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Abstract

The aim of this paper is to assess the potential impact of national-level or EU-level regulation on the international activities of private military security companies (PMSCs). It will do this by first examining the actual impact of national-level regulation of the domestic activities of PMSCs in the UK. It will then build upon this analysis to make observations about the potential impact of national-level and EU-level regulation on the international activities of PMSCs. Because there is a similarity between the regulatory structures and private organisations in this comparison, the conclusions drawn in this paper will, it is hoped, provide some insight into the potential impact of any internationally-focused PMSC regulation.

The Potential Impact of National-Level or EU-level Regulation on PMSC Activities

ADAM WHITE*

1. Introduction

The idea behind regulation – whether at the local, national, EU or international level – is to create institutional mechanisms which governments can use to steer the activities of private organisations in line with some publicly-defined goal. In reality, however, this ideal-type scenario is never fully realised. For regulatory mechanisms rarely steer private organisations down the exact path envisaged by government policy-makers and as a result unintended consequences abound. This makes the task of assessing the potential impact of regulation on private organisations a very hazardous business (especially when the possible regulatory structure is in such a formative stage, as is the case in this instance). One common-sense method of approaching this task is to find an already functioning regulatory system similar to the one under assessment and then to draw some realistic comparisons between them, moving from the ‘actually existing’ into the ‘potentially occurring’. This is the method used in this paper in order to assess the potential impact of national-level or EU-level regulation on PMSC activities. Sections 2 and 3 will proceed by examining the actual impact of national-level regulation of *domestic* private military security companies (PMSCs) in the UK. Section 4 will then build upon this analysis to make observations about the potential impact of national-level and EU-level regulation on *international* PMSC activities. Because there is a similarity between the regulatory structures and private organisations in this comparison, the conclusions drawn in this paper will, it is hoped, provide at least some insight into the potential impact of the proposed PMSC regulation.

2. The Legal Framework for Regulating PMSC Activities in the UK

The idea of regulating PMSC activities in the UK was first discussed in government circles during the 1950s. However, it was not until 2001 that the Private Security Industry Act was passed by Parliament with the purpose of setting up a formal regulatory structure for controlling the activities of PSCs within the UK.¹ The stated objective of this legislation is to protect the British public from the negligent and unprofessional practices of PMSCs by reducing criminality and raising standards within the private security industry. The centrepiece of this legislation is the creation of the Security Industry Authority (SIA), which is a non-departmental public body accountable to the Home Secretary and charged with the responsibility of administering, monitoring and enforcing private security regulation. After a twelve-month period of consultation and institution building, the SIA became operational midway through 2004 and started phasing in regulation from 2005 onwards.

The coverage of the SIA’s regulatory regime can be defined with reference to both geography and private security sector. In geographical terms, the SIA was initially responsible for regulating PMSCs in England and Wales. In June 2006, however, the regulatory regime was extended to Scotland, and during the course of 2009 was further stretched to cover Northern Ireland. In sector terms, the SIA is responsible for regulating private security in the following sectors: security guarding (contract), door

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¹ Adam White, *The Politics of Private Security: Regulation, Reform and Re-Legitimation* (Palgrave Macmillan, forthcoming 2010).

supervision (contract and in-house) close protection (contract), cash and valuables in transit (contract), public space surveillance (contract), key holding (contract) and the immobilisation, restriction and removal of vehicles (contract and in-house).² Taken together, then, these seven sectors comprise the 'private security industry' from the perspective of the SIA. This said, the amended version of the *Private Security Industry Act 2001* also allows for the regulation of private investigation services, security consultants and precognition agents (i.e. the interviewing of witnesses in civil and criminal proceedings). At present, however, these three sectors are not actively being regulated.

