

Appendix 14



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 18, 2003

The Honorable Henry J. Hyde
Chairman
Committee on International Relations
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hyde:

This is in response to your July 16, 2003, letter requesting the views of the Department of Justice on certain questions you sent to the Secretary of State in a letter dated June 25, 2003. Since the date of your letter, we have worked with the Department of State to clarify the precise contours of the assistance the United Kingdom is willing to provide the United States in preventing and investigating diversions of U.S. defense items controlled under our International Trafficking in Arms Regulations (ITAR).

The U.S. export control system, based on individual licenses subject to case-by-case review, has proven an effective instrument in preventing unlawful diversions. There are certainly possible risks associated with the proposed exemption process. By limiting the level of domestic controls and enforcement exercised by the United States, there is potentially less protection against undesirables, including terrorists, acquiring United States munitions list items. We have made our concerns known to the various agencies involved in crafting the exemption agreements, and they have responded by creating the regimes that limit the availability of exemptions to qualified companies - which will be vetted by the U.S. Government and can be excluded by us at any time. Indeed, the State Department has assured us that it expects the number of companies seeking U.K. qualified status to be significantly smaller than the number currently availing themselves of the Canada ITAR exemption. On balance, we believe that this set of agreements could, if appropriately implemented, adequately protect U.S. law enforcement interests. Please find below answers to those questions pertaining to the Department of Justice:

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Question No. 14:

As the UK MOU on law enforcement developed by DOJ appears to rest on dual criminality as a predicate to UK cooperation, please explain how a civil contract between a UK government agency and a private British person or entity compels UK government cooperation on law enforcement matters under the arrangement?

Department of Justice Response to Question No. 14:

The contract, referred to as the "binding arrangement" in Article 3 of the License Exemption Agreement ("Agreement"), would require the qualified party to comply with U.S. law before transferring or exporting qualified U.S. origin defense items or services obtained under the exemption. The party would be obligated, under the contract, to provide records and other documents to the UK Ministry of Defence upon request. The Ministry of Defence could then provide the documents to U.S. law enforcement officials, and the State Department has recently received written assurance from the Ministry of Defence that it would do so as a matter of course, unless prevented from so doing by UK law. If the party refuses to produce the documents to the Ministry of Defence, the party may lose its "qualified status" under the Agreement and be barred from future transactions involving qualified U.S. origin defense items. Cooperation with U.S. law enforcement in the event of a breach of the contract described above is addressed not only by the contracts themselves, but also by the existing Mutual Legal Assistance Treaty between the U.S. and the UK and the Law Enforcement MOU drafted in furtherance of the Agreement. Although smuggling out of the United Kingdom may be easier because its export controls are more relaxed than those of the U.S., the act itself is still a UK violation if the ultimate destination is misrepresented to UK authorities. In such cases, not only would the MLAT apply, but the new Customs MOU would actually give us a new, more direct avenue to seek assistance of additional UK resources.

Question No. 16:

Has the State Department obtained Justice Department advice or opinion with respect to whether the contractual scheme envisaged in this arrangement presents any complications to U.S. civil enforcement actions against UK persons or entities on the grounds of strict liability, double jeopardy or otherwise?

Department of Justice Response to Question No. 16:

While not finalized, the overall contractual scheme envisaged in the Arrangement does not, in its present form, appear to present any complications to U.S. civil enforcement actions against UK persons or entities.

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Question No. 19:

Given the absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulation, has the Department queried U.S. law enforcement agencies, including Justice Department and U.S. Attorneys, to determine if there are any charges (i.e., criminal counts) associated with ongoing law enforcement investigations that would be adversely affected by establishment of the waivers?

Department of Justice Response to Question 19:

The implementation of the waivers or exemptions would not immunize prior criminal conduct. Additionally, prohibitions concerning transshipment and in-country transfers would still be applicable. The only issue the Agreement raises in connection with ongoing investigations concerns UK cooperation in those cases where this is no dual-criminality. In that regard, UK cooperation would remain, as it is now, at their discretion. Moreover, it is unclear what "illegal export activities" the Committee refers to in its statement concerning the "absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulation...." If the Committee's concern is that the Agreement is somehow "immunizing" certain parties or transactions, the Agreement has no such effect. Additionally, while the Agreement alters the licensing requirements involved in applicable transactions, any illegal conduct involved in those transactions would still be subject to prosecution despite the change in the licensing requirements.

Question No. 24:

What is the basis in the United States law for a private U.S. exporter, rather than the USG, to provide approval for third party transfers pursuant to these arrangements? Has the Department sought advice or opinion from the Justice Department regarding whether any such approvals are enforceable under United States law?

Department of Justice Response to Question No. 24:

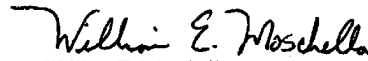
Under U.S. export control law, third party transfer is prohibited unless specifically approved prior to the transfer by the appropriate licensing official. Under Article 3(c)(iv) of the Agreement, third party transfer of any U.S. origin would be limited to other qualified parties. Consequently, a private party exporter in the U.S. would be able to give "approval" for a transfer only to a qualified party in the UK. In this regard, the exporter's "approval" is not analogous to U.S. Government approval for a third-party transfer because the qualified party has, in effect, already received U.S. Government approval to receive qualified U.S. origin defense items without a license. The notice to and approval by the U.S. exporter allows law enforcement

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officials to track an item's subsequent ownership. Any exporter "approval" to make a third-party transfer to a non-qualified party would not allow a third party to transfer the item to that party without potential criminal and civil liability. Additionally, the U.S. exporter would also be subject to potential criminal and civil liability for the transfer to the unauthorized party.

Please do not hesitate to contact this office if we can provide any further information.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Tom Lantos
Ranking Member