

EXPLANATORY MEMORANDUM TO
THE EXPORT CONTROL (SECURITY AND PARA-MILITARY GOODS) ORDER
2006

2006 No. 1696

1. This explanatory memorandum has been prepared by The Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Order amends the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 ('the 2003 Order'), The Trade in Goods (Control) Order 2003 ('the Trade Order') and the Trade in Controlled Goods (Embargoed Destinations) Order 2004 ('the 2004 Order') in relation to controls on goods which could be used for capital punishment, torture or inhuman or degrading treatment..

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 The Order implements Council Regulation (EC) No.1236/2005 ('the 2005 Regulation') which sets up a Community regime concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment by providing for licensing, enforcement and penalties together with the removal of national controls where these overlap with goods controlled by the 2005 Regulation.

4.2 An Explanatory Memorandum on the original and amended Council Regulation proposals (EM5773/03 & OTYNR-2/11/04) were submitted by the DTI to the Commons and Lords Scrutiny Committees on 1/6/03 and 2/11/04. The Commons considered them to be legally and politically important and cleared from scrutiny at their meeting on 15/3/05 and the Lords cleared from scrutiny following publication of the 8th Report of Session 2004/5 (HL paper 75).

4.3 The Technical Assistance Control Regulations laid on the same date as this Order also make provision in relation to the 2005 Regulation.

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative instrument resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Regulation has direct effect in the UK and establishes a list of goods whose import and export to and from the EC is banned and a second list whose export is controlled. The UK was instrumental in persuading the Commission to bring forward proposals in this area which are consistent with UK objectives to have a European wide ban on the export of equipment used in torture to bring other EU Member States into line with similar ban which has been in place in the UK since 1997. However the coverage of the Regulation is wider than the previous UK prohibition.

7.2 The Order maintains the existing level of export control consistent with UK policy statements and the Regulation.

7.3 The amending Order provides for licensing, enforcement and penalty requirements in order to fully implement provisions of the 2005 Regulation. It also removes national controls which would otherwise overlap with items now directly controlled by the 2005 Regulation.

7.4 The 2005 Regulation does not provide for controls in respect of Trafficking and Brokering (T&B). As the UK already has T&B controls on a number of goods which, will be directly controlled by the 2005 Regulation for export from the Community, and will be maintaining those controls, it would be anomalous to apply UK Trade controls only to some of those goods. Therefore, UK T&B controls have been extended to control trade in goods to the extent that they are goods whose export is controlled and they are goods listed in Annex II and III of the Regulation.

7.5 A three month public consultation with exporters, trade associations and NGOs on the implementation of the Regulation was completed on 31 January 2006 and a formal Government response has been placed on the Export Control Organisation website and in the House.

8. Impact

8.1 A Regulatory Impact Assessment has been prepared for this instrument although it is likely to have minimal impact on the costs of business, charities or voluntary bodies

8.2 There is no impact on the public sector.

9. Contact

Jim Bouttell at the department of Trade and Industry, Export Control Organisation. Tel: 0207 215 4648 or e-mail: jim.bouttell@dti.gsi.gov.uk, can answer any queries regarding the instrument.

REGULATORY IMPACT ASSESSMENT

1. Title:

1.1 Amendment to The Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (“the Order”).

2. Purpose and intended effect:

2.1 *Purpose*

2.1.1 To provide implementing legislation in order to provide licensing, enforcement and penalty powers for a directly applicable Council Regulation concerning trade in certain equipment and products which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. (“the Regulation”) which was adopted by the Council on 27th June 2005.

2.1.2 The Regulation bans the import and export of listed equipment that could only be used for torture or capital punishment, and introduces a licensing system for other equipment which could be used for torture but have other, legitimate uses.

2.1.3 The Regulation affects imports, exports and technical assistance related to the list of goods which are to be banned (Annex II to the Regulation) but only exports of goods subject to control (Annex III to the Regulation).

2.2 *Objective*

2.2.1 To set up a specific trade regime (for both import and export) directly applicable in all EU Member States to contribute to the prevention of the violation of the fundamental human right not to be subjected to torture and other cruel, inhuman or degrading treatment consistent with stated EU policy.

