

**Draft Secondary Legislation Consultation
EXPORT CONTROL ACT 2002**

**British American Security Information Council (BASIC)¹
Submission to the Consultation**

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Introduction

BASIC welcomes the publication of the Consultation Document on the secondary legislation and the opportunity it provides to further strengthen and clarify the proposed controls under the Export Control Act 2002.

BASIC has a number of comments on the consultation document, but our main focus is on licensed production, mentioned explicitly in the document on p. C.3 (explanation of the outcome of March 2001 consultation), but ignored in the proposed secondary legislation.

¹ BASIC is an independent analysis and advocacy organization which researches and provides a critical examination of transatlantic security issues, including nuclear policies, military strategies, armaments and disarmament. BASIC assists in the development of transatlantic security policies, policy-making and the assessment of policy priorities, and promotes public awareness and understanding of these policies and of policy-making in Europe and the US. With governing directors and offices on both sides of the Atlantic, BASIC facilitates the exchange of information and analysis on these transatlantic security issues in order to foster informed debate. Because BASIC is an NGO we do not see the formal questionnaire as relevant to our submission.

PART 1: Licensed Production

Our proposal to license LPO contracts

Contracts involving the use of licensed production overseas (LPO) and technology transfers are becoming more commonplace in the highly competitive global arms market. The consequences of this phenomenon are serious and widespread. . In the case of small arms and light weapons (SALW), for example, according to one study, between 1960 and 1999 the number of producing countries doubled (to 64) and the number of producing companies increased six-fold (to 385). Another study, which took a broader definition of small arms production, found evidence of 600 companies in 95 countries. Finally, the most recent research carried out by the UK-based Omega Foundation identified over 1,000 small arms producing companies around the world.

A 1995 report estimated that licensed production of small arms was taking place in at least 21 developing countries, 16 of which were also exporting the small arms they manufactured. More recent research found that at least 14 Western countries (including the United States and the United Kingdom) have small arms and ammunition licensed production agreements with 45 other countries. Licensed production in relation to major conventional weapons is also widespread but even more complex.

At present this proliferation avenue is not explicitly controlled by the UK government through licence.

The secondary legislation, as currently proposed, seeks to control the export of technology directly. Controlling the export of technology will go some way to bringing LPO into the government licensing procedure, but the proposed system has a number of drawbacks:

- 1) The government loses the chance to get a handle on the extent and importance of LPO, the growth of the sector, and the potential for monitoring end-use and development of the technology exported.
- 2) There is no overall context for the individual transfers of technologies, so that transfers may be allowed that enable, in combination with other technologies, bodies in sensitive locations to develop their own weapons systems. The full significance of a component or a particular technology may not be obvious to the particular individual involved in an email or telephone conversation with a partner engaged in licensed production, or to the official engaged in licensing the transfer.
- 3) Because there is no overall contract context, it is easier for recipients to disguise the real intention for their import of the technology.
- 4) By failing to control the licensed agreement, the government loses the opportunity to be aware of and to control the end use of the technology, both within the location and in re-export.

- 5) The enforcement of the LPO conditions (such as restrictions on the quantity of production, application and reuse of technology) are left to exporters, who have fewer resources and sanctions than the government to enforce their contracts, and who do not have identical objectives.

The US government does control LPO through the US Manufacturing License. As a result, in 1988 the US General Accounting Office (GAO) was able to investigate claims that the licensed production agreement between Colt Industries and the Korean Ministry of National defence had been violated. The licensed production of M-16 Assault Rifles by South Korea had exceeded the quantitative limits of the Memorandum of Understanding; Korea had also undertaken re-export negotiations without prior US approval. The US government were able to communicate the importance of these violations and Korea promptly ceased production and plans for re-export.

At the very minimum the UK government should work with industry to ensure mandatory end-use and re-export clauses to be included in licensed production agreements. This would involve consultation with the UK government in the initial stages of licensed production negotiations and follow-up consultation with recipient states intending to re-export finished weapons systems or technology.

