

Supplementary written evidence submitted by Control Arms UK¹

Recommendations

The government should consult with external stakeholders regarding the new export control rules with a view to possible amendment within a year. Any future major review of export control trade policy should include a mechanism for meaningful external consultation.

The government should, following external consultation, issue guidance regarding the definition and implementation of the term ‘facilitation’.

The changes that weaken former decision-making thresholds or that limit parliamentary or judicial oversight should be reversed.

The government should not apply a balancing approach for criteria 3 (preservation of internal peace and security) or 4 (preservation of peace and security) but should instead reinstate the ‘clear risk’ threshold test, *inter alia* as it is clearly in the UK's national interest to maintain a high degree of convergence and cooperation with the EU in these areas and not seek to diverge from their approach or terminology.

The government should clearly define the humanitarian impacts or purposes for which arms or equipment could be supplied, and ensure that these never put at risk the integrity and impartiality of aid workers or the delivery of humanitarian aid or assistance.

The section following the Strategic Export Licensing Criteria, titled ‘other factors’, should be redrafted in more inclusive terms, so as to broaden the government’s scope for refusing licences on the basis of valid but potentially unforeseen circumstances.

Introduction

1. On 8 December 2021, in a statement to the House of Commons, the Secretary of State for International Trade announced a ‘trade policy update’, which included a new set of Strategic Export Licensing Criteria (SELC).²

¹ Control Arms UK is the UK national platform of the Control Arms Coalition, an international coalition of non-governmental organisations, research institutions and other civil society organisations working for effective controls on the international arms trade. Each individual organisation brings different areas of policy expertise encompassing a wide range of related policy concerns and therefore may not address or take specific views on or endorse all areas contained within this submission. The members of Control Arms UK for the purposes of this submission include Action on Armed Violence, Amnesty UK, Omega Research Foundation, Oxfam, Saferworld, Shadow World Investigations (formerly Corruption Watch UK) and United Nations Association-UK.

² Anne-Marie Trevelyan, UK Secretary of State for International Trade, ‘Trade policy update’, House of Commons, Statement UIN HCWS449, 8 December 2021, <https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/hcws449>.

2. Having studied the Secretary of State's statement and the new SELC, and following one subsequent one-hour meeting on 18 January 2022 with officials from the Export Control Joint Unit (ECJU), Control Arms UK would like to share with the CAEC its initial thoughts in response to these developments. It should be noted that the following is a summary of our analysis; we remain at the disposal of the CAEC to present more detailed findings.
3. Notwithstanding some improvements, we see significant problems with both the substance of the changes, and the process for their development and adoption.

The process

4. We are disappointed that the process did not provide for external consultation, and were surprised to learn from ECJU officials that it was Cabinet Office-led.
5. External consultation with the likes of parliament, civil society, industry and academics when considering significant changes to the UK system of export control, including during the development of the Export Control Act 2002 but most notably with regard to the Export Control Order 2008, has proven a very effective way of instituting change. A 2013 public consultation on improving reporting on open licences was also a productive exercise, although on that occasion the government reneged on agreed changes at the last minute. In this case, however, not only was there no engagement with external stakeholders, no one outside of government was even aware the review was happening. Nor has any impact assessment been carried out regarding the new SELC.³
6. The only related reference that we have been able to find, which was repeated by officials during our January 2022 meeting, was a statement in the House of Commons by the Secretary of State for Foreign, Commonwealth & Development Affairs on 12 January 2021 that “the Government will conduct an urgent review of export controls as they apply, *specifically geographically, to the situation in Xinjiang*, to make sure that we are doing everything we can to prevent the export of any goods that could contribute directly or indirectly to human rights violations in that region” [emphasis added].⁴ This hardly suggests the comprehensive review of the Consolidated Criteria that has in fact been carried out, and our email correspondence with the Chair of the CAEC on 15-16 January 2022 suggests the Committees were similarly blindsided, as indeed, it seems, was industry.⁵ The meeting with officials quickly underlined how external consultations

³ Penny Mordaunt, Minister of State for Trade Policy, written answer to parliamentary question tabled on 10 January 2022 by Ruth Cadbury, House of Commons, 13 January 2022, <https://questions-statements.parliament.uk/written-questions/detail/2022-01-10/100569>.

