



Reports from the Defence,
Foreign Affairs,
International Development
and Trade and Industry Committees

Session 2000–01

**Strategic Export Controls: Annual Report for 1999 and
Parliamentary Prior Scrutiny**

Response of the Secretaries of State for
Defence, Foreign and Commonwealth Affairs
and Trade and Industry

*[Presented to Parliament
by the Secretaries of State for
Defence, Foreign and Commonwealth Affairs
and Trade and Industry
by Command of Her Majesty
July 2001*

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**REPORTS FROM THE DEFENCE, FOREIGN AFFAIRS, INTERNATIONAL
DEVELOPMENT AND TRADE AND INDUSTRY COMMITTEES**

SESSION 2000-01

**STRATEGIC EXPORT CONTROLS: ANNUAL REPORT FOR 1999 AND
PARLIAMENTARY PRIOR SCRUTINY**

**RESPONSE OF THE SECRETARIES OF STATE FOR DEFENCE, FOREIGN AND
COMMONWEALTH AFFAIRS AND TRADE AND INDUSTRY**

Scott Report legislation

- (a) Given this Government's debt of honour to bring forward legislative proposals to give effect to the 1996 Scott Report, it would be deeply regrettable were at least a draft Bill not presented for proper parliamentary scrutiny during this Parliament (paragraph 7).**

The Government introduced the Export Control Bill into Parliament on 26 June 2001, having published the Bill in draft for public consultation on 29th March (Cm 5091). The Bill provides, among other things, for parliamentary scrutiny of secondary legislation and for the purposes for which export controls may be imposed to be set out in legislation. Both of these were the subject of recommendations made in the Scott Report.

European Code of Conduct

- (b) We commend the real progress made in developing the European Union Code of Conduct. The Swedish Presidency offers an excellent opportunity to press for a minimum level of transparency in operation of the EU Code of Conduct, including a published Annual Report from each state, and a minimum level of information on material licensed for export, as well as uniform reporting levels for the statistics published with the annual review of the Code. We recommend that the Government continue to press for greater transparency during discussions on the Code (paragraphs 9 and 11).**

The Government shares the Committee's desire for greater transparency in the public reporting arrangements under the EU Code of Conduct. We shall continue to press for a level of transparency that matches our own.

EU Code of Conduct: applicant countries

- (c) We recommend that, in all future bilateral discussions with applicant countries, the Government makes a specific point of pressing the need to conform to the EU Code of Conduct (paragraph 14).**

As the Government has pointed out in previous responses to the Committee, the EU Code of Conduct on Arms Exports is a Common Foreign and Security Policy instrument and so falls under the CFSP chapter in negotiations to join the EU. All twelve candidates currently in negotiations have closed the chapter, confirming that they will apply CFSP instruments from the date of their accession. In addition, all candidates including Turkey have signalled support for the principles of the Code and have said that it will guide them in their national export control policies.

We hold bilateral discussions on export control issues with a range of states to promote responsible export control policies. When we hold such discussions with EU candidates we make clear the need for them to apply the criteria in the EU Code. This is a message we repeat in other relevant bilateral contacts. We are working with our EU partners to find ways of helping the accession states to ensure that their export controls operate effectively and in conformity with the EU Code.

Six Nation Agreement

- (d) We would welcome the inclusion in the next Annual Report of a note on progress in establishing the revised export control system under the Six-Nation Framework Agreement (paragraph 17).**

The Government agrees to include a note of progress in establishing the revised control system under the Six Nation Framework Agreement in the 2000 Annual Report.

Small Arms

- (e) We warmly commend the Government's efforts to date in seeking a multilateral way forward to control the illicit flows of small arms, including the International Arms Surrender Fund proposed by the Foreign Secretary. Once the UN Conference has run its course, action must be taken to achieve more public identification of those arms producing and exporting countries which are holding up the emergence of an international consensus on the key issues (paragraph 19).**

The Government is working to secure global political commitment to a comprehensive and forward-looking Programme of Action from the first UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, to be held in New York from 9-20 July. We are developing a strategy which includes the allocation of significant resources to a Weapons Collection, Management and Destruction Programme, to focus support on measures from the Conference which should lead to a reduction in the number of uncontrolled weapons in circulation, either through better management practices or through destruction.

