade and Industry Committee's report into the White Paper (HC 65, Appendix 13), the Society of British Aerospace Companies Limited commented that "the ratio of intangible transfers to tangible is very conservatively 4:1", a figure based on an informal survey of the Society's members.

With the introduction in European law of controls on the transfer of dual-use technology by electronic means in September 2000, businesses involved in such transfers already have some practical experience of the impact of such controls. It is difficult for the Department to gauge the impact of those new controls on every business affected by them; some businesses may have experienced more administrative burdens than others, especially if they have had to apply for licences to cover ITT for the first time. Businesses responding to the consultation on the draft Bill may wish to comment on their experience of ITT controls on dual-use items. The controls on dual-use ITT were widely anticipated and are likely to have been taken into account by business in their export procedures, ensuring relatively straightforward compliance. Also, more significantly, the Government has used open licensing, as it does for tangible exports, where appropriate, which has facilitated the use of electronic transfers of much less sensitive controlled dual-use technology.

Open licensing enables categories of electronic traffic in controlled technology to continue to approved destinations and end-users. Relevant Open General Export Licences (OGELs) will apply to the transfer of technology whatever the means of transfer, and would therefore cover ITT. An OGEL already exists for the transfer of most military technology to close allies and applies to a more restricted transfer of such technology to a wider group of destinations. It is intended to maximise the use of such licences, including open individual export licences (OIELs) for military ITT, where this will be consistent with the purposes set out in the draft Bill. Where potential military ITT exports would not be covered by either OGELs or OIELs, those seeking to export controlled military technology will be required to submit Standard Individual Export Licence Applications (SIELAs).

The main additional burden for business of ITT controls on military technology will be the requirement to apply for SIELAs for the transfer of military technology by electronic means. The table below sets out the number of military technology applications as well as the total number of SIELAs received in the past four years.

Table 1. Military technology-rated licence applications

Year[1]	(a) Total number of SIELAs received by ECO	(b) Total number of military technology SIELAs[2]	(b) as % of (a)
1997	11,971	210	1.8
1998	11,412	184	1.6
1999	10,700	246	2.3
2000	11,038	332	3.0

1 1997 covers the period 11 January 1997-9 January 1998; 1998 covers the period 10 January 1998-8 January 1999; 1999 covers the period 9 January 1999-7 January 2000; the figure for 2000 is provisional and covers the period January-December of that year.

2 This is based on the classification of technology controlled for export purposes in the Military List in Part III of Schedule 1 to the Export of Goods (Control) Order 1994, shown in the Annual Reports on Strategic Export Controls. In particular, it is based on the number of export licence applications that have been rated as ML18c or ML18d and ML22, ie, the technology categories. The figure for 1997 above is the one shown in the White Paper (ie, 232 for both military and dual-use SIELAs) which included all items rated ML18. Prior to 1998, sub-headings ML18c and ML18d were not separately identified.

This table shows that military technology SIELAs at about 200-300 per annum represent no more than approximately 2-3% of total SIELAs. This suggests that even assuming an increase in such applications following the introduction of controls on military ITT, this increase is unlikely to represent a significant burden on industry. Furthermore, experience to date of the new ITT controls on dual-use technology appears to suggest that any increase in licence applications as a result of the introduction of controls on electronic transfers is likely to be modest in terms of additional numbers of technology-rated SIELAs.

Table 2 shows the monthly pattern of dual-use SIELAs for 1999 and 2000 and the corresponding number of dual-use technology-rated SIELAs (ie, those in sub-category 'E', as summarised in Appendix B to the 1999 Annual Report on Strategic Export Controls). Controls on dual-use ITT were introduced on 20 September 2000, so any impact would be expected to show in the figures from October that year. While it is difficult to draw firm conclusions so shortly after the new controls were introduced, it does not appear that there has been a significant change as a result of the new controls. While there were a larger number of dual-use technology-rated SIELAs in 2000 as a whole, much of this is attributable to the period before the Regulation came into force and there were also a higher overall number of all dual-use SIELAs. Nevertheless, for the purpose of estimating costs, we have made the assumption that there will be a modest increase in technology-rated SIELAs for military technology of between 100-150 (ie, an increase of some 50% on existing levels of military technology SIELAs) on top of the existing number of military technology-rated SIELAs.