Technology is by its nature flexible in its application, as well as sometimes intangible and nebulous. This makes the control of 'technology' all the more difficult. Several mechanisms to capture the undesirable export of technology would greatly improve the UK control regime. ***It is BASIC's view, therefore, that existing licensing of technology should be supplemented by the introduction of a licensing requirement for licensed production agreements.***

This licensing requirement would include:

- The extension of extra-territorial provisions applied to the controls on intangible transfers of technology to conventional as well as mass destruction technologies.
- A denial of a license for an LPO contract where:
 - an export licence application for a direct weapons transfer would be refused;
 - the recipient state cannot demonstrate sufficient accountability in terms of export and end-use control;
 - the recipient state has a record of violating UN and other international arms embargoes; or
 - there is concern that the recipient government may licence the export of the resulting equipment to countries to which the UK would not licence such an export directly.
- Provision within the LPO contract prohibiting the re-export of the equipment without the approval of the UK Government.

- Provisions within the LPO contract stating that if the overseas producer does not honour the contract, the UK Government will revoke the licensing agreement and refuse to allow the export of any subsequent parts, training, advice etc. related to the agreement. Furthermore, the UK Government will refuse to licence any additional LPO or direct exports until such time as it is satisfied that the recipient state will ensure that all future contractual obligations are honoured.

Licensing LPO contracts in this way would have three distinct benefits:

- 1) It would address all the points of concern listed above, and thereby improve the effectiveness of controls and close a potentially serious proliferation loophole;
- 2) It may facilitate clarity for both licensing bodies and exporters, leading to a more relaxed approach at the point of individual technology transfer within the overall LPO; and
- 3) It would bring the UK approach into line with US controls on licensed production, and pave the way for further harmonisation of UK-US export controls, and possibly EU-US export controls (since Sweden and Germany also licence the production agreement).

Essentially, we live in an imperfect world. Therefore, not only do loopholes have to be filled, but also it may frequently be appropriate to have more than one method in place for capturing activities that may have significant impacts on national or global security. The proliferation of weapons technology, often dual-use, is one of the most important risks facing national security. It strikes us that one tool in the potential armoury must be to license the licences. This would provide valuable data for reference by the ECO and flag up areas of particular concern that should attract greater attention. Nor should it create a significant burden for business, especially if coordinated with EU partners to provide an EU-wide system of controlling licensed production. Such an EU system, mirroring that currently in the United States, would provide a level playing field for business to operate.

The importance of LPO

Licensed production agreements range from the transfer of helicopter and fighter jet technology right down to the development of the domestic capacity to produce small arms and light weapons. Heckler and Koch, for example, license small arms production in 14 countries including Burma, Iran, Mexico, Pakistan, Saudi Arabia and Turkey; Land Rover license the production of Scorpion light reconnaissance vehicles for production in Turkey; GKN has licensed production in the Philippines to produce Simba Armoured Personnel Carriers; FN Herstal has established licensed production in Sub-Saharan Africa; and BAe systems license the Hawk for production in several states including South Korea.

Once these transfers have taken place it is very difficult to monitor the production and to verify whether the recipient states are keeping within the boundaries of the original contracts, which often include limits to the quantities produced and re-export clauses. The UK government,

through its officials in the UK and attached to embassies abroad, is clearly able to monitor some overseas production, and this can have an impact on future case-by-case licensing decisions. However, breeches often go un-noticed and production un-monitored. The potential for the government to apply pressure through various sanctions is weaker if they are not explicitly involved in the LPO contract (through licensing it).

The practice of licensed production also has indirect consequences that highlight exactly why it should be controlled and monitored by the UK government. In particular, licensee states (i.e. those who are in receipt of technology and production capabilities) are effectively being supplied with a 'head start' in terms of the research and development (R&D) of modern and lethal weapons systems. The initial R&D costs are substantially lower for these recipient states and thus provide them with the opportunity to develop more complex systems relatively easily — and beyond the monitoring and control of the UK government. The potential then exists for re-export, possibly to countries that may otherwise have been restricted from receiving technology or systems from Britain.

The secondary legislation rightly prioritises the control of the 'provision of technical assistance' in relation to WMD. However, certain forms of conventional military technology can be equally destructive or destabilising. Multiple-launch rocket systems, cluster bombs and other forms of conventional munitions can present just as strong a threat to international security as crude forms of chemical or biological weapon. The UK government has already recognised that the proliferation of small arms and light weapons can have devastating consequences in conflicts.