As well as these multilateral efforts, the Government announced proposals for new national controls on trafficking and brokering when it published the draft Export Control Bill on 29 March (Cm 5091). The new controls will apply, among other things, to all small arms, light weapons and related ammunition. Any trafficking or brokering transactions involving such weapons or ammunition will be subject to licensing if any part of the transaction takes place in the UK, or if it involves supplying such items to countries subject to UN, EU, OSCE or UK embargo.

Exports to Israel: Southern Lebanon

- (f) It is our judgement that officials processing export licence applications for military equipment to Israel should have drawn to the attention of Ministers the possibility of the equipment being used in the occupation of Southern Lebanon, and have thereby required an explicit policy decision on such applications, possibly in the form of specific end-use conditions (paragraph 26).**

The Government rejects the inference that officials were not providing Ministers with full information on export licence applications for Israel. As stated in its Memorandum of 22 January 2001, the Government has not placed specific limitations or end-use conditions on licences for exports to Israel. If we had judged at the licensing stage that there was a clear risk that a proposed export might be misused in contravention of the criteria, we would not have issued a licence for that transaction.

All export licence applications for Israel have been, and continue to be, assessed against the export licensing criteria and in light of the best information available at the time. The Government has always judged whether equipment would be used aggressively by Israel in Southern Lebanon and would refuse applications where this was the case. We have no evidence that equipment or components licensed for export to Israel by this Government have been used by the Israeli Security Forces against civilians in Southern Lebanon. Any such evidence would cause us concern and would be examined carefully.

Open Licences

- (g) We welcome the Foreign Secretary's caution on the future use of open licences for other than the safest destinations. The example of Zimbabwe also reinforces the need for such caution (paragraph 27).**

The Government will continue to be cautious about the use of Open Individual Export Licences. Such licences will only be issued for transactions where the Government is satisfied that an OIEL offers an appropriate degree of scrutiny of the proposed exports and where the application meets the export licensing criteria.

Morocco

- (h) We would have shared the reluctance of Ministers to agree to the proposed refurbishment. If it had remained right in their judgement that the licence should be refused, despite the views of the UN, the appeal against refusal could and should have been turned down, even if that ran a risk of judicial review (paragraph 32).**

The Government takes seriously the concerns raised by the Committee on this case. However at paragraph 32 the Committee concluded that Ministers should exercise their judgement in relation to export licence applications to Morocco. This is precisely what Ministers did, as the Memorandum provided to the Committee by the former Foreign Secretary makes clear.

China

- (i) In July 2000 we recommended consideration of a stricter interpretation of the arms embargo on China than that currently operated by the UK. If it is now the case that other EU nations are relaxing the interpretation of the 1989 embargo, that lends force to the need for a common interpretation (paragraph 33).**

As the former Foreign Secretary said during his 30 January evidence session, we are discussing with EU Partners the possibility of a common interpretation of the embargo on China. We shall update the Committee on the outcome of that discussion.

Embargoes

- (j) We conclude that vigorous efforts to procure a common interpretation, at the very least among the member states of the EU, of "limited" arms embargoes would engender a greater atmosphere of mutual confidence (paragraph 35).**

The EU arms embargo against China is the only such embargo about which there are significant differences of interpretation. The UK's restrictions on strategic exports to Cyprus were an appropriate response to UNSCR 1062 (1996) which expressed serious concern about the modernisation and upgrading of military forces on the island. However, there is no EU or UN arms embargo. We do not believe that imposing an EU embargo, even if limited, in relation to Cyprus would be appropriate at the present time.

