



Foreign &
Commonwealth
Office

CONSULTATION DOCUMENT

CONSULTATION ON PROMOTING HIGH STANDARDS OF CONDUCT BY PRIVATE MILITARY AND SECURITY COMPANIES (PMSCs) INTERNATIONALLY

A consultation produced by the Foreign and Commonwealth office.

This information is also available on the FCO website

www.fco.gov.uk

Body Responsible for consultation: Conflict Group, Foreign and Commonwealth Office

Who should read this document? Anyone with an interest in the Government's approach to regulation of Private Military and Security Companies. This may include the industry itself, non-governmental organisations (NGOs), academics studying the issue and think tanks.

Making your views heard: We are keen to gather all views on the subject of PMSCs, and any supporting evidence. You should not feel constrained by the specific questions or feel obliged to offer responses to all of them. Concentrate on those in which you have most interest. It would be helpful if you could describe your views, suggestions and experiences when responding, rather than giving 'yes' or 'no' answers.

VIEWS ARE REQUESTED BY 17 JULY 2009

Phone enquiries to: 020 7839 7276 (09:30 – 16:30hrs, Mon – Fri)

Email: pmscs@fco.gov.uk

In writing: PMSC Public Consultation
W3.115, Foreign and Commonwealth Office
King Charles Street
London
SW1A 2AH

Your details: Representative groups may wish to give a summary of the views of the people and organisations they represent, and where relevant how they consulted in reaching their conclusions. You may wish to include contact details for follow-up (e.g. name, phone number, email address).

Confidentiality: The position regarding the confidentiality of information provided is set out at the back of this document. Unless you state otherwise (and an automatic disclaimer generated by your IT system will not be taken as such), we will assume you are happy for us to publish your response and to share it with other Government officials.

SCOPE OF CONSULTATION

This consultation concerns the Government's proposal to improve standards across the Private Military and Security Company (PMSC) industry globally.

The purpose of this consultation is to seek views from stakeholders and interested parties on the Government's proposal to promote high standards in the industry by working with the relevant trade association, using our status as a key buyer, and increasing international standards through international cooperation. We would be interested to hear suggestions on how this option can be further strengthened.

The Government considers that a national licensing regime would not meet the policy objectives and is not consulting on the introduction of a licensing regime. An Impact Assessment has been written for this proposal and can be found at www.fco.gov.uk.

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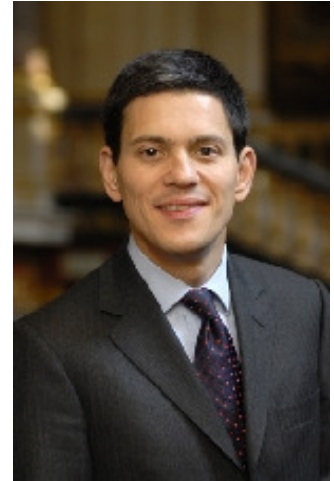
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FOREWORD BY DAVID MILIBAND

The Private Military and Security Company (PMSC) industry is an evolving and important actor in international affairs. We have seen considerable growth in the PMSC industry since we first published our Green Paper on Options for Regulation in 2002, and the industry has since played an important role in Iraq and Afghanistan, providing critical protection to our own diplomatic personnel, as well as to key NGOs and humanitarian workers. However, we also need to ensure PMSCs operating abroad do so to the highest standards, understanding that this industry is here to stay.

The PMSC industry is essential, inevitable and international. It is essential, because people need protecting in dangerous countries; inevitable, because governments cannot deploy protection in all theatres; and international, because the market and suppliers are global. Any proposal by the British Government needs to recognise both this industry's positive and legitimate role globally, as well as the geographic extent of arenas in which PMSCs operate.

Our policy proposals need to be innovative if they are going to affect the wider industry. We need to make sure any system of regulation we propose is based on international cooperation to improve standards of the industry in the UK, and more widely. This is a global issue; it requires a global response.