In order to reduce criminality and raise standards across these seven sectors of the private security industry, the SIA has two primary regulatory tools. The first is the compulsory licensing of all security staff working within the sectors covered by the regulatory regime, from street level operative up to director level. To obtain a license, each of these individuals must initially undergo a full criminal records check conducted by the Criminal Records Bureau so as to ensure that he or she qualifies as a 'fit and proper' person. In addition, each of these individuals must also demonstrate a minimum competency requirement, which can be only accomplished by attaining an SIA-approved qualification. Failure to meet either of these two conditions means that the licence will not be awarded, in turn making it illegal for the individual to gain employment in any of the regulated sectors. Licences are renewed every three years and can be revoked or suspended at any point within this period. Working in a licensable role without a valid licence can result in a maximum of six months imprisonment and/or a fine of up to £5,000. The scale and penetration of this licensing system is illustrated by the following statistics, which were released on 23rd February 2010. At this time, the SIA had issued 325,439 valid licences and recognised 620,486 approved qualifications.³

The second regulatory tool available to the SIA is the Approved Contractor Scheme (ACS). In contrast to the licensing system, the ACS is voluntary and targets companies not individuals. This system functions on the basis that companies which successfully meet certain standards of quality and best practice can apply to the SIA for approved contractor status. There are three main incentives for companies to strive for this status: first, the company will be listed on the Register of SIA Approved Contractors, which is publicised by the SIA to a range of security purchasers; second, the company will be given permission to use a special SIA accreditation mark on their publicity materials; and third, the company will be able to legally contract out security staff whose licence applications are being processed (whereas for non-ACS companies it is illegal to contract out security staff before their licence applications have been fully completed). Similar to the licensing scheme, ACS status must be renewed every three years and can be revoked at any point within that period. By 31st January 2010, 655 PCSs had successfully attained approved contractor status. And to date, only 26 private security companies have had their approved contractor status revoked.⁴

² 'Contract' private security refers to those companies which sell security services to other organisations on a contract-by-contract basis. 'In-house' private security provision refers to those companies which recruit their security staff internally, as opposed to recruiting their staff externally from 'contract' providers.

³ Security Industry Authority, *Licensing Statistics*, 23rd February 2010 – accessed online on 1st March 2010 at: www.sia.homeoffice.gov.uk/Pages/licensing-stats.aspx. It is important to mention that the issuing of 325,439 valid licences does not mean that there is this number of employees legally operating in the private security industry. This is because, with certain exceptions, each licence is limited to a specific sector. An individual working as a security guard, for instance, will require a security guarding licence, whereas an individual working as a vehicle immobiliser will require a vehicle immobiliser licence, etc. It is possible, however, to hold more than one licence. This in turn means that an individual working in two sectors may hold two valid licences, one for each sector. Once this is taken into account, the number of employees legally operating in the private security industry will be lower than the number of licences issued.

⁴ Security Industry Authority, *Register of Approved Contractors*, 31st January 2010 – accessed online on 1st March 2010 at: www.sia.homeoffice.gov.uk/Pages/acs-roac-intro.aspx.

3. The Impact of Regulating PMSC Activities in the UK

Has the SIA's regulatory regime succeeded in reducing criminality and raising standards within the private security industry? In order to answer this question, this paper will primarily draw upon the results of a survey conducted by Adam White and Martin Smith in January 2009 – these results were subsequently published in a report entitled *The Security Industry Authority: A Baseline Review*.⁵ The survey was sent to 7,000 individuals working within the private security industry and comprised 35 questions relating to the impact of regulation. 685 responses were received, generating a mixture quantitative and qualitative data (it should be noted, however, that some respondents did not complete the entire questionnaire, which in turn means that some questions have a slightly lower response rate). In addition to this data, some official statistics released by the SIA will also be used to answer the above question.

