

Controlling Private Military Services in the UK and Germany: Between Partnership and Regulation

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The emergence of a private military service industry has attracted considerable academic and public attention in recent years. In particular, the controversial involvement of private mercenary companies such as Sandline International and Executive Outcomes in Sierra Leone and Angola have spawned a growing literature on the privatization of national and international security and its problems (Mandel, 2002; Nossal, 2001; Singer 2001/2; Zarate, 1998). The main the problems identified in these studies are challenges to state sovereignty, the militarisation of societies, criminal activities such as trafficking in arms, the exploitation of natural resources, and the lack of transparency and accountability of these companies. Moreover, authors point to the lack of national and international regulation of private military companies.

The aim of this article is to present a different perspective of the character of the private military industry and the governance of the sector. Specifically, it suggests that one needs to distinguish between the use of private mercenaries in developing countries and the privatization of military services in Europe and North America. While so far most studies have tended to generalise the experiences with private military companies in the Third World, this article focusses on Western Europe. Two reasons support this focus. First, although the use of private mercenaries in Africa has been best publicised, the large majority of private military companies are not only based on Europe and North America, but are also employed by governments in industrialised countries. Second, while developing countries may be most threatened by the problems linked to the use of private military companies, governments in industrialised countries are best placed to regulate them.

To understand the nature of the private military industry in Europe and the mechanisms used by industrialised nations to control it, this article builds on the argument that the outsourcing of military services in Europe and North America can be understood in terms of a shift from 'government' to 'governance' (Krahmann,

2003). As a consequence, governments are developing new means for controlling the increasingly private provision of public services. This article uses the examples of the United Kingdom and Germany to analyse two governance mechanisms in particular: public private partnerships and governmental regulation. The first mechanism involves different types of commercial relations between public and private actors, including outsourcing, joint ventures and public shareholding. The second mechanism sets the legislative framework for the operation and export of private military services. The comparison between the two countries is particularly interesting because each has adopted a very different approach towards the governance of private military services.

Before one can turn to an analysis of the private military industry in Europe, it is necessary to clarify what is meant by 'private military companies'. Typically, the literature distinguishes three categories: mercenary firms, private military firms and private security firms based on whether they provide combat services, military training and strategic advice, or logistics and technical support (Cleaver, 2000: 136; Adams, 1999: 2, Brooks, 2000: 129; Singer, 2001). However, most studies recognize that these categories are at best ideal-types and that many companies provide functions across these areas.

The analysis presented in this article, therefore, focusses on private military services rather than companies. It defines private military services as services directly related to the provision of national and international security which are offered by registered companies. These services can take a variety of forms from combat to military training, advice and logistics. In Europe, and in this article, they are confined to the latter. The definition also includes services provided by semi-private and government-owned firms if they take a company structure and operate under corporate law. It excludes policing services which refer to the security of private persons and companies at the domestic level. For this reason, this article prefers the term 'private *military* services' over 'private *security* services' which is also used in reference to private policing (e.g. Waard, 1999).

Governance through Public Private Partnerships

One of the most central mechanisms for the governance of the private defence industry in Europe can be subsumed under the heading 'public private partnerships'. The term includes a variety of arrangements which are defined by different relations between governments and private companies in the public service sector. Public private partnerships can range from the outsourcing of single functions or entire service sectors to joint ventures and fully government-owned private companies. Each type of public private partnership is associated with different forms and levels of governmental control. Whereas outsourcing provides supervision through commercial contracts, joint ventures and shareholding directly involve governments in the provision of public services.

The following sections examine how the United Kingdom and Germany have employed different forms of public private partnerships to shape the outsourcing of military services. It shows that, although both countries have embraced the belief that private companies are able to provide military support at better value for money than their national armed forces, they have adopted different positions on whether and how to control their emerging private military service industries.

The United Kingdom: From Outsourcing to Private Finance Initiatives

The outsourcing of military support services to private companies has been one of the most notable features of the reform and transformation of European militaries in the 1990s. One of the frontrunners in this development has been the United Kingdom, where the Labour government under Tony Blair has progressively expanded the role of private military companies in the provision of national and international security functions.