INTRODUCTION

1. Private Military and Security Companies (PMSCs) provide security abroad for private sector contractors, governments and other bodies, including aid agencies and NGOs. They carry out a variety of duties, from close protection of personnel and static protection of premises such as ministries and embassies, to risk and security consultancy. They provide a vital and necessary role in hostile environments, and enable the Government to fulfill its policy objectives in Iraq and Afghanistan by providing essential security services, as well as ensuring operational NGOs are able to carry out important humanitarian work. The industry contributes significantly to our objectives, and it is important that a legitimate and important industry is not over burdened.
2. Many of the services offered by security companies are not contentious; others, such as armed security, weapons training and even unarmed military and police training, could have direct lethal consequence. There is a risk that, however unintentionally, PMSC activity might give rise to human rights or humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tension. The UK based industry has a favourable reputation, but the Government also needs to mitigate the risk that a company registered in the UK or elsewhere behaves in a way that brings the reputation of the whole industry into question.
3. The objectives of our policy are therefore:
 - a) to promote high standards of conduct by PMSCs internationally; and,
 - b) to reduce the risk that the activities of PMSCs might give rise to human rights or humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tension.
4. The Government published a Green Paper in 2002 exploring options for regulating PMSC activities in response to concern at the increased use of PMSCs in areas of conflict and instability. The Green Paper of 2002 formed the basis of a six-month consultation and we are grateful to those who submitted written responses. A large number of responses favoured some form of regulation, including self-regulation and a licensing regime. Other responses emphasised the concern that we should not adversely affect legitimate business activities with blanket legislation.
5. Drawing on these responses, officials across Whitehall carried out a more detailed review of the options for regulation in 2005, including self-regulation through a trade association, national regulation based on export controls, and national regulation based on a company licensing system alongside a Government register of approved companies. This review highlighted difficulties with regard to implementation or enforcement for each of the options and led to continued extensive discussions across Whitehall and with key stakeholders on the best way forward. We have also drawn heavily on our direct operational experience of the industry in Iraq and Afghanistan.
6. These discussions led the Government to the conclusion that a licensing regime would not meet the policy objectives, and that self-regulation through the industry association in conjunction with international cooperation to raise standards was more likely to achieve the desired outcome.
7. This consultation seeks the views of our stakeholders, and other concerned parties, on the proposals to introduce a package of measures to improve standards in the PMSC industry in the UK and worldwide. This includes self-regulation by the industry in the UK on the basis of a code of conduct agreed with and monitored by the Government, and an international agreement on standards covering all aspects of PMSC operation and organisation worldwide.

8. The paper can also be downloaded from www.fco.gov.uk. The consultation will close on 17 July 2009. This consultation is being conducted in line with the criteria of the Government's Code of Practice on Consultations.

EXECUTIVE SUMMARY

POLICY PROPOSAL

9. We recommend a composite package of:
 - a) Working with the UK industry to promote high standards through a code of conduct agreed with and monitored by the Government
 - b) Using our status as a key buyer to contract only those companies that demonstrate that they operate to high standards
 - c) An international approach to promote higher global standards, based on key elements of the UK approach.

SUMMARY OF CONSULTATION QUESTIONS

- Do you think the issues listed in this document are the right ones to be included in a code of conduct? Can you think of any other areas that should be covered?
- What requirements should the code of conduct stipulate in each of the areas set out?
- How could the trade association monitor the behaviour of its members to ensure they comply with the code?
- How should the Government monitor the implementation of the code?
- What sanctions are available to the trade association to encourage compliance and penalise non-compliance with the code?
- What extra incentives could be introduced to attract up to 90% of the industry to sign up to the trade association's code of conduct?
- How could accountability and monitoring of the industry through the international initiative be increased?
- If you run a PMSC, would your organisation be prepared to provide funds to ensure that standards were raised in the industry? What would be an acceptable amount to pay?
- Do you think the international sanctions listed would be fair and effective, and if not, what sanctions would you propose?
- Please share with us your views on the Impact Assessment. What additional evidence can you provide us to improve our understanding of the costs and benefits of the approaches analysed?
- Do you have any other comments you wish to make?

POLICY PROPOSAL

10. We propose a composite package of working with the UK industry to promote high standards through a code of conduct agreed with and monitored by the Government, the use of our status as a key buyer and raising of international standards of PMSCs through international cooperation.