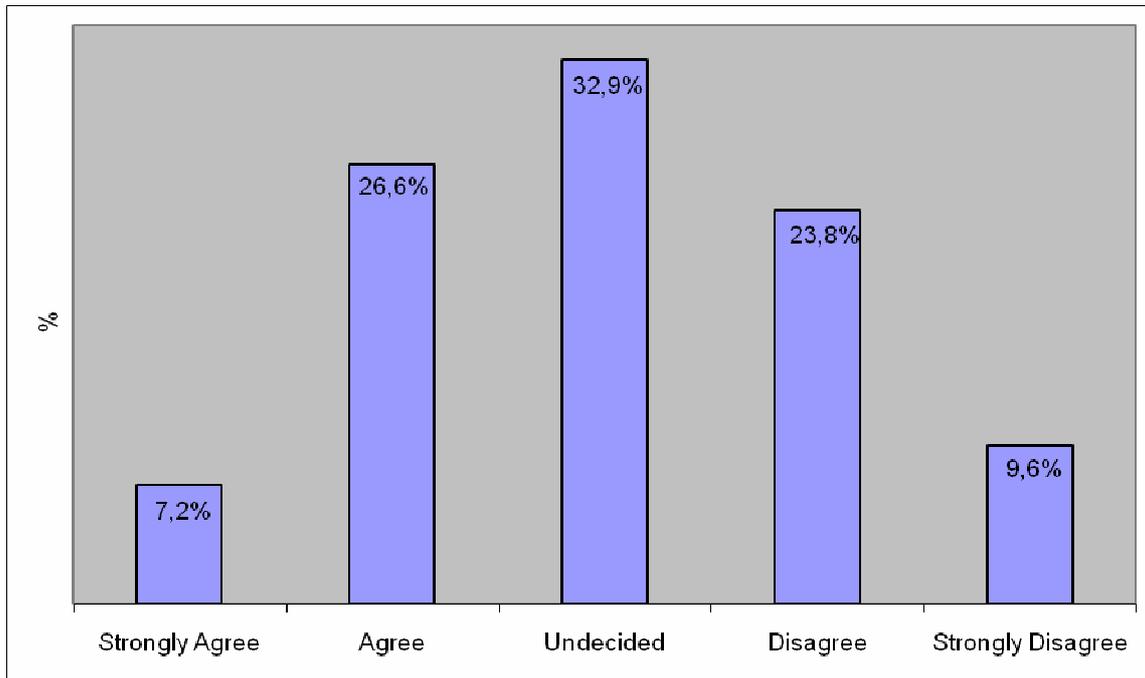
To begin with, this paper will address question: has regulation reduced criminality? For contextual purposes it is important to note that the private security industry has long been associated with a number of criminal practices, such as protection rackets, excessive use of force and the facilitation of theft and perjury, to name just a few.⁶ One of the main intentions of the *Private Security Industry Act 2001* was to significantly reduce such criminal practices. To judge whether this intention has been translated into a reality, White and Smith's questionnaire asked the following question: 'To what extent do you agree with the following statement? Overall there appears to be less criminality in the private security industry as a result of statutory regulation'. As Graph 1 shows, the response is ambiguous, with roughly equal numbers of respondents agreeing, disagreeing and remaining undecided when considering this issue.

⁵ White, A. and Smith, M. J. *The Security Industry Authority: A Baseline Review* (Sheffield: University of Sheffield, 2009). Available at:

<http://www.sia.homeoffice.gov.uk/Pages/publications.aspx?category=SIA+Research> .

⁶ For a more detailed list, see: HC 17-1 (1994-95) *First Report from the House of Commons Home Affairs Committee: The Private Security Industry* (London: HMSO, 1995), pp.xii-xiii.

Graph 1: To what extent do you agree with the following statement? Overall there appears to be less criminality in the private security industry as a result of statutory regulation.⁷ (N = 572)



It is possible to add some more details to this hazy picture. SIA statistics provide supporting evidence for those who agree that some criminality has been removed from the industry. For instance, by the 23rd February 2010 the SIA had refused 18,238 licence applications⁸ and by 31st January 2010 had revoked 17,046 licences.⁹ This clearly amounts to some reduction in criminality. It is equally possible, however, to provide supporting evidence to those who disagree that criminality has been removed from the industry. White and Smith's survey revealed that criminality still exists in a number of forms. For instance, while licensed security officers may be used in a PMSC's visible operations, unlicensed security officers may be used in less visible (and often less legitimate) operations, thereby pushing criminality 'underground'. Furthermore, the questionnaire found that 'loopholes' in the legislation are exploited a great deal. Individuals advertise their services as 'security consultants', for instance, so as to define their activities outside the SIA's regulatory remit.¹⁰ This clearly indicates the enduring presence of criminality within the private security industry. And it is the fact that such supporting evidence can be found both for a reduction in and for a perpetuation of criminality which explains the spread of responses depicted in Graph 1.