The British government has fostered the development of a private defence industry since the mid-1980s. At the time the Thatcher administration began with the privatisation of the national armaments industry, including the British Aircraft Corporation, Royal Ordnance, Rolls Royce and the Royal Dockyards (Edmonds,

1998:121; Lovering, 1998: 227). Since then the New Labour government has further advanced the use of private companies with the outsourcing of a growing range of military services. While early projects introduced the private provision of non-military services such as support vehicles, the handling of equipment and housing estate management, the scope of public private partnerships was soon extended to include contracts for the privatization military service functions.

One of the first steps has been the outsourcing of military training, such as the private sector provision of flight simulators and instructors for the Hawk Synthetic Training Facility in Anglesey in 1998. Another example is the Medium Support Helicopter Aircraft Training Facility which provides initial and continuation training as well as mission rehearsal for the RAF's fleet of Puma, Chinook and Merlin aircrews. Since then the British Ministry of Defence has signed contracts with a multiplicity of private companies for the training of pilots for the RAF's attack helicopters, light aircraft, Lynx helicopters and Tornado fighter jets, of crewmen for the Navy's ASTUTE class submarines, and of 16-17 year-old students at the Army's Foundation College.¹

Originally the majority of public private partnerships involved the outsourcing of military services to private companies. In particular, the 'Competing for Quality' initiative which was initiated during the 1990s 'encompassed 160 areas of business, costing some 1.5 billion annually' half of which were outsourced to private businesses². The British government has thus from the start adopted a market-oriented approach to the emerging private military service industry in the United Kingdom. The outsourcing of military functions to private firms has been designed to draw on the existing expertise of private businesses in producing services at maximum value for money. Governmental involvement in the privatized sector has been perceived as hindering this aim because it would restrict companies' ability to operate according to market principles. Instead, officials were instructed to view private firms as partners which should have an equal input into how services are

¹ A database of MoD Private Finance Initiatives which is regularly updated can be found at: <http://www.mod.uk/business/ppp/database.htm>

² See 'Elements of PPP in Defence - Extracts from a speech by the Minister of State for the Armed Forces, John Stellar MP to the PFI and Defence Conference, March 2000', at: http://www.mod.uk/business/pfi/ppp_defence.htm.

provided (MoD, 2001). Contracts have provided the primary means of governance in these schemes. However, while the exclusive reliance on contracts as a control mechanism seemed to be justified by the initially non-military character of privatized services, a number of developments have begun to change the nature of public private partnerships in recent years.

In particular Private Finance Initiatives, which continue to be announced as the Ministry of Defence's (MoD) 'first choice method of funding new capital projects'³, have substantially transformed the relationship between the public and the private sector in military affairs. Although the MoD has since the inception of the programme become more critical of the use of PFIs and has established strict criteria for the evaluation of their economic and military suitability for individual projects, the MoD had signed over thirty Private Finance Initiatives with a value of over £1.4bn by 2002 and was considering more than ninety new projects with an estimated value of £6bn.⁴ Under the PFI scheme, the British government invites private companies to bid for not only for the servicing, but also the construction and maintenance of military facilities. Private companies finance these projects in return for military service contracts with the British government which typically last between ten and forty years and guarantee continuous income in the form of agreed fees. In addition, some projects allow companies to generate 'third party revenue' from the sale of spare capacities to private customers in the UK and abroad, although the contracts can include controls for sensitive destinations.

Notable about the PFIs is that they influence the structure of the private defence sector. In particular, the PFI scheme has facilitated the growth of the private military service industry in the UK. Moreover, since British PFIs require a prime contractor, i.e. a single company which signs the contract with the government, they have fostered close prime contractor-supplier relations and the creation of consortia specifically designed to compete for MoD projects (Matthews and Parker, 1999: 28, 32). The PFI contract for the Medium Support Helicopter Aircraft Training Facility, for instance, is held by CVS Aircrew Training which is a consortium of CAE Electronics,

³ 'The Private Finance Initiative', at: <http://www.mod.uk/aboutus/factfiles/pfi.htm>.

⁴ See 'Public Private Partnerships in the MoD: MoD's Approach to the Private Finance Initiative', at: <http://www.mod.uk/business/pfi/intro.htm>.

Vega and the outsourcing specialist Serco. Under the contract CAE designs, builds and operates the facility, while Vega supplies computer or internet based training products and Serco provides the training. Many of these consortia are not led by service companies, but by defence corporations which are thus seeking to enter the market for military services. In addition, defence corporations are increasingly bidding directly for training, maintenance and servicing related to their equipment.