REGULATION THROUGH THE TRADE ASSOCIATION/STATUS AS A KEY BUYER

11. We will work with the relevant trade association to agree and implement high national standards / agree a code of conduct for all members and to develop expertise and best practice in the area. We will encourage all UK based PMSCs to join the association and adhere to its membership standards. As well as raising standards, this will give the Government greater oversight of the number of companies operating in the PMSC industry and their current activities.
12. The code of conduct will need to be agreed by the Government and we will insist on it including high standards of accountability and transparency. Government and industry will also jointly monitor its operation. Our aim is for the framework to cover compliance in accepting contracts, incidents and accountability, resource management and responsible behaviour and promote respect for International Humanitarian Law and (IHL) and Human Rights Law (HRL).
13. The Government would agree with the trade association performance indicators to measure the effectiveness of self-regulation (membership targets, reduction in number of complaints upheld). These would be summarised in a published annual report. The Government would review the self-regulation regime on an annual basis, and make a decision after three years on whether it was proving equal to the task.
14. The Government would contract those companies that follow regulatory, humanitarian and ethical standards consistent with the trade association's code of conduct, or can show adherence to other equivalent standards.

Question 1: Do you think the issues listed above are the right ones to be included in a code of conduct? Can you think of any other areas that should be covered?

Question 2: What requirements should the code of conduct stipulate in each of the areas set out above?

15. The trade association, with the Government, would closely monitor the implementation of the code and would have up to 3 years from the announcement of our policy to show that they can deliver the targets set, including to attract up to 90% of the UK based industry. To secure the Government's support, the trade association will have to deliver robust, enforceable standards that they can implement swiftly. As noted above, the Government will require a regime that sets high standards of transparency and accountability and will seek to ensure that these are upheld. Membership of the trade association would signal to prospective buyers the companies that adhere to the highest standards. Operators who could not meet these standards would risk a significant reduction in market competitiveness.
16. If companies already granted membership of the trade association fail to adhere to the standards, the trade association would be able to use its own sanctions and expel any company found in breach of the code. This would diminish the company's reputation, reducing its chances of employment and of being accepted into the international arrangement, and would thereby severely restrict its future business opportunities.

Question 3: How could the trade association monitor the behaviour of its members to ensure they comply with the code?

Question 4: How should the Government monitor the implementation of the code?

Question 5: What sanctions are available to the trade association to encourage compliance and penalise non-compliance with the code?

Question 6: What extra incentives could be introduced to attract up to 90% of the industry to sign up to the trade association's code of conduct?

INTERNATIONALLY AGREED BENCHMARK STANDARDS FOR PMSCS

17. To complement and reinforce our approach to applying national standards, we will seek to extend international cooperation on this issue. In 2005, the Swiss government and the International Committee of the Red Cross (ICRC) launched an initiative to promote respect for international humanitarian law (IHL) and human rights law (HRL) on the part of PMSCs operating in situations of armed conflict or post-conflict. This multi-stakeholder initiative includes States, NGOs, industry, and academia. It has achieved its two initial objectives:
 - a) to reaffirm and, where necessary, clarify existing legal obligations of States and other international actors under international law (especially IHL and HRL); and
 - b) to identify good practices and regulatory options to assist States in promoting respect for IHL and HRL by PMSCs. These good practices are non-binding guidelines on regulation that States may choose to follow.
18. The 17 participating states – including the UK – agreed these deliverables in the Montreux plenary in September 2008. We will now advocate an extension of the initiative to create internationally agreed benchmark standards for companies, building on the national standards devised by the Government and trade association. We aim to do this within two years. We will work with the Swiss government to draw experts and government representatives together. Once an international code of conduct is agreed, we will encourage a wide range of PMSC exporting and contracting states and the main industries employing PMSCs to sign up to it.
19. Participating states and key buyers of PMSC services will then be able to insist that PMSCs wishing to bid for future contracts adhere to the internationally agreed standards. The involvement of key buyers from the extractive/natural resource industries will widen the scope of the initiative beyond just Government contracts. The Government is a key employer of UK PMSCs and exerts influence over the industry through its prestigious contracts, but it is critical to broaden the scope of the initiative to include the private sector to cover the rest of the industry. Our ultimate objective will be for all governments and the private sector to use only PMSCs who adhere to these internationally endorsed standards, creating a global security benchmark in private security procurement and best practice, and driving up standards globally. PMSCs wanting to win contracts with any of the governments or companies concerned will have a strong reputational and commercial interest to sign up to and implement these internationally agreed standards.