Zimbabwe

- (k) We remain firmly in the opinion that a serious error of judgement was made in late 1998 and early 1999 in granting several Military List OIELs covering Zimbabwe. We now have also to conclude that the Government response on this point was factually inaccurate. It is also wholly irrelevant to our central concerns that a number of the OIELs were to named end-users, as adduced in the Response, since the OIEL about which we have particular concerns was for goods to be supplied to the Government of Zimbabwe, and so capable of being used in the Democratic Republic of Congo (paragraph 38).**

The Government regrets the factual error in the number of OIELs said to have been issued for Zimbabwe in late 1998 and early 1999 but points out that this was a calculation error and that details of all relevant OIELs were provided as soon as the Committees requested them.

The Government repeats that the OIELs issued during this period were generally for equipment, for example components for civil radar, sporting rifles or shotguns for game parks, which the Government was satisfied would not be used in the conflict in the DRC. The Government was content that in these cases OIELs offered an appropriate level of scrutiny and control and that the issuing of such OIELs was not an error of judgement. In pointing out that a number of OIELs were for specific end-users only, the Government was attempting to address the Committees' apparent concern that SIELs should have been used in place of all of these OIELs. The Committees have now agreed that some OIELs were unobjectionable.

The Government, however, notes the Committees' concerns over the one OIEL for aircraft spares.

Conditions on licences for police arms

(l) We recommend a thorough evaluation of the outcome of the licence for the Jamaican police so that the practice can be extended to other countries where the UK quite properly feels obliged to refuse a licence (paragraph 41).

The Government will look closely at the results of the human rights training for the Jamaican Constabulary Force being carried out by local human rights specialists and financed by the Jamaican Government. The UK Government will consider implementing similar licensing arrangements elsewhere, if appropriate.

Appeals

(m) We recommend a rethink of the target of 30 working days for settling appeals against refusals and renewed efforts to meet an achievable but challenging target. We also reiterate our opinion that a procedure be established through which companies would at least have the chance to answer the department's doubts or concerns (paragraph 48).

The Government recognises the need to improve performance and procedures on appeals, and is taking a number of steps to do so. For example, the type of procedure recommended by the Committee has now been adopted and DTI does give appellants the opportunity to make their case in person – this addresses some of the specific cases cited by the Committee.

Given that all refusals are considered carefully and decisions to refuse taken only where the Government is satisfied that this is justified, appeals cases are by nature difficult. This, and the fact that appeals require comprehensive and independent reassessment, means that many appeals take time to determine. The Committee's criticism of the Government for partially granting the Morocco licence, which was initially refused, illustrates the difficult issues involved in appeals. The Government will however consider whether the 30 working day target is still appropriate.

Prior Parliamentary Scrutiny: coverage

(n) We are prepared on an experimental basis to recommend exclusion from Stage 1 notification of–

- (i) licence applications for exports to NATO countries and other close allies, on the basis of a list of criteria to be agreed between the Committee and Ministers:**
- (ii) licence applications for dual-use goods, subject to the right to identify in the light of experience specific countries or specific categories of goods where prior scrutiny would be required: and**
- (iii) licence applications not circulated to other departments.**

That should halve the number of licence applications requiring initial notification, significantly reducing the administrative burden (paragraph 53).

Prior parliamentary scrutiny: numbers

- (o) Based on our experience of looking at three Annual Reports, and on the reference by the Foreign Secretary to having had barely half a dozen in the four years he had been in office which raised major issues, we would not expect to seek formal Stage 2 notification of more than a hundred licence applications a year. Of those, a number might in any event be refused by Ministers, leaving a handful of possibly controversial cases (paragraph 55).**

Prior parliamentary scrutiny: urgency

- (p) We are therefore prepared to concede that Ministers should be free to go ahead with the grant of a licence otherwise subject to Stage 2 notification, not only as a result of national security and operational considerations in crises or conflicts as set out in our July 2000 Report, but also where there are genuine and well-founded grounds for believing that a contract may otherwise be lost (paragraph 59).**