Another characteristic of the PFI programme has been the growing range of functions which have been delegated to private companies. While initially outsourcing was confined to non-military support and management, it is including more and more military functions such as logistics and training. As a consequence, private support operations have increasingly moved towards the front line. Although the British government maintains that there is a distinction between combat, which remains the prerogative of its national armed forces, and combat support, which may be delegated to private military companies, this distinction is weakening. In particular, the concept of 'Sponsored Reserves' challenges the notion that there is a clear line between armed forces which operate in the field and the employees of private military companies which will not become directly exposed to military conflicts.

The Sponsored Reserve concept, which was incorporated into British law in the Reserve Forces Act (Part V) in 1996, envisages that private military companies provide services in conflict situations by enrolling parts of their workforces as voluntary Sponsored Reserves.⁵ These employees will become reservist members of the Armed Forces and will receive training accordingly. The use of Sponsored Reserves is tightly regulated. When serving with the Armed Forces, they are subject to the Service Discipline Acts and Service regulations. Moreover, Sponsored Reserve employers have no right to appeal against a call out. Like other reserve forces the maximum call-out period is nine months, however, for Sponsored Reserves this might be extended with the agreement of the reservist and the employer. So far Sponsored Reserves have only been used in the Armed Forces Mobile Meteorological Unit. However, further Sponsored Reserves have been agreed upon under the Heavy Equipment Transporter contract signed in December

2001. The contract will outsource the transport, deployment and evacuation of tanks and other heavy vehicles in international crises. More Sponsored Reserves are planned for the Future Strategic Tanker Aircraft for in-flight refuelling, which will at £9bn be the most costly Private Finance Initiative project so far.⁶

With the Private Finance Initiatives, the British government is thus progressively transforming the relationship between the public and private sector. Not only is the growing scope of private military services and the move towards the front line increasing the dependence of the MoD on private firms, prime contracting also facilitates the national and transnational consolidation of the industry which contributes to reducing the competition among private companies (Matthew and Parker, 1999: 33). Moreover, Private Finance Initiatives with their long-term commitments of between ten and forty years place a heavy burden on the design and management of public-private contracts. Most contracts establish a close rapport between the MoD and the private sector companies. However, if this fails, the renegotiation of the initial terms of a contract can be costly. Moreover, while minor reviews occur on average after five years, the majority of contracts include only one major review - usually at half term - which allows for the discontinuation of the arrangement. Since the PFIs mean that the ownership of military service facilities as well as technical expertise remains with private companies, the MoD may find it difficult to opt out of such contracts because it will lack the facilities and staff who could replace the private contractor in the short term. Most crucially, the terms of PFIs are not public. Moreover, unlike governmental regulation, PFI contracts do not have to be approved by Parliament - neither, in fact, has the call-out of Sponsored Reserves. Thus, while contracts between the government and private military companies or Sponsored Reserves may give the executive some control, they lack transparency and offer only limited public accountability.

Germany: Between Selective Privatization and Shareholdership

⁵ Reserve Forces Act, 1996, at: <http://www.hmso.gov.uk/acts/acts1996/1996014.htm>.

⁶ 'Sponsored Reserves', at: <http://www.mod.uk/business/ppp/reserves.htm>.

In recent years many European countries have looked to the UK as a model for the outsourcing of military services and have embarked upon similar measures (Roos, 2000). Germany has taken steps towards the use of private companies through the reform of the Bundeswehr since the mid-1990s. The approach taken by the German government in the outsourcing of military services, however, has been quite distinct from that of the United Kingdom. Although the German government planned to introduce market principles into the Bundeswehr as early as 1994, it has been much more cautious in the outsourcing of military functions than the UK. Not only has privatization been slower, the German government also has tried to maintain direct control over military services through government ownership.

The first steps towards the use market mechanisms were made in 1994 when the Minister of Defence ordered for the entire military services to be redesigned and - 'where appropriate' - to be privatized (BMVg, 1998). However, significant progress was only made with the signing of the Framework Agreement 'Innovation, Investment and Efficiency in the Bundeswehr' between the Minister of Defence and representatives of the German economy on 15 December 1999 (BMVg, 2001a: 2). By today nearly 700 private companies in Germany have signed up to the Framework Agreement which identifies fourteen pilot projects for the privatization of military services.