Table 2. Monthly incidence of all dual-use rated licence applications, including technology-rated dual-use applications

Month	1999		2000	
		Technology		Technology
March	182	3	147	16
April	134	2	144	10
May	130	4	154	5
June	150	4	162	11
July	187	3	182	19
August	145	7	164	15
September	146	4	143	14
October	151	5	191	14
November	148	8	192	23
December	121	11	139	8
Total	1,494	51	1,618	135

In addition, it is likely that the new controls on intangible transfers, and in particular those proposed on technical assistance relating to weapons of mass destruction and related missiles, will lead to companies seeking additional ratings advice from the ECO (ie, pre-application informal advice as to whether or not a licence may be required), particularly in the period after the introduction of such controls, but is not possible to quantify this.

Overall, the widely anticipated extension of ITT controls under the proposed Bill, the judicious use of open licensing (as noted already, much controlled technology is permitted to many destinations under open general licences covering technology relating to military items) and the practical experience that business now already have of controls on dual-use ITT should ensure the relatively straightforward implementation of extending such controls to military technology.

4.2 Controls on trafficking and brokering

As noted above (paragraph 1.2(iv)), the Government proposes to introduce broader controls on activities connected with trafficking and brokering than was proposed in the White Paper. The broader controls would involve an extension of the licensing regime to apply to activities that are organised from the UK. As these would be new controls (excepting the controls that apply by virtue of the UN Act 1946 to implement binding embargoes), there is very little information available about the number of companies or individuals involved. While it is difficult to make direct comparisons, the experience of other countries that have introduced their own controls on trafficking and brokering suggest that the licensing burden is small in comparison with that for export controls as a whole. Also, the use of OGELs and OIELs would enable the continuation of much collaborative work overseas between UK and foreign defence industries without the need to apply for individual licences. Taking those considerations into account, this assessment assumes that between 100-250 extra SIELAs would be made each year.

The regulatory impact of the new controls will be based on the requirement to obtain a licence and maintain records for inspection for the purpose of ensuring compliance. This

requirement will only apply to those persons who propose to engage in the activities subject to control, as explained in the outline of secondary legislation (see Part 1 of the consultation document).

Register of brokers

In addition, the Government proposes to establish a register both of those engaged in trafficking and brokering and those exporting controlled goods from the UK. However, as details will be added to the register when licence applications are made, this will not give rise to regulatory burdens on businesses or individuals.

5. OTHER COSTS

Additional costs will be incurred by DTI as the licensing authority, and the Government Departments consulted about licence applications, primarily the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MoD). The Department for International Development consider export licence applications relevant to developing countries, and the new controls under the draft Bill are not expected to increase their costs significantly. Enforcement costs will be incurred by HM Customs & Excise in respect of enforcement of the new controls on trafficking and brokering and ITT. There are no additional costs for DCMS. The assumptions made are based on the additional SIELAs that would need to be dealt with by DTI, FCO and MoD as set out above (ie, in the range of 100-150 additional technology-rated SIELAs, and between 100-250 additional licence applications for trafficking and brokering). As noted above, these assumptions are based on the firm proposals in the draft Bill, and do not include costs associated with the possible options on which views are being invited as part of the consultation on the draft Bill (ie, in respect of licensed production overseas; the extraterritorial scope of the licensing regime for trafficking and brokering; whether or not all items on the Military List are subject to the trafficking and brokering controls; and whether or not the controls on technical services should apply to destinations subject to UN, EU, OSCE or UK embargoes).

Customs and Excise estimate that the additional costs to them would be approximately £200,000–300,000 per annum, consisting of £150,000–250,000 on trafficking and brokering enforcement activities, and £50,000 on ITT. This includes legal costs, equipment and running costs. It is based on the assumption that they will have no routine regulatory role in respect of the new controls.

MoD estimate that the additional costs to them would be in the order of £400,000 in the first year, consisting of £100,000 on trafficking and brokering, and £70,000 on ITT. This includes annual staff and IT costs and a one-off IT investment of £230,000, so the recurrent costs would be in the region of £170,000 per annum. MoD costs take into account the involvement of a number of technical and specialist advisers in the assessment of licence applications. Further additional resources would be required should the Government decide to introduce controls which go further than those which it has declared its intention to introduce in this consultation document.

FCO estimate that the additional costs to them would be approximately £50,000, based on two additional staff in their Non-Proliferation Department to deal with the processing of licences for both trafficking and brokering and ITT applications. The

burden on FCO would be spread across, and be mainly absorbed by, a range of country desks that are consulted about individual licence applications.

As the Export Control Organisation within DTI has increased manpower and IT resources devoted to export licence processing since publication of the White Paper, the additional costs of the new controls under the draft Bill are estimated to require at most two extra members of staff to handle additional licence applications, at a staff cost of approximately £50,000 per annum. Costs associated with providing additional ratings advice would be absorbed within existing resources.

The total cost to Government in dealing with additional licence applications for ITT and trafficking and brokering are therefore estimated to be in the range of £700,000–800,000 for the first year, and between £470,000–570,000 for subsequent years.

6. SECURING COMPLIANCE

Industry is generally familiar with the requirements of export controls, and in cases of doubt as to whether or not a licence is required, a well established advisory ratings service and helpline is available to companies. DTI carries out many awareness raising activities each year to inform exporters of existing and proposed controls, and this includes an Internet website and the distribution of publications. A high-level of awareness is achieved by these activities and through the activities of various business organisations. This general level of awareness is complemented by a strong business ethic of compliance with strategic export controls.

7. PUBLIC CONSULTATION

A consultation was held about potential changes to export control legislation on the basis of a Green Paper on Strategic Export Controls in 1996 (Cm 3349). The White Paper went further in that it set out a number of specific proposals for a new legislative framework for strategic export controls.

Views were specifically invited on the provisional regulatory assessment published with the White Paper. The responses to the White Paper were published on 30 November 1998. There were a total of 54 responses, all but two of which were published, two anonymously. The responses included a number from businesses and business organisations. Although no firm cost estimates were suggested by business, they considered that the provisional assessment underestimated the public and private sector costs associated with the proposals for imposing controls on ITT. However, the proposed controls under the draft Bill, as with the controls on dual-use ITT under European legislation, will maximise the use of open licensing, where appropriate.

Business exporters were concerned about international collaborative commercial/ research projects, and potential damage to the UK as a location for advanced technology companies, and companies that export encryption products. Some of the comments suggested a disproportionate impact of the controls on companies involved in IT and software development.

As well as business organisations, some parts of the academic community expressed concern about the proposals for controls on ITT, particularly controls on ‘‘non-

documentary'' transfers (eg, in person by oral means), because they considered that such controls would lead to difficulties for universities in recruiting and teaching foreign students. The Government has taken those concerns into account in drawing up its proposals for controls on intangible transfers. It therefore proposes that under the secondary legislation introducing these controls, a licence should only be required 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. The Government also proposes that the controls would not apply to information already in the public domain, and will be considering if further exemptions in secondary legislation for certain academic activities would be appropriate.

8. SUMMARY AND RECOMMENDATIONS

The proposals are aimed at bringing export control legislation up to date to deal with the development of electronic means of communication, preventing the transfer of information that could assist weapons of mass destruction programmes, and preventing trafficking and brokering in arms between overseas countries, undermining arms embargoes, or otherwise fuelling trafficking and brokering of weapons and related equipment to regions of conflict. The additional costs to industry and to Government should be reasonably limited, and it is recommended that these are worthwhile in view of the very serious risks posed by proliferation of weapons of mass destruction and conventional weapons and related technology.

9. ENFORCEMENT, SANCTIONS, MONITORING AND REVIEW

It is proposed that under the Bill offences would carry a maximum penalty of up to ten years' imprisonment (the current maximum is seven years). Enforcement would be mainly the responsibility of HM Customs and Excise. There would also be some enforcement responsibilities for the police in respect of offences related to the transfer of technology by intangible means. (The police already have responsibilities in respect of offences under the Chemical Weapons Act 1996 where the offence was committed within the UK.) The impact of export controls which have been imposed by means of Export of Goods (Control) Orders (EGCOs) is kept under review generally. The same will apply to all future controls imposed by means of an EGCO.

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).

DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the balance between cost and benefit is the right one in the circumstances.

Dr KIM HOWELLS, MP
Parliamentary Under Secretary of State
March 2001

EUROPEAN CONVENTION ON HUMAN RIGHTS

Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement, before second reading, about the compatibility of the provisions of the bill with the Convention rights (as defined by section 1 of that Act). The Secretary of State for Trade and Industry made the following statement when publishing the draft Bill:

> "In my view the provisions of the Export Control and Non-Proliferation Bill are compatible with the Convention rights".