Question 7: How could accountability and monitoring of the industry through the international initiative be increased?

20. Companies seeking contracts with participating states and key buyers would need to provide supporting evidence to show that they meet the benchmark standards. Examples might include demonstrating training and management processes are compliant with IHL and HRL, and an on-going process of review to ensure that all staff receive relevant training.
21. These benchmark standards should be supported by an effective complaints mechanism. We envisage establishing an international secretariat, paid for by an annual licence fee levied on PMSCs, to monitor overall standards and ensure compliance. The right to lodge a formal complaint with the secretariat against a PMSC for a specific incident would

reside primarily with the host state, whose authorities would provide the necessary evidence to support the allegation. Where a state does not have sufficient capacity to collect the necessary evidence, the participating states could offer technical assistance, with the agreement and cooperation of the host state.

22. The convention of participating states would be able to uphold and enforce complaints through a series of sanctions overseen by an international secretariat. There would be four measures of increasing severity against any company found to be in breach:
- a) *Placing additional conditions on their contract.* Conditions may include protective measures to control specified activities of the PMSC for a period of time, and would require buy-in to the arrangement from either the contracting state or the contracting private sector enterprise;
 - b) *Issuing the company an official warning.* The company's name and the allegation against it would be publicised on an official website so that contracting and host states in the future are aware of any previous history/behaviour before committing to a contract with that PMSC;
 - c) *Financial sanction.* Agreed and imposed by the international secretariat; and
 - d) *Suspension or eventual removal of the PMSC from global security benchmark initiative.* This would prevent a PMSC securing a future contract either with/in any contracting or host state or with a private sector buyer who is party to the arrangement, seriously diminishing that company's current and future business opportunities.

Question 8: If you run a PMSC, would your organisation be prepared to provide funds to ensure that standards were raised in the industry? What would be an acceptable amount to pay?

Question 9: Do you think the international sanctions listed would be fair and effective, and if not, what sanctions would you propose?

Question 10: Please share with us your views on the Impact Assessment at Annex A. What additional evidence can you provide us to improve our understanding of the costs and benefits of the approaches analysed?

Question 11: Do you have any other comments you wish to make?

PROBLEMS WITH A LICENSING REGIME

23. The Foreign & Commonwealth Office consulted widely about the possibility of setting up a licensing regime for the export of specified private military and security services, supplemented by a register of Government-approved companies. This was known as the twin-track approach. To obtain approved status a company would have to submit for scrutiny to the Government its accounts, insurance, vetting, training and employment policies and procedures, ethical criteria for accepting contracts, and a code of conduct for employees. The Government would also examine the history and track record (especially in overseas markets) of both the company and its directors. Only a company with Government-approved status would be permitted to apply for licences to export military and security services.
24. After significant consultation on this option with the industry, partners across Government and civil society, we concluded that this option would not meet our policy objectives for the reasons listed below:
 - a) Any breach of the regime would almost certainly take place outside the UK. PMSCs typically operate in countries where legal systems are often not functioning effectively and frequently work in remote locations overseas. Consequently, investigation, obtaining evidence and enforcement would all be likely to prove highly complex and difficult. In particular, securing a successful conviction would rely on the level of assistance forthcoming from the host states' investigative and judicial authorities, as well as on the reliability and admissibility of evidence obtained from often-remote places. If a person alleged to have committed a breach of UK criminal law is not present in the UK, that person would need to be extradited from the State where he or she is present, but whether that would be possible would depend upon the terms of the extradition arrangements between that State and the UK; and in any event extradition is rarely a straightforward process. The chances of successful prosecution would be remote, as demonstrated by existing South African legislation, which has not yet resulted in a successful prosecution.
 - b) UK companies channel a significant proportion of their contracts through overseas subsidiaries and any attempt to bring these within UK legislation would face serious legal and diplomatic problems. Subsidiaries are subject to regulation in their place of incorporation, rather than in the UK: any attempt by the UK to regulate such companies would be contrary to our normal policy that there should be no extraterritorial regulation of companies by States other than that of their incorporation, and might provoke complaints from States where such companies are incorporated.
 - c) A Government approved register of companies would be difficult to create, maintain and use effectively. Establishing criteria to be accepted on to the register that would not be open to legal challenge would be problematic. It would be necessary to keep the register continuously updated. There is a risk that the register could be seen as a stamp of approval for all of the company's activities, even though we would still have to license individual contracts. Finally, this could be perceived as placing non-UK EU based companies at a competitive disadvantage because HMG would have more difficulty in obtaining robust independent information on overseas companies. It could therefore take longer to agree their inclusion on the register. This could leave the Government open to challenge under EU law.
 - d) This policy option is not proportionate to the scale of the problem in the UK. The UK based industry has a favourable reputation and operates to high standards. Considering the global nature of the industry, regulating solely the UK industry would reduce competitiveness unnecessarily and would not prevent international companies being involved in incidents that could call the reputation of the UK industry into