The projects envisaged under the Framework Agreement range from information technology to military training and logistics, and take the form of conventional outsourcing of military services to private companies. In these outsourcing schemes the Bundeswehr maintains the ownership of military assets, while private firms are taking over associated services such as management, operation and training. So far only a limited number of pilot projects have started. They include the privatization of an Army Combat Training Centre and a training facility for the Eurofighter aircraft. The three-year Euro 75m contract of the Army Combat Training Centre went to GÜZ-System-Management Ltd., a company owned in equal shares by STN Atlas Elektronik, EADS/Dornier and Diehl. Under the terms of the contract, GÜZ operates and maintains the facility and its vehicles. It will also provide training support. The details of the Eurofighter training project are yet to be

decided.⁷ However, the development and manufacture of synthetic training aids for the Eurofighter Typhoon aircrew has been contracted out to Eurofighter Simulation Systems Ltd. (ESS), a consortium of STN Atlas Elektronik and CAE Ltd. of Germany, Thales Training and Simulation from the U.K., Indra of Spain and Meteor of Italy.⁸

Essentially the pilot projects under the German Framework Agreement are comparable to the early outsourcing of military services in the United Kingdom. The main control mechanism in these public private partnerships are short-term contracts with private service providers. Moreover, the German government has not hesitated to immediately expand the scope of private military support from management functions to essential services such as the training of fighter pilots. However, the duration of the contracts presents a controlling factor which not only prevents long-term dependence of the Bundeswehr on a single service provider, but also can act as an enforcement mechanism because the continuation of the public private partnership is based on the satisfaction of the Bundeswehr.

While the Framework Agreement envisages the private provision of individual military services on the basis of case-by-case market testing assessments, the German government has taken a different approach with regard to the management of three core segments of the Bundeswehr: white fleet, clothing supplies and information technology.⁹ To evaluate the options for public private partnerships in these and other areas, the German government created the Association for Development, Procurement and Operations ('Gesellschaft für Entwicklung, Beschaffung und Betrieb', GEBB) in 2000.¹⁰

Unlike the British MoD, the fully government-owned GEBB appears to have been keen to maintain a direct involvement in the provision of military services. While

⁷ See 'Kooperationsprojekte zwischen Bundeswehr und Wirtschaft', at: http://www.bundeswehr.de/reform/hintergrund/ref_hg_projektliste.php; 'Viel werden das Ticket haben wollen', http://www.bundeswehr.de/forces/020920_eurofighter_einfuehrung.php

⁸ 'Simulators are go', ETSNEWS, at: http://www.ets-news.com/eurofighter_typhoon.thm.

⁹ A fourth area - estate management - was considered for privatization, but was eventually withdrawn from the list. In particular, the GEBB argued that the management of the Bundeswehr estates was too heterogeneous and strategically too important for a wholesale privatization. However, plans by the GEBB to split the estate management into different sections which would have allowed for the outsourcing of single service elements to private companies failed because they proved too complex.

the GEBB admits that the outsourcing of the three core areas to private companies would achieve the highest possible efficiency, it has repeatedly made the case that privatization finds its limits where military services of 'strategic relevance' are concerned.¹¹ In particular, the GEBB has argued that the German constitution requires that the Bundeswehr preserves a control and coordination function over the private provision of military services.

For the management of the white fleet the GEBB has, therefore, created the BwFuhrparkService, a joint venture which is owned to 75.1 percent by the GEBB and to 24.9 percent by the Deutsche Bahn AG, the German train company which is also government owned. The joint venture sufficiently takes into account the size and strategic importance of the white fleet by reserving strong intervention rights and options for the government. Specifically, the arrangement contractually safeguards the steering authority of the government and places representatives of the Bundeswehr on its board of chairmen (BMVg, 2001a: 20).

The greatest contribution of the private sector has so far been in the second currently operating company, the LHBundeswehr Bekleidungsgesellschaft, which provides clothing for the Bundeswehr. In this case, the GEBB has set up a semi-privatized company with a government minority shareholdership of 25.1 percent. The remaining 74.9 percent are owned by a consortium of the German subsidiary of the American corporation Lion Apparel and the Osnabrück-based Hellmann Worldwide Logistics.

The third sector, the IT provision of the German armed forces, is being investigated under the name Project 'HERKULES'. Given the sensitivity of IT for the Bundeswehr, the government is considering a similar model, but with a significantly higher government share of 49.9 percent. Further public private partnerships and outsourcing projects are currently explored in the areas of food services, logistics and training.

