

**Fourth Meeting
Geneva, 10-14 December 2007**

**Meeting of Experts
Geneva, 20-24 August 2007**

Items 5 and 6 of the provisional agenda

**Consideration of ways and means to enhance
national implementation, including enforcement
of national legislation, strengthening of
national institutions and coordination among
national law enforcement institutions**

**Consideration of regional and sub-regional
cooperation on implementation of the Convention**

**TWO ISSUES IN BTWC NATIONAL IMPLEMENTATION: THE
CHALLENGE OF INTANGIBLE TECHNOLOGY CONTROLS AND
EXPORT LICENSING ENFORCEMENT**

Submitted by the United Kingdom of Great Britain and Northern Ireland

Introduction

1. At the 2003 Meeting of Experts the UK presented four papers on core elements in implementing legislation, intangible technology and export control legislation.¹ Much of what was said in these papers still stands. Current UK legislation is listed in the working paper presented by the EU. However, one piece of primary legislation reported in 2003, the Export Control Act 2002, had not then been brought into effect. This paper therefore offers a brief update on experience gained in the UK following the implementation of the Act by means of secondary legislation. The paper highlights key changes brought about by the legislation and the nature of publicly available advice provided by the relevant government departments on:

- (i) intangible technology controls;
- (ii) intangible technology controls: UK experience; and,
- (iii) export licensing enforcement.

¹ BWC/MSP.2003/MX/WP.8, BWC/MSP.2003/MX/WP.45, BWC/MSP.2003/MX/WP.65 and BWC/MSP.2003/MX/WP.66

2. The UK experience may be relevant for other States Parties grappling with the implementation problems presented by intangible technology controls and enforcement of export licensing. The requirements of different States Parties in this area will of course vary, depending on their circumstances; but in any case, we see the vital principle as the need for clear guidance for industry and academia on the implementation of national export licensing regulations and procedures, especially on intangible technology. Moreover, it is no use having perfectly crafted legislation if it is not effectively enforced. Attention must therefore be paid to the practicalities of effective and sustained enforcement.

Intangible technology controls: what was changed

3. The extension of controls on the electronic transfer of goods, software, and technology, to licensable military items (these transfers were already in place for dual use items) was one of the most significant changes introduced under the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003.² In doing so, the UK brought controls more closely into line with developing business practices and established equality of treatment for military and dual use items.

4. A range of other measures was introduced in the context of weapons of mass destruction (WMD). There are controls on the export or transfer of goods, software and technology related to WMD and the provision of WMD related technical assistance. These controls were also extended to cover intangible transfers, and indeed transfers by any means, to ensure completeness of coverage. The controls in the 2003 Order apply to persons in the United Kingdom and, for certain provisions, to United Kingdom nationals anywhere in the world.

5. The Export Control Organisation (ECO) within the Department for Business, Enterprise & Regulatory Reform (BERR), formerly the Department of Trade & Industry provides help for exporters on all aspects of strategic export controls via a Helpline, its website and programmes of seminars and workshops. The website includes details of all the help available, as well as guides to export controls and web-based search tools for exporters to check licensing requirements for their goods.³

6. To help implementation of the strategic export control legislation, the ECO has issued a Compliance Code of Practice. This document explains how companies and others can effectively comply with the law on strategic export controls. It also aims to increase awareness of controls amongst those affected. The Code offers guidelines for dealing with export controls, setting a standard based on existing best practice within companies. The Compliance Code of Practice incorporates case studies to provide examples of best practice, including an illustration of how companies might approach compliance procedures to deal with the legislative changes described above.

7. The ECO also carries out compliance visits to ensure that export licence users have the necessary systems and procedures in place, that they are familiar with export control legislation as it applies to their business and particular circumstances, and that their knowledge is correct and current.

² Secondary legislation made under the Export Control Act 2002

³ <http://www.berr.gov.uk/europeandtrade/strategic-export-control/index.html>

Intangible technology controls: UK experience

8. The initial introduction of these controls caused a good deal of concern within business circles. But in reality, the number of extra transactions becoming licensable has been significantly fewer than estimated. Burdens on business have thus been minimised. There are two reasons for this. First, we have found that it is rarely the case that technology is transferred electronically without an associated physical transfer of goods, which already required a licence under existing controls. Second, this was because of the extensive range of new Open General Export Licences (OGELs) that were developed and have proved to be well used by exporters. Processing times for licences covering electronic transfers are broadly comparable with those for licences covering previously controlled activities, so exporters are not receiving a slower service if their applications cover electronic transfers.

9. In the early days after introduction, there was undoubtedly a training and awareness need amongst exporters. The introduction of controls on the electronic transfer of technology means that potentially everyone who has access to email, a telephone or a fax machine could commit a licensable act if they also have access to controlled technology, thus taking export control issues into new areas within companies. It therefore quickly became apparent that all staff within companies would need to be informed of their responsibilities under the legislation. Consequently, organisations would need to consider selecting appropriate personnel, for example, those involved in sales and marketing, project management, or technical advice, to play a more active role in complying with export control legislation. This represented a challenge for industry in the early days and generated a large amount of queries and requests for clarification. However, after that initial upsurge, we have found that exporters have introduced robust procedures and improvements to their internal control and compliance systems to cope with the controls on electronic transfers. Some companies have found that beneficial side effects have resulted, in that they have reduced the chances of accidental transfers that might have an adverse business impact.