To an extent, such ambiguity should be expected, for no law is adhered to completely. But there is a sense that criminality could be reduced much further. The question of how this can be accomplished brings into frame the issue of enforcement. For contextual purposes, it should be noted that the SIA

⁷ White and Smith, *The Security Industry Authority*, p.21.

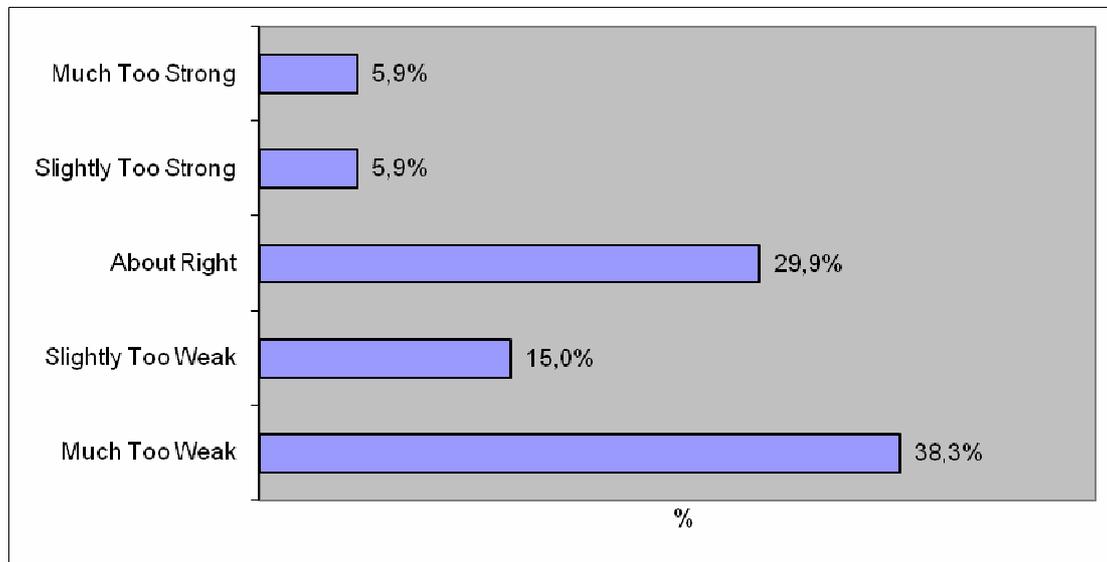
⁸ Security Industry Authority, *Licensing Statistics*, 23rd February 2010 – accessed online on 1st March 2010 at: www.sia.homeoffice.gov.uk/Pages/licensing-stats.aspx.

⁹ Security Industry Authority, *Enforcement Activity*, 31st January 2010 – accessed online 1st March 2010 at: www.sia.homeoffice.gov.uk/Pages/enforcement-activity.aspx.

¹⁰ White and Smith, *The Security Industry Authority*, pp.23-24.

utilises an intelligence-led model of investigation and enforcement. This means that rather than conducting random spot checks on PMSC officers, SIA investigators use reports of illegal activity to target their resources. If illegal activity is discovered the SIA has a range of sanctions. The most obvious is to initiate criminal proceedings. However, the SIA has not used this regularly (the SIA had successfully prosecuted 13 entities for 89 offences as of 31st March 2009).¹¹ Most commonly the SIA uses one of its three non-criminal proceeding sanctions: a written warning to an individual in breach of the *Private Security Industry Act 2001* (1,398 had been issued as of 31st January 2010);¹² an improvement notice to companies in breach of the *Private Security Industry Act 2001* (116 had been issued as of 31st January 2010);¹³ and revoking a licence. To assess perceptions about the level of enforcement shown in these statistics, White and Smith's questionnaire asked the following two questions: 'How would you describe the SIA's enforcement policy against private security staff working without a licence?'; and 'How would you describe the SIA's enforcement policy against private security companies supplying unlicensed staff?' The responses to these questions are depicted in Graphs 2 and 3.