In contrast to the United Kingdom, the above illustrates how the German government is using corporate shareholdership and joint ventures as mechanisms

¹⁰ 'Von Grund auf', at: <http://ministerium.bundeswehr.de/presse/146.php>.

¹¹ 'Public Private Partnership im Bereich des Bundesministeriums der Verteidigung', at: <http://www.bundeswehr.de/pic/pdf/reform/PubPrivPartnership.pdf>

for the control of private military services. Rather than relying exclusively on contractual obligations, these public private partnerships enable the Bundeswehr to exert immediate control over these companies and determine how services are provided. This ability is crucial where, as the GEBB asserts, strategic concerns are more important than cost efficiency. Moreover, through governmental shareholding the Ministry of Defence becomes publicly accountable for the operation of private military services.

In spite of its advantages, however, the German 'Sondermodel' has recently run into problems. Following a ruling of the Higher Superior Court of Düsseldorf of 30 April 2003, even companies with a governmental minority shareholding, such as the LHBw Bekleidungsgesellschaft, are now subject to public procurement procedures.¹² The ruling thereby eliminates one of the main cost reducing effects of government shareholdings and may result in pushing the Bundeswehr towards full privatization or conventional outsourcing projects.

Governance through Regulation

The preceding sections have illustrated how public private partnerships can be used to structure and steer the private military service sector in Europe. Nevertheless, public private partnerships are not always a sufficient mechanism for ensuring the transparency, accountability and control of private military companies. In particular, the export of private military services is a contentious issue. Due to shrinking relative defence budgets and the limited size of national defence markets in Europe, exports have increased in their importance during the 1990s. In the armaments sector this has been evident in the rising proportion of exports in most major European countries.¹³ So far no data is available on the export of private military services. However, both the UK and Germany appear to expect that private military companies will achieve some cost-savings from the sale of excess capacities to third

¹² Oberlandesgericht Düsseldorf, Verg 67/02, 30 April 2003.

¹³ See SIPRI (2002) Trends in Arms Exports in the USA, the UK and France, 1990-1998, at: <http://projects.sipri.se/milex/aprod/trendstab3.html>, and SIPRI (2002) National Arms Sales and Arms Exports, Western Europe 1990-2000, at: <http://projects.sipri.se/milex/aprod/trendstab1.html>

parties within the country or abroad. In addition to the spread of armaments and dual-use goods, the international community thus increasingly faces risks from the proliferation of military knowledge and expertise, including tactical advice and training.

In response to these threats, European governments have used national regulation as another governance mechanism to control their emerging private military industries. In particular, three sets of controls are relevant for the private military industry: the regulation of private policing, the licencing of armaments and dual-use exports, and the regulation of mercenaries and private military companies.

The regulation of private policing is one area which potentially shapes the provision of private military services in Europe. Whether and to what degree it does so mostly depends on the definition of private policing or security services embraced by different countries and the amount of national regulation. A comparison of national legislation conducted by the European Confederation of Security Services (CoESS) and the Union Network International (UNI) shows significant differences (Weber, 2002). Some European countries, such as Denmark, Finland, France, Portugal and Spain, have strict and comprehensive controls of private security services. Others, such as Germany, Austria and Italy, have only narrowly defined regulations (Weber, 2002: 5). Some countries have had laws controlling the private security services since the early 1980s. Whereas the United Kingdom and Ireland have for a long time favoured a self-regulation of the sector and have introduced national legislation only in 2001 (Weber, 2002: 7-13). With the growth of the industry, however, most governments have taken a more proactive approach towards the regulation of private policing and security services. In particular, the United Kingdom and Germany have recently strengthened their controls.

The second set of regulations which have an impact on the private defence industry are national armaments and dual-use export controls. Although these controls have traditionally focussed on equipment, in recent years there has been a growing recognition that non-proliferation policies need to be adapted to changing practices and technologies. Part of this development has been the licencing of the electronic transfer of sensitive technologies. In addition, the spread of small arms has given rise to strengthened controls on the trafficking and brokering of weapons.

Finally, the United Kingdom has been the first European government to investigate the possibility of regulating of mercenaries and private military companies. The process has led to the publication of a Green Paper 'Private Military Companies: Options for Regulation' (FCO, 2002) in February 2002. However, so far the British government has failed to announce a timetable for the drafting and implementation of such controls.

Examining each sets of regulations in the United Kingdom and Germany, the following analyses to what degree they allow both countries to control the transfer of private military services.

The United Kingdom: High Profile, Little Punch?

