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8 December 2011

Valerie Evans MBE
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UK MOD
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Dear Valerie,

Re: UK Industry Views on the UK/US Defense Trade Cooperation Treaty (DTCT)

We would like to thank the UK MoD for its latest efforts, over the last few months (beginning in May and concluding in November), to consult with UK Industry on the plans for the implementation of the UK/US Defense Trade Cooperation Treaty, and for the openness and transparency with which you have sought to brief us on the plans for the Treaty, and its implementation. At the 10th October briefing of UK Industry, it was stated that it would be invaluable to assist in your efforts for UK Industry to submit it own thoughts on the utility of the Treaty, in a clear, concise and coordinated way, on a number of issues; the same questions which you raised at that time were then reiterated and discussed, at length, at the subsequent briefings on 8th and 18th November.

The Export Group for Aerospace & Defence (EGAD) is a UK-based not-for-profit making special interest industry group, founded in September 2004, focusing exclusively on all aspects of export and trade control matters. EGAD is the only dedicated national industrial body in the UK dealing exclusively with export control issues. EGAD operates under the joint auspices of ADS Group Ltd, the British Naval Equipment Association (BNEA), INTELLECT and the Society of Maritime Industries (SMI). EGAD also has informal links to the Confederation of British Industry (CBI), which often turns to EGAD for expert guidance on export control issues, as these arise. Therefore, it is proposed that it should be EGAD which will seek to respond to the UK MoD's request in this regard to put together a consolidated UK Industry response to the questions posed.

EGAD warmly welcomes this opportunity to provide input to these consultations on the Treaty, and, as you know, has undertaken to organize two further Industry briefings since that on 10th October, to assist it in trying to put together this requested paper on UK Industry's views on the Treaty. We feel that this work has enabled us to put together the following summary.

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As was stated at the 10th October briefing, it has been difficult for UK Industry to come up with an agreed common line on the Treaty and its utility, with the subject matter expert export control practitioners within Industry (making up EGAD's Members) expressing sometimes contentiously critical views which were seen to be 180 degrees divergent from those of more senior people within Industry! The following comments should be read in that light.

First of all, we would like to state, for the record, that we regard the negotiation of the text of the Treaty, itself, to be an achievement for the British Government, and we strongly believe that the UK MoD is to be congratulated for having negotiated it. Our issues are not with regard to the Treaty, itself, but are focused on its "Implementing Arrangements", as published in early-2008, and which, in our view, greatly undermine any potential Industrial benefit which could have been generated from the Treaty for "UK plc". We fully recognize that Industrial benefits for British companies were not in the forefront of the UK MoD's thoughts, when they negotiated the Treaty.

Since the latest of our meetings to date (on Friday 18th November), of course, as you know and had been accurately predicted by the UK MoD, the US Department of State has published its draft proposals for the implementation of the UK and Australian Treaties (at: www.gpo.gov/fdsys/pkg/FR-2011-11-22/pdf/2011-29328.pdf), which came out on Tuesday 22nd November, and gave us some further details on what was proposed, which has built on what was already known. We understand from informal feedback that the reaction of US Industry to these proposals has been less than positive, with some apparently stating that, at least at first sight, these proposals seem to be very similar to the existing Canadian "ITAR Waiver" (at 126.5 of the ITAR), which is EXACTLY what US Industry (as well as UK companies) had specifically NOT wanted to be the case – therefore, we understand that many in US Industry are somewhat less than enamored with the Treaty, and are not likely to want to choose to try to use it.

The sheer breadth and scale of the "Excluded Technologies" list under the Treaty's Implementing Arrangements means that many UK firms cannot, to all practical intents and purposes, make use of the Treaty, and, thus, limits its utility for companies on both sides of the Atlantic. We hope that the assurances that we have been given with regard to the potential future reduction on the scope of the technologies listed may result in additional UK firms being able to make practical use of the Treaty, but, certainly at its inception, we feel sure that many UK firms who might otherwise be wanting to apply to be part of the "Approved Community" under the Treaty, and, therefore, able to make use of it, will be significantly smaller than would otherwise have been the case. The fact, as was discussed at the 18th November briefing, that the Treaty will have no impact on other US legislation (eg the "Berry Amendment", the "Buy America Act", etc) also means that, to all practical intents and purposes, the published "Excluded Technologies" list is not definitive, and that other impediments stand in the way of other technologies which relevant UK firms might want to sell into the US market.