Graph 2: How would you describe the SIA's enforcement policy against private security staff working without a licence?¹⁴ (N = 572)



Note: 4.9% answered 'Don't Know'

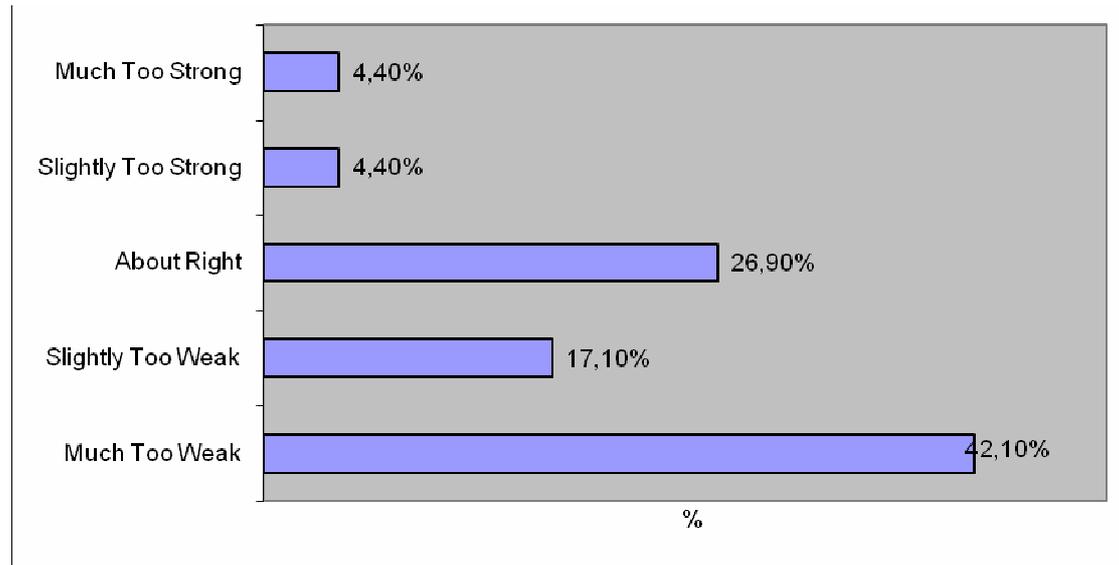
¹¹ Better Regulation Executive, *Security Industry Authority: A Hampton Implementation Review Report* (London: Better Regulation Executive 2009), p.30.

¹² Security Industry Authority, *Enforcement Activity*, 31st January 2010 – accessed online 1st March 2010 at: www.sia.homeoffice.gov.uk/Pages/enforcement-activity.aspx.

¹³ Security Industry Authority, *Enforcement Activity*, 31st January 2010 – accessed online 1st March 2010 at: www.sia.homeoffice.gov.uk/Pages/enforcement-activity.aspx.

¹⁴ White and Smith, *The Security Industry Authority*, p24.

Graph 3: How would you describe the SIA's enforcement policy against private security companies supplying unlicensed staff?¹⁵ (N = 572)



Note: 5.1% answered 'Don't Know'

These graphs very clearly demonstrate that enforcement is considered to be weak. In the case of enforcement against private security staff working without a licence, more than half of the respondents (53.3%) considered that the SIA's enforcement policy was 'slightly too weak' or 'much too weak'. Similarly, in the case of enforcement against PSCs supplying unlicensed staff 59.2% deemed the SIA's enforcement policy to be 'slightly too weak' or 'much too weak'.

White and Smith's questionnaire collected a large number of comments which add explanatory depth to this trend. The most common ones were: investigators are rarely seen on the ground; reports of illegal activity are not followed up; checks should be random and unannounced; regulation has no teeth and doesn't provide a deterrent; if there is no enforcement then regulation simply punishes the compliant PMSCs.¹⁶ These comments all essentially relate to the point that the SIA does not have sufficient resources to undertake comprehensive enforcement activities. This lack of resources is certainly in large part due to the fact that the SIA is a self-funding body. Its operations must be balanced against its income from licensing and the Approved Contractor Scheme – no additional public money is received (though in the past the SIA has been bailed out with additional public money when it has run significant deficits). As a result, the SIA only has very limited resources for enforcement – hence the above comments. In addition to these resource constraints, the SIA is also limited by the Hampton Principles which stipulate that regulators must assume a 'light touch' approach so as not to over-burden the commercial activities of a private organisation.¹⁷ It is possible to conclude, then, that the reasons for the ambiguous trends regarding the reduction in criminality delineated above are in part related to the SIA's weak enforcement regime and, by extension, the SIA's lack of resources and political constraints.