At first sight the British government appears to have the broadest range of regulatory measures to supervise the transfer of private military services abroad. Not only has the United Kingdom regulations for private policing services, it has also recently expanded its controls for armaments, and it is considering the licencing of private military companies. Nevertheless, the high profile legislation which has been introduced by the New Labour government seems to be less strict than controls which have been used by other European countries for some time.

Notably, the United Kingdom only introduced regulations for private policing services in May 2001. The Private Security Industry Act 2001, which sets the basis for the governance of domestic private security services, however, has not yet been fully implemented and is therefore difficult to assess (HMSO, 2001). The Act established a Security Industry Authority (SIA) which will specify licencing criteria and supervise their enactment plans licences for door supervisors, wheel-clampers, keyholders, manned guarding, private investigator and security consultants.¹⁴ Most licencing procedures will be published and implemented from the end of 2003. Conditions which *can* be attached to licences include training, registration and insurance, the manner in which activities are to be carried out, the production and

¹⁴ SIA, 'Who will need a licence?', at: <http://www.the-sia.org.uk/licences/who-will-need.asp>.

display of the licence and information that the licensee is to provide to the SIA from time to time.¹⁵

As far as private military services are concerned, the Act includes a number of regulations which may contribute to the governance of the sector. However, it needs to be noted that these regulations will only apply to services offered within the UK. As soon as a British company operates in another European Union member state, a different national law applies. In particular, the private military industry might come to be affected by the licencing of security personnel which carries arms, the training in the handling of arms, the gathering of intelligence and the policing of military facilities. Not controlled by the Private Security Industry Act are services relating to strategic training, military logistics and management. The export of military services to customers overseas is also not covered by the legislation.

Potentially more effective controls for the transfer of private military services have been included into the British legislation of armaments exports which is currently undergoing a major review. The British Export Control Act 2002, which received Royal Assent on 24 July 2002, for the first time envisages controls for the provision of technical assistance abroad as well as for the brokering and trafficking of arms (DTI, 2002a). The Export Control Act 2002 replaces the Import, Export and Customs Powers (Defence) Act which was passed in the run-up to the Second World War in 1939 and seeks to bring current British legislation in line with requirements of the European Union and international obligations. Specifically, the act implements the Statement of Principles on trafficking and brokering published in the Third Annual Review of the EU Code of Conduct on 11 December 2001 (DTI, 2002b: 7), and the European Joint Action of 22 June 2000 on the provision of technical assistance (CFSP, 2000/401).

Private military services will come under the influence of the new controls because the Draft Orders on the implementation of the Export Control Act which are expected to lead to secondary legislation by the summer of 2003 define technical assistance as 'technical support related to repairs, development, manufacture, assembly, testing, use, maintenance or any other technical service [...] outside the EC' (DTI, 2002b: 25). In addition, private military companies are affected by the Act if

¹⁵ SIA, 'The Private Security Industry Act', at: <http://www.the-sia.org.uk/legislation/the-act.asp>.

they engage the trafficking and brokering of 'military and paramilitary equipment of the U.K.'s Military List' (DTI, 2002b: 30). Specifically, the proposed Draft Order states that 'a licence will be required when a trader who owns controlled goods in a country overseas and either moves them to another country, or disposes of them through sale, lending, letting or giving them away in a transaction which he knows or has reason to believe could result in them moving to another country' (DTI, 2002b: 31).

However, while the new controls affect some forms of private military services, the Export Control Act 2002 does not explicitly concern itself with the regulation of the private military industry. The main imperative for the extension of export controls to the transfer of military services such as technology and technical assistance is the growing perception of threat from the proliferation of weapons of mass destruction (WMDs). Consequently, the proposed regulations only require licencing if these services are linked to WMDs. The provision of technical assistance and technology related to conventional weapons remains unregulated. Moreover, the regulations concerning the brokering and trafficking of controlled weapons only apply 'where any relevant part of the trade transaction occurred in the UK' (DTI, 2002b: 31). This will allow UK nationals to engage freely in the trafficking and brokering of arms as long as they close their deals abroad (Eavis and Mepham, 2003; Bunting, 2002; Mephan and Eavis, 2002).

The failure of the British Export Control Act 2002 to regulate the export of private military services is the more remarkable since the consultations about the Act have been conducted parallel to the drafting of the British Green Paper 'Private Military Companies: Options for Regulation' (FCO, 2002), its discussion in the Ninth Report of the House of Commons Foreign Affairs Committee (FCA, 2002) and the subsequent response of the British government¹⁶.