Standard export contracts involving finished systems frequently sit alongside LPO contracts. For example, as part of a recent direct export deal with Malaysia BAE Systems not only sold 18 Hawk Jets, but also included engineering know-how, aerospace technology and training for the engineers.

Part 2: Other aspects of the draft Secondary Legislation

Appeals

Companies and individuals have a right to appeal against refusal, but there is, of course, no right to appeal against the granting of a licence, as there is no prior scrutiny of the licensing process (although, as set out previously, we believe there should be). Export Control Officers are required to provide a written notification to the applicant or licence holder of the reasons for any refusal, suspension or revocation of a licence.² To give Officers the maximum leeway to interpret the export control criteria in a restrictive way – since preventing the proliferation of military technology is the overriding concern - the detail required for the reasons given for refusal should not be too onerous; the standard of proof at the first refusal should not be high and the place for detail should be at the appeal level.

² Page 11, para 2.11

Costs

Throughout the document the emphasis is placed upon the costs of controls and associated record-keeping to industry without the corresponding, and far greater long-term costs associated with the proliferation of weapons and their technologies. This emphasis is likely to translate into a weaker application of controls by officers working on individual applications. Companies involved in the export of military-related goods and technology are engaged in dangerous activities. Associated costs are an inevitable by-product of controls (though perhaps not at the scale reported by companies), and these costs should be borne by the companies and internalised into their pricing structure, as an unavoidable cost arising from the supply of their product.

Record keeping options

(Question 6, p.16)

Option A would more clearly communicate to companies and their employees the intention behind controls and importance of their application. However, if Option B is indeed adopted, it would be important that functional record keeping is adequate, and that training given to employees includes not only the filling in of forms, but the level of importance attached to the control of technology exports.

(QA6, p. A13)

Much is made of the costs to companies of requiring records to be kept of email transactions. The costs given here by industry appear to us to be significantly overestimated. A simple header to each email asking for a Yes/No response on whether the email contained a technology transfer would be extremely simple, and reduce the number of emails requiring more detailed records considerably. The estimates of additional costs involved in the storage of electronic records outlined in *paragraph 6.14 (p. A13)* seem grossly overstated. If these estimates are to be taken seriously the ECO should ask the companies for their calculations in arriving at such figures.

(QA7, p. A13)

We find it difficult to understand how technology can be quantified in any meaningful manner, as implied in QA7, making replies from companies next to impossible.

(QA11, p. A 16)

Many of the recording requirements outlined in *para. 6.24* are standard records required for good project management independent of any export controls. It would be erroneous to include them as part of the costs imposed on industry.

Staff training (QA 12, para 6.26)

ECO should consider making the training of all staff involved in activities that may come under the remit of the Act compulsory, and to audit the training quality, or to provide the training itself and charge the costs of such provision.

Costs to HMG

We would agree with those within industry that pointed to the danger of a lack of resources devoted to the task of running a sufficiently robust control system (*para 6.29, p. A18*). The costs outlined by different government departments and agencies do not appear to be adequate. We would highlight in particular the extraordinarily low estimates provided by Customs and Excise for the control of military technology transfers (£50,000 per annum). There are no estimates for the increased policing costs identified in para 11.2 or investigative powers for any authority. Indeed, there are no explicit plans for investigation. We can only conclude that government departments assume the Act and associated Secondary Legislation is viewed in effect as a voluntary code rather than a well-enforced legal instrument.

We would suggest that the ECO consider charging a licence application fee to cover the costs of a significantly improved system. Such a fee might be applied only to major exports of complete weapons systems, to mitigate the accusation that it would be a general tax on exports.

Barriers to entry (QA14, para 9.5)

Controls inevitably create barriers to entry into the market, but the consultation document is right to say these can be kept to a minimum. This would require existing companies to fulfil equally testing requirements as any potential new entrant. Unfortunately, all the costs of acquiring a Standard Individual Licence are loaded upfront within the application process, presenting greater difficulties to new companies. Also, Open General Licence responsibilities can be easily incorporated by existing companies into their general running systems, when new companies would have to invest significant resources in setting up such systems.

Technology on servers abroad (Question 14, p.20)

The provisions outlined in *paras. 3.22 and 3.23* open up the possibility that information could be recklessly (or deliberately) stored on servers abroad and accessed by third parties without specific permission.

ENDS