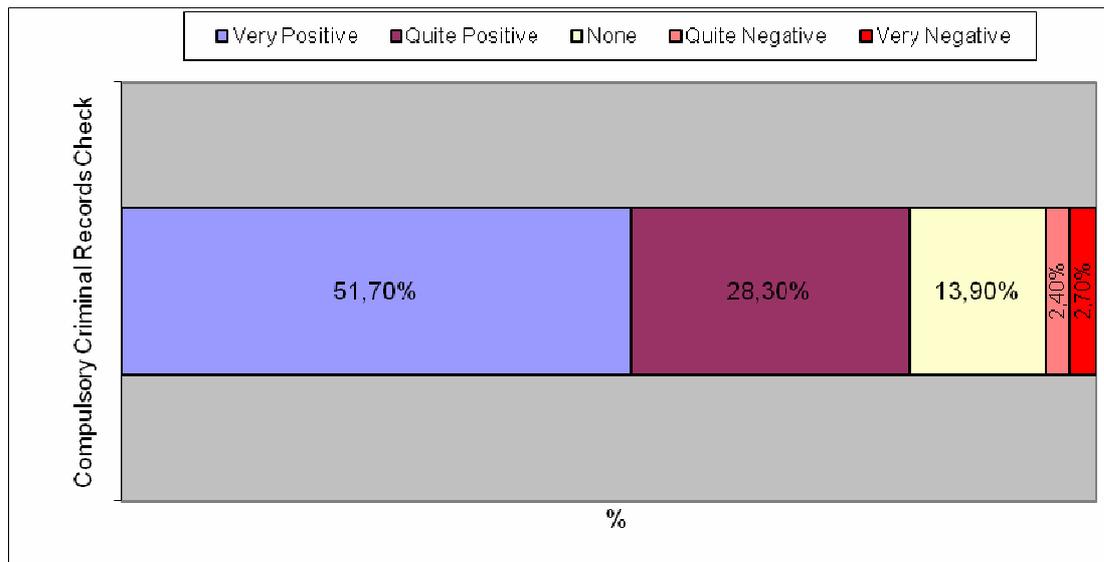
¹⁵ White and Smith, *The Security Industry Authority*, p26.

¹⁶ White and Smith, *The Security Industry Authority*, p.30.

¹⁷ White and Smith, *The Security Industry Authority*, pp.31-32.

The paper will now address the question: has regulation raised standards? As background to this question it is important to note that the private security industry has long been associated with poorly trained, badly equipped individuals working excessively long hours and providing sub-standard services. With this in mind, one of the other main intentions of the *Private Security Industry Act 2001* is to improve standards of service. In order to assess the extent to which this intention has been translated into reality, White and Smith's questionnaire asked a series of questions about the impact of licensing and the ACS on the overall ability of private security officers to do their jobs. The responses are shown in Graphs 4, 5 and 6.