The Green Paper, which is the first and so far only attempt by a European government to explore legislation on mercenaries and private military companies, lists a variety of options for their regulation, their advantages and disadvantages (FCO, 2002: 22-26). Specifically, the Green Paper examines three policy options: (1)

¹⁶ Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, 'Private Military Companies', October 2002, online at: <http://www.fco.gov.uk/Files/kfile/cm5642.pdf>.

a national and international ban on mercenary activity, (2) national licencing of private military companies and exports and (3) the self-regulation of the industry.

The first option would be the most effective, but is dismissed both by the Green Paper and the Foreign Affairs Committee Report on the grounds that it would be too difficult to enforce because of the problem of defining mercenary activities, because it would 'deprive weak but legitimate governments of needed support' and because it would deny British defence exporters legitimate business (FCO, 2002: 23, FAC, 2002: #102).

The second option appears to be favoured by both documents. The Green Paper specifically discusses the licencing of contracts for military and security services abroad. It states that activities for which licences were required might include 'recruitment and management of personnel, procurement and maintenance of equipment, advice, training, intelligence and logistical support as well as combat operations. [...] For services for which licences were required, companies or individuals would apply for licences in the same way as they do for licences to export arms (though not necessarily to the same Government Department). Criteria for the export of services would be established on the same lines as those for exports of arms' (FCO, 2002: 24). In addition, the Green Paper raises the possibility of a registration of private military companies, the notification of the government of contracts for which companies are bidding, and a general licence for private military services to a specified list of countries (FCO, 2002: 24f.). It seems most sceptical of the last option which it argues 'would provide little protection for the public interest' (FCO, 2002: 25). However, the Green Paper admits that a general licence could be used in conjunction with other regulatory measures.

The Foreign Affairs Committee broadly follows this line by recommending that 'each contract for a military/security operation overseas should be subject to a separate licence, with the exception of companies engaged in the provision of non-continuous services for whom the Government considers a general licence would suffice' (FAC, 2002: #123). However, the Committee also supports that 'private military and security companies be required to obtain a general licence before undertaking any permitted military/security activities overseas' (FAC, 2002: #134).

The third option of encouraging the self-regulation of the private security industry is considered insufficient in both documents because it would prevent the government from restraining private security companies which were acting contrary to British national interests abroad (FCO, 2002: 26; FAC, 2002: #137).

However, while the British government has examined some of the options for the regulation of mercenaries and private military companies, so far no progress has been made on the drafting of these regulations. In fact, if the lengthy process which led to the regulation of the private security industry can serve as a model, British controls for private military services cannot be expected for some time.

In conclusion, the regulation of private military companies in the United Kingdom remains limited. Moreover, the failure of the Export Control Act to include the trafficking and brokering of British nationals or residents when abroad, might indicate a general unwillingness of the British government to fully exploit available governance mechanisms for the control of the private military industry. If duplicated by the Security Industry Authority and in the prospective legislation on mercenaries, this might result in controls which - although highly visible - will not be very effective.

Germany: Long Standing, Low Key

The German government has regulated private policing and the export of armaments more consistently over the past and has also stronger controls than the United Kingdom. The government has thus a number of mechanisms at hand with which to further assert its existing influence over its private military sector. Private security and policing services have been regulated by the German Trade Code (*Gewerbeordnung*) since 1927 as well as by special legislation for security services (*Bewachungsgewerberecht*) since 1995 (BGBI, 1995-2002; Weber, 2002: 71). The Trade Code proscribes the assessment and licencing of service companies, whereas the regulations of private security services which have been strengthened most recently in 1999 and in 2002 (BGBI, 2002), define further requirements such as training hours, a written and oral test on legal and other requirements, sufficient insurance and other obligations for private security personnel. As services, private

military services are also regulated by the Trade Code. Moreover, the private security regulations specifically refer to private military services where they concern the protection of military facilities.