2.2.2 The Regulation does not apply to brokering activities and therefore does not have a direct impact on the UK Trade controls. However, the scope of UK Trade controls will be increased to include all the goods controlled or banned under the Regulation.

2.3 *Rationale for Government intervention*

2.3.1 The Commission considers the Regulation would be consistent with the guidelines on EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment adopted by the Council on 9 April 2001. Which state that the EU will urge third countries to prevent the use, production and trade in such equipment. Therefore the Commission considers that the EU should itself take the same measures that it urges third countries to take.

2.3.2 The Regulation is directly applicable in all EU Member States. However, provisions for licensing penalties and enforcement must be implemented at a national level.

2.4 *Background*

2.4.1 The UK extended its national ban on certain torture equipment in 1997 following Robin Cook’s statement to Parliament in July 1997. The EU Regulation, which introduces

controls on certain equipment and products used for capital punishment or torture to all 25 Member States, some of which are already subject to national controls, is consistent with UK's objective to press for a global ban.

2.4.2 The current national legislation in which certain torture equipment, as set out in the Regulation, is controlled is The Export of Goods, Transfer of Technology and the Provision of Technical Assistance (Control) Order 2003, Trade in Goods (Control) Order 2003 and Trade in Controlled Goods (Embargoed Destinations) Order 2004.

2.4.3 The Secretary of State for Trade and Industry is responsible for trade policy and is the Government's export licensing authority, however the Secretary of State for Foreign and Commonwealth Affairs has responsibility for human rights issues whilst the Chancellor of the Exchequer (in respect of HM Revenue and Customs) and the Home Office would also have an interest.

2.4.4 An earlier RIA in respect of the Council Regulation, which was endorsed by Ministers on 1 November 2004, was submitted to the Commons and Lords EU Scrutiny Committees in support of an Explanatory Memorandum.

2.4.5 UK national Trade controls are not directly affected by the adoption of the Regulation. However, amendments will be necessary to reflect the change to the control entries of certain goods and the decision to apply national trade controls to all goods in Annex II and III to the Regulation as a consequence to the adoption of the Regulation.

3. Consultation

3.1 Government departments with an interest in the Regulation were consulted and kept informed of the developments during the negotiations for the Regulation. They were also consulted in respect of the implementing legislation.

3.2 Ministerial endorsement of the final negotiated proposal was sought and given prior to the Regulation being adopted by the Council on 27th June 2005.

3.3 There had been general consultation with interested parties, including possibly affected industry sectors on the original Regulation proposals via a Notice placed on the Export Control Organisation's website which, is widely accessed by the export community and automatically circulated to registered users. In addition there was extensive consultation undertaken with various interested parties during the consultation phase of implementation of related controls under UK national secondary legislation made under the Export Control Act.

3.4 A further round of consultation was undertaken with industry, including three further Notices on the ECO's website, the first confirming the adoption of the Regulation and followed up by a second more detailed Notice outlining the practical effect of the Regulation and the 3rd included the informal consultation which concluded on 31 January 2006. A number of industry contacts including Trade Associations have also been approached with a view to identifying potential exporters.

3.5 Respondent to the informal consultation, recommended that the implementation of the Regulation should not weaken existing UK trafficking & brokering regulations - i.e. the Trade in Goods (Control) Order 2003 & the Trade in Controlled Goods (Embargoed destinations) Order 2004. These Orders cover any act in the UK or by UK persons anywhere, which is calculated to promote the overseas trade of electro-shock devices and leg-irons & related over-size handcuffs. As confirmed by DTI officials, these Orders will be amended to enable the current brokering controls on such equipment to remain operational. In addition, the scope

of the Orders will be extended to ensure that all equipment subject to export control under the Regulation will also be subject to trade control under the UK Orders.

4. Options:

Option 1

Do nothing

Option 2

Make an Order, under powers in sections 1,2, 3, 4, 5 and 7 of the Export Control Act, amending the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order, (this would include any necessary amendments to the Trade in Goods (Control) Order 2003 and the Trade in Controlled Goods (Embargoed Destinations) Order 2004).

Option 3

Raise a freestanding Order specifically to implement required provisions of the Council Regulation.