⁴ Dominic Raab, UK Secretary of State for Foreign, Commonwealth and Development Affairs, House of Commons, vol. 687, col. 160, 12 January 2021, <https://hansard.parliament.uk/commons/2021-01-12/debates/C7E8DDAA-46C2-4A47-B2D6-BBBE0A99B76/XinjiangForcedLabour>.

⁵ Penny Mordaunt, Minister of State for Trade Policy, written answer to parliamentary question tabled on 15 December

could have helped deliver a more robust and fit-for-purpose final product, both with regard to basic drafting for the sake of clarity and in the context of more significant substantive issues.

7. As one example, whereas for many years the government has committed to apply all the licensing criteria to all gifted equipment, the SELC can be read as applying only “certain of the criteria” to gifted items and even these at the discretion of the government, whereas in our meeting the ECJU officials assured us there had been no change to the previous policy. Examples of a more substantive nature appear below.

8. Recommendation: The government should consult with external stakeholders regarding the new export control system with a view to possible amendment within a year. Any future major review of export control trade policy should include a mechanism for meaningful external consultation.

Positive changes

9. There are a number of amendments which we regard as positive, including the following changes that bring the national criteria more in line with the obligations contained in the Arms Trade Treaty (ATT).
 - Repeated references to the need to assess the risk that items might be used to facilitate as well as commit certain acts, e.g. in connection with internal repression, a serious violation of IHL, gender-based violence, terrorism and with transnational organised crime. The language of ‘facilitation’ is new and raises the prospect of a broader-based approach: for example, armoured vehicles used to transport forces into a context where those forces might then use other items to commit violations might now be captured by the licensing system in ways that would not have been the case in the past. However, in the absence of published guidance, it is unclear how facilitation is to be defined and implemented within the licensing system.
 - Several explicit references to the need to assess risks relating to gender-based violence (GBV) make this type of assessment more integral to licensing decisions than was previously the case and should lead to this receiving more attention in future.
 - Whereas under the Consolidated Criteria the government was only required to ‘take into account’ certain issues relating to ‘terrorism and international organised crime’, there is now an obligation to not grant a licence in the event of a clear risk that the

relevant items could be used to commit or facilitate an act of terrorism or transnational organised crime.

10. In addition, there has been a welcome announcement of plans to enhance the military end-use control with respect to embargoed destinations, for example by applying it to a wider range of items than only those that would be ‘components in, or production equipment for, military equipment’, as was previously the case.

11. Some of these new inclusions are, however, compromised by other amendments, which are discussed below.

12. Recommendation: The government should, following external consultation, issue guidance regarding the definition and implementation of the term ‘facilitation’.

Negative changes

13. The government has said that the main motivation for the review, beyond responding to the specific circumstances in Xinjiang, has been to move into stricter alignment with the requirements of the ATT as opposed to those of the EU, in light of the UK’s departure from the latter. The ECJU advised that in addition to the technical adjustments made in order to reflect this new institutional alignment, the UK is now in a position to actively diverge from EU policy and practice where it sees its preferences and interests lying elsewhere.

14. A detailed analysis of the changes made so far tell a more complicated story, with the retention in some instances of EU-sourced wording and concepts, which raises questions about the real rationale behind some of the new rules.

‘Internal repression’

15. For example, the SELC have kept the EU language of ‘internal repression’ in criterion 2a, as opposed to changing to what would be ATT-consistent and widely understood language of ‘international human rights law’. This, it should be noted, is just one example of where external consultation would have helped: the ECJU claimed the reason for keeping ‘internal repression’ is that its removal would have been opposed by external stakeholders such as ourselves, whereas this is one example of where we much prefer the ATT terminology. Indeed, members of Control Arms UK have been consistently raising concerns over the use of the phrase “internal repression” within the EU criteria since their inception in the late 1990s.