Prior Parliamentary Scrutiny: confidentiality

- (q) We have given this matter serious reconsideration in the light of the Foreign Secretary's remarks, and the memorandum received from the Defence Manufacturer's Association. It is really up to the Government to decide what level of classification to put on information given to a Committee. The solution to the concerns expressed on confidentiality lie in the hands of Government, and do not constitute any sort of reason to resist prior scrutiny (paragraph 63).**

Prior Parliamentary Scrutiny: provision of information

- (r) That there may be points of friction and areas of disagreement over the provision of information argues, not that the proposed system of Prior Parliamentary Scrutiny is unworkable, but that it will require give and take on both sides: a self-evident truth we do not seek to conceal (paragraph 67).**

Prior Parliamentary Scrutiny: issue of principle

- (s) We cannot agree that all "individual casework decisions" by Ministers can be automatically exempt from Prior Parliamentary Scrutiny (paragraph 70).**

Prior Parliamentary Scrutiny: Implementation

- (t) Our new proposals deserve proper scrutiny within Whitehall; but there is no reason to wait another five months for an answer. There is every good reason to have a system of Prior Parliamentary Scrutiny ready to operate as soon as committees are set up in a new Parliament (paragraph 72).**

The Government is proud of its record in increasing the transparency and accountability of decisions on export licences for arms. The Government remains committed to facilitating the scrutiny of individual export licensing decisions, as our co-operation with this Committee shows. The Government is also committed to ensuring proper Parliamentary scrutiny of secondary legislation and setting out in law the purposes for which export controls may be imposed, as recommended by

Lord Scott, and provided for in the Export Control Bill introduced into Parliament on 26 June. The Government takes great care when making export licensing decisions, in the full knowledge that they will be looked at very closely and that Ministers will properly be held accountable for such decisions by Parliament through the Annual Reports on Strategic Export Controls. The Committee has acknowledged that few other EU member states approach the UK's level of transparency and that our Annual Reports are "the most transparent reports of their sort in Europe".

The Government has looked very carefully at the Quadripartite Committee's amended proposals for prior parliamentary scrutiny of export licence applications. However, the Government remains convinced that prior parliamentary scrutiny of export licence applications would not be right in principle, and could not be made to work in practice.

Principle

While export licensing is a sensitive type of ministerial casework, the Government does not believe that it is uniquely sensitive when compared to other areas of ministerial work. The Committee has stated that these cases warrant democratic involvement. The Government agrees: a democratically elected Government, accountable to Parliament through a transparent reporting system, provides this. The Committee has reiterated that a system of prior scrutiny "would not mean that a Committee would share responsibility or take decisions". However, the Government strongly believes that bringing the Committee into the export licensing process, regardless of the formal status of the Committee's recommendations to Ministers, would in practice be bound to blur this responsibility. The Government therefore remains of the view that, as a matter of principle, it would be wrong for Ministers to be required to consult Parliament before taking decisions in individual cases.

Practical Problems

In addition, the Government believes that the Committee's involvement on this basis could compromise confidentiality, give rise to legal difficulties, and cause delay, without necessarily improving the quality of decisions.

Confidentiality

The Government attaches considerable importance to the issue of confidentiality and notes that the Committee has only partly acknowledged that need. The need for commercial confidentiality in the export licensing process, which the Committee accepted in their March 2001 report, illustrates one difference between retrospective scrutiny by the Committee and actual involvement in the decision taking process. Until a firm contract is signed, which may be some time after a licence has been granted, there is a danger that a UK exporter may be displaced by a competitor. So the public disclosure of any information before a contract is signed could be prejudicial. Moreover, after a contract is signed, information may still be commercially sensitive – in some cases, for example, an exporter may hope to supply spares and support following the original order. And overseas Governments can have legitimate requirements for non-disclosure of their military procurement programmes, for example on grounds of national security, which they would wish to see respected.