10. ECO advice to exporters stresses the importance of maintaining records of electronic transfers. These should include a description of the technology sent; details of the recipient and end-user, including the destination country; the date of the transfer or start and end dates in cases where the transfer takes place over a period of time; and any other records which the licence may specifically state.

11. The UK has recently embarked upon a major review of the legislation introduced in 2004 and, in its public consultation document, has specifically asked for feedback on the impact and effectiveness of the new controls on electronic transfers. It is fair to say though, that we would be surprised if the feedback we receive is substantially different from our own internal findings as above.

Export licensing enforcement

12. The UK system for licensing of Strategic Export Controls is operated by a single Export Licensing Community. This Community comprises four Government departments: the Foreign and Commonwealth Office (FCO), Business, Enterprise and Regulatory Reform (BERR), the Ministry of Defence (MOD) and the Department for International Development (DFID). Her Majesty's Revenue & Customs (HMRC), is the UK's enforcement authority for licensing restrictions and investigating suspected offences, including breaches involving the transfer of

intangible technology from the UK and the overseas transfer, by any means, of WMD-related technology.

13. BERR is the licensing body for strategic exports in the UK. It sets out the regulatory framework under which licence applications are considered, and the Secretary of State for BERR takes the formal decision to issue or refuse export licence applications in accordance with the appropriate legislation. The FCO and MOD act in a policy advisory capacity, providing BERR with advice and analysis on the foreign and defence policy aspects relevant to consideration of export licence applications against a range of agreed criteria, principally the Consolidated EU and National Arms Export Licensing Criteria. DFID provides specific expertise and advice in considering applications to those developing countries eligible for concessional loans from the World Bank's International Development Association. It does so by assessing the risk of whether a proposed export would seriously undermine the economy or seriously hamper sustainable development in the recipient country.

14. HMRC's enforcement framework is based on:

- (i) the legal obligation on exporters to declare to HMRC whether goods at the point of export require a licence;
- (ii) targeting customs checks on the basis of intelligence and risk;
- (iii) taking effective enforcement action against persons breaching the controls;
- (iv) dealing with intelligence and credible allegations to establish if an offence has been committed;
- (v) investigating where there is evidence of a serious offence; and,
- (vi) reporting for prosecution in appropriate cases.

15. HMRC may also call for examination of the goods where there is reason to believe that they may not conform to what is permitted by the licence, or where they believe a licence is required but has not been obtained. When in doubt, officers are able to call on experts in the BERR and, where necessary, the MOD.

16. The Restricted Enforcement Unit (REU) is a working level group of officials that acts on intelligence relating to attempted breaches of UK export controls or other attempts to supply sensitive items to countries of concern. It includes representatives of the FCO, Cabinet Office, BERR, MOD and HMRC. The REU regularly considers the latest intelligence relating to potential breaches of export controls or other exports of concern, and co-ordinates action by its member Departments. These actions can include alerting UK exporters, seizing illegal goods, investigating potential breaches of UK export controls, and informing authorities in other countries of proliferation under their jurisdiction and encouraging them to take action against them. For regulatory breaches, HMRC action may be to detain the goods until a licence is produced, or formal seizure of the goods with immediate restoration on payment of a restoration fee, and an undertaking not to export the goods without a licence.

17. All detections, intelligence and credible allegations are considered by HMRC for follow up action against three criteria: the Government's export control priorities; practicability in terms of ability to secure sufficient evidence; and the nature and seriousness of the offence.

18. In practical terms, the first step is to establish that an offence has been committed and can be proven. If so, then the case will be considered for investigation. HMRC will report for prosecution those cases where there is evidence to show that a deliberate attempt was made to contravene the licensing rules in circumstances where a licence is unlikely to have been granted. For minor cases not involving destinations or goods of particular concern, HMRC confines action to a formal warning, which could be by a letter or a visit to the exporter to ensure they are fully aware of their obligations and of the implications of any similar conduct in future.

19. In the case of intangible technology, enforcement is intelligence led and subject to the same criteria as breaches relating to tangible goods and technology. The export licensing community conducts a good deal of intelligence-led work, with a view to identifying any end users of concern and/or suspect transactions. The thrust of this work is to identify the final result of any suspect transactions, i.e. who got what and how. If an end user of concern has received goods or technology in breach of export controls, then that will always be a matter of concern. Appropriate corrective action is taken, regardless of the means by which the transaction took place.

Review of legislation

20. It is important to keep export control legislation and regulations up-to date in light of changing circumstances. For this reason the UK is currently conducting a review of the 2002 Act, although this had not been completed before the August 2007 Meeting of Experts. This review presents an opportunity to examine the effectiveness of the legislation and whether changes need to be made to meet the challenge of *inter alia*, the fast pace of technological developments and the threat from terrorists.