5. Benefits

Option 1

As the Regulation is directly applicable it will become law in all EU Member States on 30 July 2006. Without national implementing legislation these goods will still be controlled but without any national ability to issue licences if appropriate. This would effectively mean a complete prohibition on everything controlled by the Regulation and would be detrimental to those exporters who may otherwise be able to export. This option would also be contrary to the provisions of the Regulation, which requires authorities to take decisions on a case by case basis taking into account all relevant considerations.

Option 2

All the necessary implementation provisions would be contained within a single piece of legislation, and fully meet the requirements and provision of the Regulation.

Option 3

Like option 2 this would meet all the necessary implementation provisions to fully meet the requirements and provisions of the Regulation. However, separate amendments to existing legislation would still have to be made.

6. Compliance costs for industry:

Option 1

As this would effectively introduce a total ban on all the listed goods it would have a detrimental effect on those exporters who currently legitimately export these goods. The

costs to industry would be in respect of lost orders and/or penalty clauses due to their inability to supply.

Option 2

likely to have only a negligible impact on industry costs. Because of the types of goods covered it is very unlikely that many companies will be involved. Those companies which are exporting, are likely to already require licences under current national export control legislation. Therefore additional costs are likely to be minimal.

Option 3

Same as option 2.

7. Affected Business Sectors:

7.1 Apart from those exporters who are currently caught by the existing UK national controls on certain types of goods which could be used for torture such as handcuffs, leg-irons, stun guns we have been unable to identify any significant supplier or exporter which would be adversely affected by the Regulation and subsequent implementing legislation.

8. Other Costs

8.1 It is unlikely that the implementation of the Regulation would generate anything other than minimal additional Government costs. We already have in place export controls on certain equipment used in torture and trade controls on trafficking and brokering. The legislative framework for implementing any licensing or enforcement activities envisaged by the proposed Regulation are already in place. Any additional licensing requirements are likely to be able to be accommodated within existing resources or where extra procedures are required with a minimum of extra costs.

9. Small Firms Impact Test

9.1 At the time of completion of the earlier RIA despite enquiries we had been unable to identify any significant small businesses involved in the import or export of goods banned under the provisions of the Regulation. A Notice to Exporters was published on the ECO's website in July and August 2003 notifying firms of the proposals including a draft Regulatory Impact Assessment, asking for comments and whether they were likely to be effected but none responded. Discussions at that time on the proposals with the Small Business Service confirmed that there was unlikely to be an impact on small firms as a result of the proposal.

10 Competition Assessment

10.1 Where there is currently trade in the goods proposed to be banned under the Regulation this is likely to be for export only as there is little or no EU market. While some of the component parts may be standard, such as ropes or chains, the completed products are specialised and therefore those seeking to purchase the equipment will do so from different countries. In these circumstances the potential market for such goods will be international rather than UK or EU wide.

10.2 Some of the goods identified within the Regulation are already subject to a UK ban and therefore extending the ban throughout the EU would have no effect on UK business. Where the Regulation introduces a ban on goods which are not subject to current national control this will be applied across the EU and remove any commercial trade on such goods.

10.3 Where the Regulation introduces export controls on goods, licensing will be considered on a case by case assessment against stated criteria which will be consistent throughout the EU.

11. Enforcement, sanctions, monitoring and review

11.1 There are no enforcement, sanctions or monitoring provisions within the proposals. These will fall to Member States acting under national legislation. In the UK, enforcement would be principally under the Customs and Excise Management Act 1979. Some provisions would also be required under secondary legislation made under the Export Control Act.

12. Summary of Recommendations

12.1 Option 1 is not feasible given that it will have the greatest impact on industry by effectively banning all exports and is likely to be contrary to the provisions of the Regulation.

12.2 Options 2 and 3 have equal merit but Option 2 would minimise the number of changes needed to existing legislation and therefore would be the recommended option.

13. Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed *Malcolm Wicks*
Malcolm Wicks
Minister of State for Energy
Department of Trade and Industry

Date: 29th June 2006

Contact Point:

Jim Bouttell
DTI
Export Control Organisation
Tel: 0207 215 4648
Fax: 0207 215 4510
e-mail: jim.bouttell@dti.gsi.gov.uk