One major issue is that those UK firms who want to be part of the "Approved Community" will have to pass List-X type protocols in order to qualify - this will be another major (and not inexpensive) inhibitor. EGAD and ADS stand ready to assist in undertaking awareness briefings of UK firms in early-2012 to ensure that those companies who may be thinking of applying to be part of the "Approved Community" are able to do so in full knowledge of what this will involve, such that they can make an informed decision about whether they want to do so, or not. Whilst we cannot predict with any accuracy the number of UK facilities who may want to apply for membership of the "Approved Community", we are not totally convinced that the UK MoD's vetting organizations will be able to cope with the scale of workload in processing applications from entities who wanted to be part of the "Approved Community". The impact of similar requirements for those staff in the UK companies who are part of the "Approved Community" to be Security Cleared to SC level on the resources of those British Government agencies involved could also, potentially, be considerable. The cost and delay required to achieve accreditation for IT systems to carry RESTRICTED information is an additional concerning factor.

We continue to have serious concerns about some legal aspects. Section 10, and, in particular, (7)(f) seems to give the US authorities the ultimate power to access the records and visit premises in the UK, more or less regardless of the views of HMG. You have assured us that this will be specifically discussed in the Management Plan, but we await sight of the new text.

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Another serious impediment is the fact that no non-UK commercial entities are allowed to have access to the technology to be transferred under the Treaty, which we feel sure will hugely handicap its utility for many (if not all of) the larger UK firms, almost all of whom have significant global supply chains, encompassing companies from around the World. Whilst it has been stated that this would not be totally impossible, under the Treaty, and that procedures will be put into place for dealing with circumstances under which items can move in and out of the Treaty, we feel sure that, if presented with having to deal with such circumstances either by utilizing the Treaty or by the traditional ITAR route (most especially through ensuring that the US company concerned lists such commercial entities, based both in the UK or overseas, on a TAA application as "sub-licensees"), most US firms will opt for the tried and proven formula with which they are familiar, and which currently appears to be operating quite efficiently. Therefore, common sense tends to indicate that the most likely initial users of the Treaty are likely to be enthusiastic small and medium-sized enterprises (SMEs), who have very limited supply chains, most of which are based in the UK.

The fact that any UK firms who did want to apply to become part of the "Approved Community" under the Treaty will HAVE to operate and maintain at least two (2) parallel export control compliance systems, one for the Treaty and a separate one for traditional ITAR (both of which will have to be as water-tight as possible, given the potential penalties that they would have to face if anything went wrong and they were found to have been in breach of the regulations) could, in our view, be a significant, and not inexpensive, barrier for many firms. Furthermore, the different requirements for UK export controls, as well as for FMS and of EAR compliance (which may very well loom larger after the US Administration's Export Control Reform programme) could add to the number of compliance systems, and, thus, the potential complexity for companies, on both sides of the Atlantic.

The clear statement that only projects which would be applicable under the terms of the Treaty are those intended for actual end-use of either the UK and/or the US Armed Forces, alone, will also, in our view, greatly reduce the utility of the Treaty for UK Industry. The British Defence Industry has, over the last 30 years, become increasingly export-focused, and, given the current parlous state of the UK national economy in general, and the UK MoD's budgetary problems in particular, as well as the constant mantra coming out of the current British Government that UK Industry must help to rebalance the UK national economy by getting increasingly involved in export markets, we believe that the main focus for the Treaty should be on UK SMEs who are seeking to do business with the USA.

As already stated, there is also some uncertainty on issues such as what happens when an item leaves the "Approved Community" (with the Treaty and its "Implementing Arrangements" strongly suggesting that once an item leave the Community, and, thus, the Treaty, then it leaves it forever), whilst we have been assured that, for practical reasons, this is not going to be the case, and that mechanisms and procedures will be put into place to cover such eventualities. Clear guidance on this issue will be essential. It is also clear from the discussions that, whilst the focus has been to assist in making EXPORTING of controlled technology between the USA and the UK as easy and bureaucracy-free as possible, very little (if any) regard has been taken with regard to the parallel IMPORT control arrangements, and we would like the essential link between exports and imports to be featured in any guidance which is produced by both Governments on what companies will need to do in order to implement the Treaty, in order for them to make informed decisions on whether they want to apply to become part of the "Approved Community", and make use of the Treaty. The need for import licensing controls to continue, on both sides of the Atlantic, could be perceived to undermine fundamentally the original raison d'etre behind the Treaty (ie to facilitate LICENCE-FREE bilateral exchanges between the US and the UK).