Criterion 8

16. Also, criterion 8 (sustainable development) has been retained, whereas this is completely absent from the ATT. Note that, to be clear, we strongly support the retention of this criterion, and note as well that during the ATT negotiations the UK government fought harder than any other state to see language about development included in the Treaty text.
17. If, however, we accept at face value the declared intention to conform to ATT- as opposed to EU- type language where there are discrepancies, this ignores the UK's role in developing EU rules (both conceptually, and with respect to the technical drafting of documents) and the EU's negotiating stance for the ATT. It is not tenable to claim that the UK has had its hands tied or wings clipped due to its EU membership, in fact the opposite applies. The UK was the leading state in developing the EU's common rules governing arms exports in the late 1990s, and was the leading EU state in the ATT negotiations, where it used its leverage in the EU to advance its objectives more broadly.

Contributing to or undermining peace and security

18. The negative implications of the UK's new approach is perhaps most obviously and certainly most dangerously on display with decisions under criteria 3 & 4 to now be based on whether the items to be transferred 'would *either contribute to or undermine* peace and security', and to not grant a licence only where 'it determines there is a clear risk that the items would, *overall*, undermine peace and security' [emphasis added]. Under the former rules these criteria were purely restrictive in nature, i.e. they set out conditions under which a licence would not be granted – it was not a case of balancing different factors and coming to a decision for or against in the round.
19. This, as was accepted by ECJU officials, is a fundamental shift in approach to UK strategic export licensing, which the government is claiming is legitimate on the basis of the ATT. However, at the time of the ATT negotiations the UK was unequivocal that it did not support the language in the ATT of weighing "overriding" risk, that this language was adopted purely with the aim of persuading the US to sign on to the Treaty, and that as far as the UK was concerned it would interpret this nationally as applying the 'clear risk' test, which the UK has long championed including among EU member states.
20. Further clouding the issue, the UK has chosen to replace the ATT term 'overriding' with its own 'overall', though as it happens neither of these terms are well understood and both are problematic in a legal sense.
21. Control Arms UK is deeply concerned that the real rationale for this change – and for the departure from the 2014 Consolidated Criteria, i.e. from refusing licences on the basis of a clear risk, to refusing licences on the basis of the government determining there is a clear risk – is related to Campaign Against Arms Trade's (CAAT) legal challenges to licences issued for arms exports to Saudi Arabia.

22. It must not be forgotten that the UK's ongoing role as one of the main suppliers of the Royal Saudi Air Force (RSAF) is still to this day intensely problematic. We have, for example, credible allegations of Saudi air attacks on a prison on 21 January 2022 resulting in the death of more than 80 non-combatants.⁶ In response to criticism, Saudi Arabia almost immediately declared its actions acceptable and appears to consider the matter closed, as, according to a press release, the prison was not directly targeted and in any event was not included "on the No Strike List in accordance with the agreed upon mechanism with the United Nations Office for the Coordination of Humanitarian Affairs."⁷ But the strictures of international humanitarian law go far beyond what the Saudi Press Agency is describing here, even if its explanation is accepted at face value.
23. CAAT's first legal challenge succeeded in the Court of Appeal despite the incredibly high bar set by the existing rules. The new SELC sets this bar even higher in at least two significant ways.
24. Whereas the test previously rested upon answering the question: "is there a clear risk?" (of a named negative consequence), that test has been changed formally to whether the government *determines* there is a clear risk. In addition, the government can now legally approve licences despite the transfer being a clear risk to peace and security if it determines this risk is balanced by a countervailing potential positive influence on peace and security.
25. The additional latitude this confers upon the government's export licence decision-making and the additional weight given to Ministerial responsibility in these areas makes it considerably harder for the Government in our view, to be held accountable for the export licensing decisions it makes, either via parliamentary scrutiny or through the courts via judicial review.
26. Control Arms UK therefore urges a return to the former approach so as to allow for at least some possibility of external restraint on government decision-making.
- 27. Recommendation: The government should avoid any changes that weaken former decision-making thresholds or that limit parliamentary or judicial oversight.**
- 28. Recommendation: The Government should not apply a balancing approach for criteria 3 (preservation of internal peace and security) or 4 (preservation of peace and security) but should instead reinstate the 'clear risk' threshold test, *inter alia* as**

⁶ 'Yemen: UN urges investigation into Saudi-led coalition air raids', *Al Jazeera*, 22 January 2022, <https://www.aljazeera.com/news/2022/1/22/un-chief-calls-for-probe-into-saudi-led-air-raids-in-yemen>.