question. This option would place an unwarranted strain on a legitimate industry and would be disproportionately costly to small businesses.

- e) The Government does not believe that a regulatory option would meet the policy objectives in this case. There is a high probability that regulation would impose costs, which would outweigh any benefits and create economic distortions. Furthermore, unintended consequences, such as the relocation of UK-based PMSCs overseas, are likely. We have therefore explored possible alternatives to classic regulation in line with Government guidance on impact assessments to find the most effective option to improve standards in the PMSC industry worldwide. Further guidance on Impact Assessments can be found at: <http://www.berr.gov.uk/files/file44544.pdf>
25. We conclude that national regulation based on either an export or company-licensing system, whether or not supplemented by a register of Government-approved companies, would not meet the policy objectives.

HOW TO RESPOND

26. This consultation was launched on 24 April 2009 and will close on 17 July 2009. The consultation document will be available electronically from 24 April 2009. Please ensure that your response reaches us by 17 July 2009.
27. You can choose to reply to just one or all of the consultation questions. Please send consultation responses and address any queries to:

PMSC Public Consultation
W3.115, Foreign and Commonwealth Office
King Charles Street
London SW1A 2AH
Tel: 020 7839 7276
Fax: 0207 008 1580
pmscs@fco.gov.uk
28. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear who the organisation represents, and, where applicable, how the views of members were assembled.
29. If you have any suggestions of others who may wish to be involved in this process, please contact us. Please also feel free to forward this document to other potentially interested parties, in the UK or elsewhere.
30. The information you send us may need to be passed on to colleagues within the Foreign and Commonwealth Office and/or published in a summary of responses received in response to this consultation (along with a response from the Government). We will assume that you are content for us to do this, and that if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system, unless you specifically include a request to the contrary in the main text of your submission to us. Please ensure that if you want your name or response to be kept confidential, you state this clearly in your response. (Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.) This document and annex can be provided in alternative formats upon request.

WHAT HAPPENS NEXT?

31. A full analysis of responses will be undertaken following the consultation and published after the close of the consultation. Based on the responses received and evidence gathered during the consultation period, a final decision on the proposals will be taken and, if appropriate, proposals will be laid before Parliament.
32. A summary of responses will be made available and will be accessible via our website at www.fco.gov.uk or by request from:

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CONSULTATION CRITERIA

33. The consultation is being conducted in line with the Code of Practice on Consultation. The Criteria are listed below. The full version can be accessed at:
<http://www.berr.gov.uk/files/file47158.pdf>

34. The Seven Consultation Criteria

- a) When to consult: Formal consultation should take place when there is scope to influence the policy outcome.
- b) Duration of consultation exercises: Consultations should normally last for 12 weeks with consideration given to longer timescales where feasible and sensible.
- c) Clarity of scope and impact: Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- d) Accessibility of consultations exercises: Consultations exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- e) The burden of consultation: Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- f) Responsiveness of consultation exercises: Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- g) Capacity to consult: Officials running consultations should seek guidance in how to run an effective consultation and share what they have learned from the experience.

35. If you feel the consultation does not satisfy these criteria please contact:

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