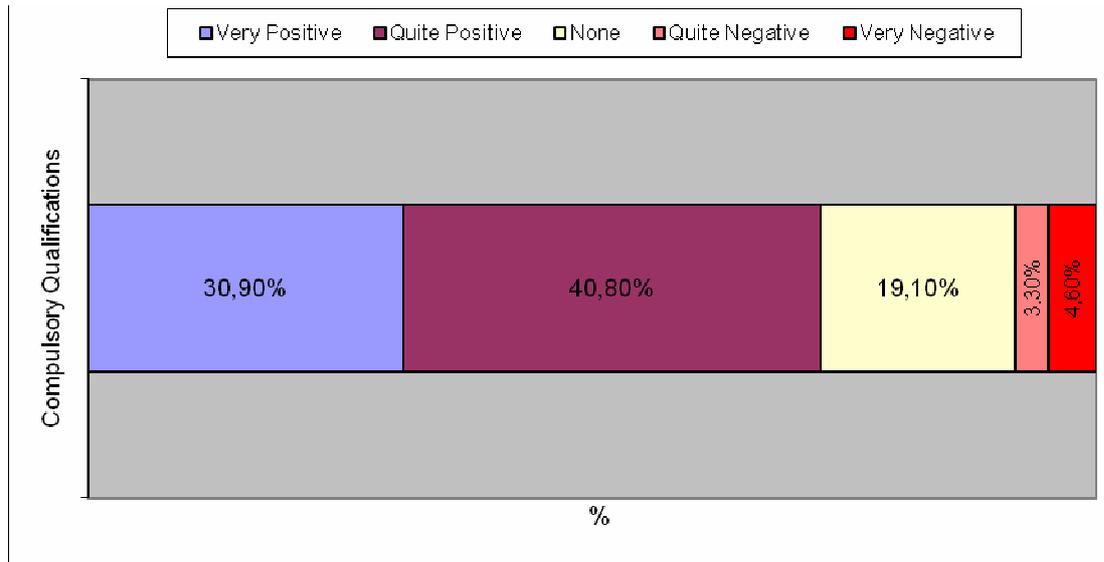
Graph 4: What impact have compulsory criminal records checks had on the overall ability of private security staff to do their jobs?¹⁸(N = 635)



Note: 1.1% answered 'Don't Know'

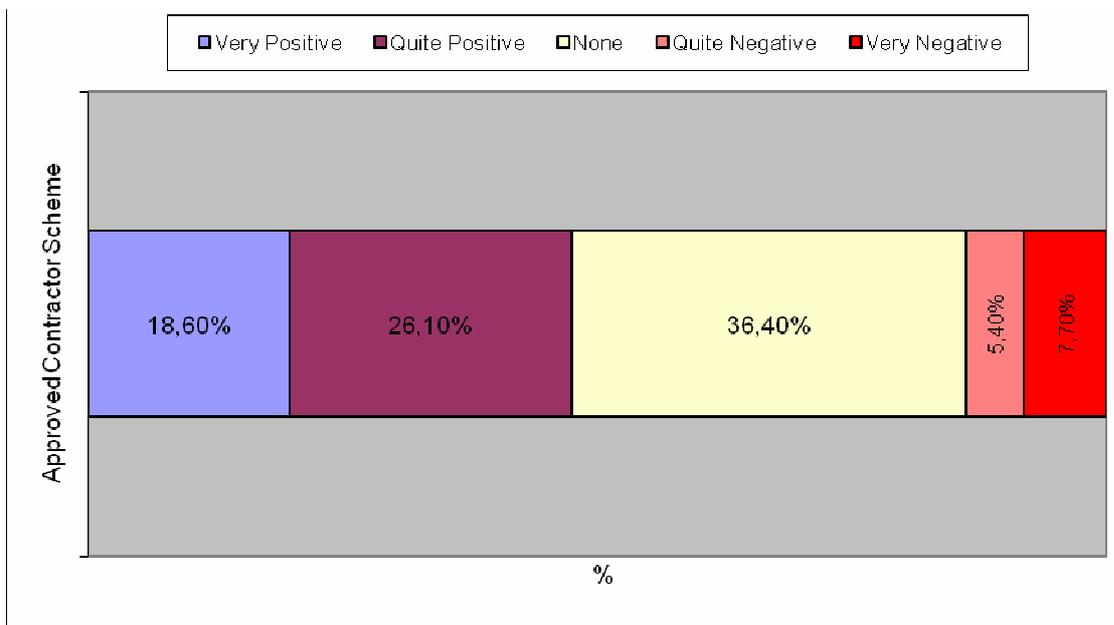
¹⁸ White and Smith, *The Security Industry Authority*, p.38.

Graph 5: What impact have compulsory qualifications had on the overall ability of private security staff to do their jobs?¹⁹(N = 635)



Note: 1.4% answered 'Don't Know'

Graph 6: What impact has the Approved Contractor Scheme had on the overall ability of private security staff to do their jobs?²⁰ N = 635



Note: 5.8% answered 'Don't Know'

¹⁹ White and Smith, *The Security Industry Authority*, p.36.

²⁰ White and Smith, *The Security Industry Authority*, p.44.