We have also been concerned to hear that the UK MoD has submitted to the US Department of State a list of "intermediate consignees" (eg freight forwarders, etc) which has been generated wholly internally within the UK MoD, and without any consultation with UK Industry. I am afraid that we find this news to be entirely unfair and problematic, as it is going to disadvantage severely many specialised and experienced transport firms used by ADS and EGAD Members, or who are involved with warehousing, handling, general supply chain activity, etc, and may not already contract directly with the UK MoD. There are, we believe, other far better ideas to come up with such a list; for example, to require firms to be Authorised Economic Operator (AEO) approved, and, thus, to have thereby demonstrated an auditable standard of security and good practise. Surely that is better than some arbitrary and expedient list which has been provided by the UK MoD, and would reflect on-going parallel developments in the field of transport matters. There is also, seemingly, a measure of confusion within the UK MoD on the potential need for "intermediate consignees" to apply to become part of the "Approved Community", with the impression given at the 10th October meeting was that there was NOT going to be a requirement for them to be qualified under the "Approved Community", whilst conflicting views on this issue are now being aired. This needs to be clarified and covered in any publicly available definitive guidance which is going to be produced.

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Thus, in our view, the Treaty does have a veritable multitude of restrictions, issues and provisos which will only serve to limit its practical utility. The fact that the implementing OGEL relating to the Treaty is apparently an extremely complicated one in nature, does not bode well.

However, all that being said, even at the initial implementation stage, we are confident that there WILL be some UK firms who can, and will, be able to make good and effective use of the Treaty, when it comes into force in the Spring of 2012. As we have already intimated, chief amongst these will be UK SMEs who are looking to pursue potential business opportunities in the USA, and, therefore, it is somewhat disappointing that more of these were not included in the UK MoD's "Pathfinder" programmes to test implementation of the Treaty. For these SMEs the Treaty could well represent considerable potential commercial benefits, making it much easier, quicker and simpler for them to gain access to the information that they would need to identify and pursue potential US business opportunities.

Therefore, in response to the specific questions which were posed by the UK MoD to UK Industry, and seeking to answer these:

What types of programme will the Treaty support better than current arrangements?
This was discussed during the briefings and in our opinion can be summarised as programmes supporting UK and US Government end-users, which have a limited UK supply base (Prime and sub-licensees). Few large programmes would benefit from the Treaty as the numbers of sub licensees and locations (non UK) are highly likely to be not covered. Most projects are collaborative in nature, and very few companies work in isolation, and VERY few programmes are restricted to just the UK only, or the US only, or just the UK and US alone. Thus, the truly more globalised nature of the modern commercial World is not reflected in the Treaty. As a result, we do not collectively readily know of any major programmes which will benefit from the Treaty, although there are some smaller niche projects which may benefit. With respect to hardware transfers from the US in support of UK MoD requirements, the free movement of goods could well save time (c.6 weeks) - however, this assumes the hardware is available for delivery, as, in many instances, the manufacturing lead time exceeds the licence application lead time.

What advantage does Industry perceive from membership of the Approved Community; for instance, would Industry be more likely to bid directly for USG solicitations?
In our view, there is real potential benefit here, with regard to solicitations from the US Government. Currently it takes about 6 weeks (or so) to secure a DSP-5 licence for the transfer of technical data for evaluation and quotation purposes, and the approved licence does not permit any defense services. The Treaty, for eligible programmes, will allow for the technical data transfers and the provision of defense services without delay, and this is one of the primary benefits. However, on the Industry-to-Industry side, such benefits will, of course, be hugely contingent on the willingness of US companies to use the Treaty to provide this information to UK firms, in the first place. At present we have no definitive sight of what the appetite is amongst US firms to want to make use of the Treaty, but informal feedback is somewhat less than positive, in this regard, as, in most cases, it appears that they are sufficiently comfortable with complying with an ITAR system with which they are already familiar, and appears to be currently operating extremely efficiently, rather than wanting to have to comply with something which is new to them. Naturally, this will vary from company to company, with some being more keen to use it than others, but, in general, be do not believe that US Industry is swept with an unbridled enthusiasm for the Treaty.

It what areas will the Treaty deliver benefit for SMEs in their various guises (manufacturing, specialist technical advice, etc)?
The Treaty should greatly assist UK SMEs in all of their guises, by enabling them to receive tender information on potential business opportunities in the USA as expeditiously as possible, and with minimum delay. We strongly believe that this is the area which offers most potential benefit, and that UK firms may then opt to utilise normal ITAR routes for subsequent business which may result. The Treaty should also greatly ease the bureaucratic burden for UK firms with US-based parent companies, subsidiaries or joint venture partnerships, with regard to the potential pursuit of US business opportunities and the freeing up and making easier the liaison and exchange of information between them. This is a very significant potential benefit for a number of UK firms.