In addition, private military services are partially regulated by the German Export Control Order (*Aussenwirtschaftsverordnung*). Specifically, the recent extension of export controls to technical assistance for the development of weapons of mass destruction *and* for goods with military end-uses in a country subject to a national or international embargo has direct implications for the provision of private military services abroad. Notably, according to the German export control regulations, technical assistance includes military services such as the repair, development, construction, montage, testing, maintenance, as well as teaching, training, and the supply of know-how. Moreover, unlike in the United Kingdom, the restrictions apply to all German residents as well as to non-resident Germans (BAFA, 2002: 8). Crucially, licences for technical services in relation to weapons of mass destruction and military end-uses in embargoed countries are also required where the assistance is provided *inside* the European Community territory (BAFA, 2002: 8). Finally, the German export control regulations demand authorisation for the trafficking and brokering of arms on the national control list or to countries subject to an embargo where conducted by German residents (BAFA, 2002: 7).

Private military services, such as the training of personnel operating military equipment in embargoed countries, are thus subject to national controls independently of whether the training is provided by German nationals abroad or by residents at training facilities in Germany. The provision of military services to Sierra Leone, as by Sandline International, for instance, would have been subject to a licence in Germany, if the company's owners or employees were German or resident in Germany and if it included military training or the transfer of weapons or paramilitary equipment under the German national embargo to the African state. More crucially, considering the recent developments of the private military industry in Europe outlined in the preceding sections, the regulations restrict the ability of private military facilities within Germany to sell services to third parties if they are from embargoed countries.

Conclusion

The preceding analysis has illustrated that European governments have a range of governance mechanisms at hand with which to control the growing private military industry. Most of these mechanisms have a direct influence on the sale of private military services not only in the region, but also overseas. However, whether and how governments use these measures depends on their understanding of the dangers involved in the privatization of military functions and their willingness to inhibit the free operation of the market in the military service sector. Since there is often a perceived trade-off between the two, the question remains a political one.

This article has sought to show how this question has been resolved in the United Kingdom and Germany. The comparison is interesting because both countries have so far approached the governance of private military services in different ways. While the British government has placed considerable trust in the privatization of the sector and has only recently strengthened governmental regulation, the German administration has been careful to maintain its steering capabilities through public private shareholdership of key military functions and through stricter legislative controls.

Since both countries have only relatively recently expanded their use of private military services, it is too early to evaluate the effectiveness of the different governance mechanisms adopted by the United Kingdom and Germany. Existing studies by the British National Auditing Office (NAO) and the US General Accounting Office indicate some problems with the reliance on contracts as a governance tool. These problems can range from loss of efficiency and lack of control, to insufficient transparency and public accountability. The NAO, for instance, observed in its analysis of the British peacekeeping operation in Kosovo that inflexible contracts meant that the MoD had to pay damages for changing specifications and demands during the course of the operation (NAO, 2000: 5). The American experience with more flexible agreements, such as the indefinite-delivery, indefinite-quantity contract with Brown and Root in the Balkans, showed that the company used its freedom to oversupply the army and set higher specifications than would have been required - at full cost to the Department of Defence (GAO, 2000). In addition, contractual

governance can be criticised for its essentially unpolitical nature. In particular, the contractual regulation of exports to sensitive destinations is not subject to parliamentary approval and thus lacks public transparency and accountability.

Regulation would be a more suitably mechanism for addressing these problems, however, regulation is too young and inconsistent to offer direct insights into the effectiveness of different types of national controls. Although the existing German controls surpass those of the United Kingdom in areas such as the trafficking and brokering of arms by private military service providers in as well as outside Germany and the sale of military services to countries subject to an embargo, secondary legislation to the British Export Control Act 2002 and the prospective regulation of mercenaries might change this imbalance in the future.

A positive outlook for the governance of the private military industry seems nevertheless justified by the observation that, as far as governmental regulation is concerned, the policies of the United Kingdom and Germany appear to have been converging over the past two years. One explanation for this development is policy transfer due to the growing recognition of the dangers involved in the use of private military force at the national level and the export of private military services to third countries. After years in which the British government hoped for a successful self-regulation of private policing services, the failure of national service organizations to agree on and enforce common standards for the industry, the UK has thus turned to public regulation. In addition, the Sandline Affair, in which the Foreign and Commonwealth Office was accused of having had knowledge of the illegal export of arms to Sierra Leone by the London-based private military company Sandline International, led the British government to reconsider its armaments export controls and investigate the possibility of regulations for mercenaries and private military companies. Another explanation is increasing pressure within the European Union to harmonize the regulation of private policing and military services in order to ease the transfer of services within the Community and to eliminate competitive disadvantages arising from differences in national export controls. In the final instance, all these developments will have crucial implications for the use of private military companies not only Europe, but also the Third World.

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