In each case, the overall impact of each regulatory mechanism on the ability of private security staff to do their jobs has clearly been positive. With regard to compulsory criminal records checks, 51.7% of respondents considered that the impact has been ‘very positive’ and 28.3% thought that the impact had been ‘quite positive’. With regard to compulsory qualifications, 30.9% of respondents deemed that the impact has been ‘very positive’ and 40.8% thought that the impact had been ‘quite positive’. And, lastly, with regard to the Approved Contractor Scheme, 18.6% of respondents judged that the impact has been ‘very positive’ and 26.1%. It seems, then, that regulation has been successful at raising standards among PMSCs.

However, an important caveat is necessary. The training programmes set by the SIA as part of the compulsory qualifications built into the licence and the ACS only ever aimed to raise standards to a minimum level. As a result, while some PMSCs have indeed been forced to raise their standards to this minimum level, others have essentially decided to lower their standards to this minimum level. This is because compliance with SIA regulation now serves as a near-universal mark of approval for security purchasers, to the extent that many purchasers do not look for anything more than this when sending out tenders for contracts. For many PMSCs, then, the incentive to pitch their activities above the level set by the SIA has been removed. This has in turn stifled the drive for greater professionalism within many parts of the industry. This is undoubtedly an unintended negative consequence of regulation. Yet this negative consequence must be viewed alongside the overall successes regarding improvements in PMSC service standards as a whole.

4. The Potential Impact of National-Level and EU-Level Regulation of PMSC Activities

The regulatory mechanisms used by the SIA to control the activities of PMSCs in the UK could – in a modified form – be used by national governments or the EU to control the activities of PMSCs in the international sphere. For a licensing scheme and a register of approved contractors have both been taken into consideration as possible regulatory mechanisms during the course of the Priv-war project. With this in mind, the purpose of this final section is to build upon the analysis in the previous two sections to make three general observations about the potential impact of national-level and EU-level regulation on PMSCs.

First, as with any regulatory mechanism, the intention of a licensing scheme and a register of approved contractors will never be directly translated into a real world outcome and unintended consequences will inevitably occur. For instance, if the intention of licensing PMSCs is to reduce criminality, the reality may be that a (sizeable) proportion of criminal practices among PMSCs are simply pushed further underground. Similarly, if the intention of introducing a compulsory training component into a licensing scheme or a register of approved contractors is to raise the standards of PMSC services to an acceptable minimum level, the reality may be that the standards of many PMSCs may actually be lowered to meet this minimum level. And even if other types of regulatory mechanism are used by national governments of the EU, such contradictory scenarios will still occur because different PMSCs will interpret any regulatory mechanisms in a number of ways. Some will enthusiastically and unreservedly work within the regulatory framework, others will find ingenious ways to dodge certain parts of the framework. Some will completely flout the regulatory framework, others will manipulate it to fit in with their pre-existing business plans. Such variations, and the unintended consequences that ensue, are endemic to any regulatory regime.

Second, such variations and unintended consequences could, however, be mediated with a strong enforcement policy. It was certainly suggested by PMSC respondents in White and Smith’s survey that stronger enforcement would lead to more compliance with SIA stipulations, and there is nothing to suggest that this formula would be any different in the case of PMSCs. Worryingly, though, it will

be harder for either national governments or the EU to enforce the conditions of a licensing scheme or a register of approved contractors on PMCSs operating in foreign territories than it has been for the SIA to enforce its conditions on PMSCs within the UK. This is because international investigation and enforcement regimes will require a great deal more resources – especially in unstable political systems where existing infrastructure is poor – and will run into the problem of applying laws in foreign legal systems. So unless any national or EU regulatory system is very well resourced and has a number of extradition treaties, enforcement will be weak and, by extension, unintended consequences will be particularly abundant – certainly more abundant than in the SIA’s regulatory regime.

Finally, and on a more general level, it is very important to keep in mind the inevitability of such unintended consequences when drawing up blueprints for a regulatory regime at the national-level or EU-level. That is, it is important to approach the task of regulating PMSCs in the international sphere with a sense of realism. Otherwise the result will be an inappropriate regulatory framework and a sense of unrealised expectations. Regulation is an approximate science and it is dangerous to treat it otherwise.