How would Industry operate a dual compliance regime and what would be the implications of that?
In our view it would not be a question of companies having to operate under a dual compliance regime, but, especially given on-going developments with the US Export Control Reform initiative, which is seeing technologies currently covered by ITAR being moved to EAR, as well as FMS sales, this is more like a multiple compliance regime being needed.

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Almost no UK companies would be prepared to contemplate operating such a compliance regime on the same programme. For relevant, new programmes the Treaty would be used for quotation purposes and then agreements and licences would be secured for contract award. In effect, unless a programme can be fully supported by the Treaty, regular ITAR compliance would be used by firms, as this is what they are already most familiar and comfortable with implementing.

What support does Industry need during the early stages of Treaty adoption and does ADS have a role to play here?

We are convinced that UK (as well as US) Industry will need clear guidance on what implementation of the Treaty will mean, which is as extensive and informative as possible, so that they can then make informed decisions as to whether they want to try to make use of the Treaty, or not. We believe that these should include the holding of detailed briefings on the Treaty and its implementation, and EGAD (as well as ADS, and all of the other relevant trade bodies involved) would be happy to assist as best as we can to organise and promote such workshop briefings.

A Member of the EGAD Executive Committee has had discussions with a number of US firms in the last month and has asked the compliance staff at all of them about their response to the Treaty. He reports that whilst many were mostly enthusiastic, they wanted to know exactly how it will work and what should be written on what document, etc to allow them to decide if following the Treaty is worthwhile or not. Therefore, much awareness work needs to be undertaken on both sides of the Atlantic to try to address this.

EGAD has already been in discussion with the US-based Society for International Affairs (SIA; www.siaed.org), with whom it has worked before on promoting awareness of ITAR compliance issues within UK Industry, about the holding of awareness briefings on both sides of the Atlantic to assist both UK and US companies to make informed decisions on whether they want to try to make use of the Treaty, or not. Once the decision is made to go ahead with the implementation of the Treaty, these efforts should be activated. We would also do all that we can to produce detailed guidance documents (in association with both the SIA and the UK and US Governments), and post this up on our website, again to assist UK firms to make informed decisions on whether they want to make use of the Treaty.

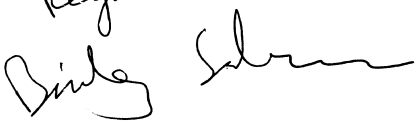
What (additional) information does Industry need to make a balanced judgement on whether to invest in membership of the Approved Community?

We have already mentioned several areas of uncertainty, where clarification is needed. This includes the treatment of items leaving and re-entering the approved community - are they permanently excluded or not? You have also assured us that the more inequitable aspects of Section 10 of the Implementing Arrangements will be modified in the 'Management Plan'- clearly we shall need to know in what terms. We are aware of a number of UK firms do actively and knowingly want to be members of the "Approved Community", as they feel that it provides additional options when dealing with the USA. With regards second and third tier suppliers (sub-licensees) in a supply chain, it is unlikely that they would want to join the community, as very few of these companies are likely to be List-X approved or have SC security clearances in place for its staff. Given the limited potential benefit for these firms (in most cases), the sheer investment in time, resources, effort and money would not make this a viable option. Also, as discussed at the 8th November workshop, we feel that we should officially state that UK Industry feels that the list of UK members of the "Approved Community" MUST be posted up (and kept up to date) by the US Department of State on a public domain website, for the benefit of US Industry.

Meanwhile, the on-going efforts at Export Control Reform (ECR) which are currently taking place in the USA, are also, we feel, certain to be reducing the potential appetite of US companies to be able to make use of the Treaty (and also its Australian counterpart), as, for them, as well as for companies all around the World, the potential benefits of the ECR could greatly outweigh anything which might come out of the Treaties. No-one is quite sure how the ECR efforts (and especially the re-classification of ITAR-controlled items) will dove-tail into the future development of the Treaty, and what its potential impact may be on the latter. Hopefully, these may prove to be beneficial and encourage further UK companies to want to sign up to become part of the "Approved Community".

We hope, and trust, that the above comments are of assistance to the UK MoD in its planning for the implementation of the Treaty, and stand ready to assist as best we can in this endeavour.

Regards



Brinley Salzmann - Secretary, EGAD