Open debate of the merits of a particular proposed export, as the Committee believes it might wish to encourage in some instances, could quite simply result in a UK exporter losing the business, whatever the Committee or Parliament's eventual recommendation would have been. The Government accepts the Committee's assurance that information provided to the Committee in confidence would be handled properly. However, preserving that confidentiality would mean the Committee could not seek the views of third parties, as it has done in order to carry out effective

¹ HC225, pxxx

² HC212, pxxvii

retrospective scrutiny. This would hamper its ability to make a positive contribution to the process of decision-making. These considerations lead the Government to conclude that transparent and effective scrutiny by Parliament is only possible after decisions have been taken; and that a report to the House or an effective Parliamentary debate on a pending licence application, as the Committee envisages in certain circumstances, would aside from the other considerations not be possible without compromising commercial confidentiality.

Legal concerns

If following the introduction of a system of prior scrutiny, in cases where the Committee's advice to the Government arose from a disagreement over policy, the Secretary of State would be unable to act on that advice without exposing the Government to an increased risk of judicial review on grounds of inconsistency and unlawful sub-delegation. Exporters have a legitimate expectation that decisions on individual export licence applications will be made on the basis of Government policy, and not on the basis of views of those outside Government.

On the other hand, where the Committee agreed with Government policy but disagreed with its implementation in respect of a particular application, it is likely that the Committee would be acting on the basis of less information than that available to the Government. The Committee has said³ that "the questions confronting Government, however apparently technical, are by and large susceptible to political judgement". The Government has announced the criteria against which it judges applications for licences to export arms and believes that a distinction between technical and political questions underestimates the complexity of the process. The judgement that is taken is ultimately a question for the Secretary of State for Trade and Industry and must take account of all relevant factors, including information not available to the Committee. The Secretary of State has a duty to take decisions consistently, so a request for Stage 2 notification of one particular application could also have implications for similar extant applications and recent decisions. Should a decision that had been subject to Stage 2 be challenged, it might be argued that the Secretary of State had been unduly influenced in one direction or another by the Committee's recommendation, on a number of grounds including unlawful sub delegation and inconsistency with stated Government policy or other decisions in similar cases. The introduction of the Committee into the decision making process would increase the uncertainties for exporters and could leave those decisions more open to legal challenge. It is also difficult to see how such a system could be introduced without the Committee taking a shared responsibility, and becoming accountable for the role it would play in export licensing decisions. That would, in turn, make its retrospective scrutiny less effective.

Processing delays

The Government stands by its belief that prior parliamentary scrutiny would introduce further delays into the licensing process. The DTI's Export Control Organisation (ECO) circulates relevant licence applications to other government departments with an interest in line with their policy responsibilities. Applications are typically considered by a number of advisors in each department. The decision is taken after synthesising all such advice, which is given from varying perspectives, different specialist expertise and on the basis of a range of facts and judgements. The process of gathering, synthesising and acting on this advice can take some time, and the Government is working hard to reduce that time. Through "Stage 2" the Committee seem to envisage acting as a privileged adviser who would be consulted after all other advice had been taken and a decision was about to be taken. Where a difference of opinion arose, the Government would, at the very least, want to explain its views to the Committee – as it does for decisions which the Committee comments on retrospectively. This is why the Government believes that the 10 days proposed by the Committee represents the very minimum additional delay, and that in practice the delay would often be a great deal longer.

³ HC467, pxxvii

Resource implications

The Committee's involvement so far in retrospective scrutiny of export controls – which the Government welcomes – has required the Government to devote resources to maintain liaison with the Committee. The Government would need to devote significant extra resources to implement the much increased level of liaison with the Committee that would be needed by the system of prior scrutiny proposed by the Committee. The Government takes these practical considerations very seriously. The Government believes that, by diverting significant extra resources from processing export licence applications, any form of prior scrutiny would risk undoing the progress that has been made in recent years to improve efficiency and would impede the further progress that the Government is determined to make.

Conclusion

The Government takes the Committee's views seriously. The Committee is able to express its views on Government policy at any time and the Government is committed to taking account of them. The Government repeats its previous offers of confidential briefings to the Committee on export control issues, with a view to improving the dialogue on policy between the Government and the Committee. The Government hopes that the Committee will decide to take up the offer.



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