⁷ 'Joint Forces Command of the Coalition to Restore Legitimacy in Yemen: Circulations Regarding Coalition's Targeting A Detention Center In Sa'dah Are Baseless And Unfounded', *Saudi Press Agency*, 22 January 2022, <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2322966#2322966>.

it is clearly in the UK's national interest to maintain a high degree of convergence and cooperation with the EU in these areas and not seek to diverge from their approach or terminology.

Humanitarian purposes or impacts

29. The new SELC allows for the supply of arms that contribute to ‘humanitarian purposes or impacts’ in criteria 3 & 4. We are concerned that ‘humanitarian’ is not defined in the SELC and that ECJU staff were to give us a firm definition when asked. The ECJU informed us that two examples of humanitarian purposes are peacekeeping and demining, but criterion 7a in the SELC distinguishes between peacekeeping and humanitarian activities. As written, we are concerned the references to ‘humanitarian purposes’ could be used to justify the supply of arms to security forces in fragile and conflict-affected contexts which would otherwise be refused on peace and security grounds (criteria 3 & 4) or due to risk of diversion (criterion 7).
30. This could also undermine the vital impartiality of humanitarian organisations providing aid to those caught up in conflict, by allowing the supply of arms or equipment to security forces to facilitate aid delivery, or for the military imposition of so-called humanitarian corridors/safe areas, facilitating the punishment of those who rely on aid but do not support the recipient government.
31. This could therefore compromise the integrity of aid and development agencies, bringing their impartial response for those in the direst need into question, and making their job much harder to do, even in some circumstances putting aid workers’ lives at risk.
- 32. Recommendation: The government should clearly define the humanitarian impacts or purposes for which arms or equipment could be supplied, and ensure that these never put at risk the integrity and impartiality of aid workers or the delivery of humanitarian aid or assistance. This definition should be laid before parliament in an amendment or annotation to the SELC.**

Other factors

33. The government has also streamlined the text regarding ‘other factors’ which follow directly on from the criteria. While we agree that this section was in need of amendment, we fear that this has now been drawn too narrowly – the only reason to refuse a transfer in addition to those set out in the criteria is where there are ‘exceptional circumstances’ and the ‘items may have a significant negative impact on the UK’s international relations.’

34. This appears too restrictive. The UK government should always have full discretion to refuse a transfer for any reason it so decides; the underlying structure of the UK system points directly to this – arms exports are illegal unless a specific exemption (in the form of an export licence) is granted. We would therefore see ‘other factors’ as operating as a catch-all to capture unexpected and serious eventualities.
35. One example of reasonable grounds to refuse a transfer is where the sale is known, or highly likely, to involve substantial corrupt practices. This is especially relevant given that the UK’s National Anti-Corruption Strategy 2017-2022 acknowledged that ‘corruption threatens our security and prosperity, both at home and overseas. ... In particular, corruption undermined the capacity of national security institutions to fulfil their roles and, in certain cases, underpinned and facilitated an increased threat of terrorism.’⁸ With no mention in the new criteria of corruption as grounds for refusing a licence, a redrafted ‘other factors’ could give the scope for the government to act on this where necessary and appropriate.
36. The example of corrupt practices also highlights a drafting issue in the new ‘other factors’. Currently these apply only when it is the *items* that have the significant negative impact. The *decision to transfer* is excluded in this formulation, but in the case of corrupt practices, for example, it is far more likely to be the deal or the export licensing decision that is the problem, rather than the items themselves. For ‘other factors’ to function as a form of catch-all it would be more in keeping with the purpose of the criteria if it were drafted in inclusive terms, rather than using the new narrow and excluding formulation.
37. Additionally, the list of sources on which the government might draw to inform itself before making a decision on issuing a licence has been deleted. This makes the process less transparent than before and denies stakeholders access to an important consideration in understanding the licensing process, and will make scrutiny of the reason for decisions by the CAEC more difficult.
- 38. Recommendation: ‘Other factors’ should be redrafted in more inclusive terms, so as to broaden the government’s scope for refusing licences on the basis of valid but potentially unforeseen circumstances.**

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⁸ UK Anti-Corruption Strategy 2017-2022, Her Majesty’s Government, 2017, p. 7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf.