

EXPLANATORY MEMORANDUM TO
THE EXPORT CONTROL (AMENDMENT) (EU EXIT) REGULATIONS 2020
2020 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for International Trade and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The instrument will make the necessary changes to maintain the United Kingdom's robust export control regime at the end of the transition period on 31st December when export control regulations in Northern Ireland will continue to be EU law. In Great Britain export control regulations will be domestic law at the end of the transition period (which includes retained EU law). The domestic law needs to be amended before the end of the transition period so that it continues to function effectively in both Great Britain and Northern Ireland.
- 2.2 The instrument will also amend:
- the Export Control Order 2008 to correct existing references to EU law; and
 - the Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations (unmade; see paragraph 2.4) to address technical deficiencies in those Regulations.
- 2.3 We assess that this SI should be subject to the draft affirmative procedure because it amends primary legislation, creates, or widens the scope of, criminal offences, and amends a power to legislate. Paragraph 8F(1) of Schedule 7 to the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) specifies that instruments that make provision within paragraph 8F(2) of Schedule 7 to the Withdrawal Act must be subject to affirmative resolution. It is for these reasons that the instrument must be made by the affirmative procedure.
- 2.4 Please note the draft Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations have not been made but are identifiable by international standard book number (ISBN) 978-0-11-118352-6. The Regulations were laid before Parliament on 15th March 2019 and approved by resolution of the House of Commons on 8th April 2019 and by resolution of the House and Lords on 11th April 2019. A copy is available to view online at <https://www.legislation.gov.uk/ukdsi/2019/9780111183526/contents>.

Explanations

What did any relevant EU law do before exit day?

- 2.5 Council Regulation (EC) No 428/2009 of 5th May 2009 (“the Dual-Use Regulation”) sets up a Community regime for the control of exports, transfer, and brokering of dual-use items. Dual-use items are goods, software, technology, documents and diagrams which can be used for both civil and military applications. They can range from raw materials to components and complete systems, such as aluminium alloys,

bearings, or lasers. They could also be items used in the production or development of military goods, such as machine tools, chemical manufacturing equipment and computers. The regulation requires export authorisations to export a dual-use item from the EU to a non-EU country.

- 2.6 Regulation (EU) No 258/2012 of the European Parliament and of the Council of 14th March 2012 (“the Firearms Regulation”) lays down rules on exporting, importing and transporting firearms, their parts and components, and ammunition and implements Article 10 of the United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. The Regulation sets out a list of firearms, their parts and components, and the ammunition that require export authorisation. When exporting firearms, their parts and ammunition outside the EU, an exporter must provide the relevant authority in its own EU country with authorisation from the non-EU country receiving the shipment, and from any non-EU countries through which the shipment will pass.
- 2.7 Regulation (EU) No 2019/125 of the European Parliament and of the Council of 16th January 2019 (“the Torture Regulation”). The Torture Regulation includes a ban on the export and import of equipment that could only be used for torture or capital punishment and a ban on related technical assistance. There are also provisions to make licensable the export of equipment which could be used for torture, but which also has legitimate applications.
- 2.8 The Statutory Instrument amends four existing instruments:
- The Export Control Order 2008
 - The Export Control (Amendment) (EU Exit) Regulations 2019
 - The Trade etc. in Dual-Use items and Firearms etc. (Amendment) (EU Exit) Regulations 2019
 - The Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations (unmade; see paragraph 2.4)
- 2.9 These Regulations come into force at different times:
- Regulations required to amend the commencement clause of the Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations (unmade; see paragraph 2.4) come into force at the very end of the day on which these Regulations are made. This is necessary to ensure the Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations, which will be made on the same day, but prior to, these Regulations, do not come into force until the end of the transition period.
 - The amendments to the Export Control Order 2008 come into force the day after the date on which the regulations are made. This is appropriate because these amendments are minor and technical with no public impact.
 - The remainder of the Regulations come into force immediately before IP completion day. This is appropriate as these Regulations amend Regulations that do not come into force until IP completion day, which is 11pm on 31st December 2020.
 - These Regulations are laid under paragraph 8F(1) of Schedule 7 to the Withdrawal Act. The Regulations are made primarily using the section 8(1) power to ‘fix’ deficiencies in retained EU law and the section 8C(1) power in connection with the Ireland/Northern Ireland protocol. Export Control Act

2002 powers are used to make the minor and technical amendments in Part 2 (amendments of the Export Control Order 2008).

- 2.10 These Regulations make amendments to legislation in the field of customs and in relation to export, transfer, and other trade controls on military and dual-use goods (goods which have both a civilian and a military use).

Why is it being changed?

- 2.11 The changes in Parts 3 and 4 are necessary so that those EU Regulations relating to export control and listed in Annex 2 to the Protocol on Ireland/Northern Ireland continue to operate effectively in Northern Ireland after 31st December 2020.

What will it now do?

- 2.12 The SI will ensure that EU Regulations relating to export control and listed in Annex 2 to the Protocol on Ireland/Northern Ireland continue to operate effectively in Northern Ireland after 31st December 2020. It will also make minor amendments to the Export Control Order 2008 and amend the draft Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations (unmade; see paragraph 2.4) to address technical deficiencies in those Regulations that arose, for the most part, as a result of amendments to section 3 of the Withdrawal Act, which means direct EU legislation forms part of domestic law on and after the transition period, not on and after exit day.
- 2.13 From 1st January 2021, part of the law controlling strategic exports in Northern Ireland will be EU law, which in accordance with section 7A of the Withdrawal Act is without further enactment to be given legal effect or used in the United Kingdom.
- 2.14 From 1st January 2021 the law controlling strategic exports in Great Britain will be domestic law (which includes retained EU law at the end of the transition period).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Please note the split commencement clause (regulation 2) and the amendments relating to regulation-making powers in the Export Control Act 2002 (regulation 9).
- 3.2 Part 5 (amendment of the Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations 2020) purports to amend an instrument that has not been made. Additional Parliamentary time would be required if the Torture etc. Goods (Amendment) (EU Exit) Regulations (unmade; see paragraph 2.4) were instead re-laid following technical amendments and the instrument had to be debated again in its entirety by each House of Parliament.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 The territorial application of this instrument includes Wales, Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State, Ranil Jayawardena MP has made the following statement regarding Human Rights:

“In my view the provisions of the Export Control (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

6.1 These Regulations are made in part to address inoperabilities and deficiencies of EU law arising from the withdrawal of the United Kingdom from the EU.

6.2 The instrument will make the necessary changes for the end of the transition period when export control regulations in Northern Ireland will continue to be EU law. In Great Britain export control regulations will be domestic law at the end of the transition period (which includes retained EU law). The domestic law needs to be amended before the end of the transition period so that it continues to function effectively in both Great Britain and Northern Ireland.

6.3 These Regulations amend legislation implementing the strategic export controls of the United Kingdom.

6.4 Part 2 amends the Export Control Order 2008 (S.I. 2008/3231, as amended) to amend two cross-references to Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (OJ No. L 30, 31.1.2019, p .1, as amended).

6.5 Part 3 amends the Export Control (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/137), regulation 4 of which, for the most part, amends the Export Control Order 2008 on IP completion day, in consequence of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

6.6 Regulation 7(2) and (11), in relation to the Export Control Order 2008, provide for certain definitions in relation to England and Wales and Scotland to reference retained EU law and, in relation to Northern Ireland, to reference EU law as it has effect by virtue of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

6.7 Regulation 7(4) provides for an exception to certain prohibitions to continue in relation to a certified person who is a part of the armed forces, a police force, or a public authority of the United Kingdom, who is a hunter or sport shooter, or who holds a Manx firearms certificate.

6.8 Regulation 7(9) provides for a new Part 6A (provisions relating to the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement), which comprises the regulations necessary to implement or supplement the provisions in EU instruments relating to strategic export controls as they have effect by virtue of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement but for which there is no equivalent provision in relation to retained EU law.

6.9 The new Part 6A includes new articles 42C, 42J, 42M, 42R and 42T, which modify the application of existing offences in the Export Control Order 2008. These provisions are necessary so the United Kingdom continues to have these offences in place at the end of the transition in respect of EU instruments relating to strategic

export controls as they have effect by virtue of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

- 6.10 Regulation 7(10) authorises the continued use, for prescribed purposes, of information which is held by the Secretary of State or the Commissioners for Revenue and Customs in connection with the operation of strategic export controls imposed by any retained EU law or directly applicable provision of an EU instrument which has effect by virtue of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.
- 6.11 All the other paragraphs in regulation 7 make minor or technical amendments in consequence of the amendments set out above.
- 6.12 Part 4 amends the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/771), which amends the Export Control Act 2002 (c. 28) and certain retained EU law relating to strategic export controls, in consequence of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.
- 6.13 Regulation 9 amends regulation-making powers in the Export Control Act 2002 to allow the Secretary of State to make provision in connection with any controls imposed by a directly applicable provision of an EU instrument as it has effect by virtue of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.
- 6.14 Regulation 10 provides for certain authorisations under Council Regulation (EC) No 428/2009 of 5th May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ No. L 134, 29.5.2009, p. 1, as amended) that have effect before IP completion day to continue to have effect after 31st December 2020 as if they were corresponding authorisations under domestic law.
- 6.15 Regulation 11 provides for a firearms export authorisation under Council Regulation (EC) No 428/2009 of 5th May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ No. L 134, 29.5.2009, p. 1, as amended) that has effect before the end of the transition period to continue to have effect after 31st December 2020 as if it were a corresponding authorisation under domestic law.
- 6.16 Part 5 amends the Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations (unmade; see paragraph 2.4), which amends, and includes transitional provisions in relation to, Regulation (EU) 2019/125 of the European Parliament and of the Council of 16th January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (OJ No. L 30, 31.1.2019, p. 1, as amended; “the Torture Regulation”).
- 6.17 Regulation 13 aligns the commencement of the principal Regulations with the incorporation into domestic law of the Torture Regulation.
- 6.18 Regulation 14 replaces the Introductory Note in Annexes 2 and 3 of the Torture Regulation (as retained direct EU legislation) to remedy deficiencies and to amend the forms in Annexes 7 and 8 to remedy a deficiency and to restate certain entries in a clearer and more accessible way. The deficiencies are remedied by inserting references to the tariff of the United Kingdom in Annexes 2 (a list of goods with no use other than for the purposes of torture etc.), 3 (a list of goods that could be used for torture), and 8 (authorisation form for the supply of brokering services).
- 6.19 Regulation 15 provides for certain authorisations granted by the Secretary of State under the Torture Regulation that have effect before the end of the transition period to

continue to have effect after 31st December 2020 as if they were corresponding authorisations under domestic law.

7. Policy background

What is being done and why?

- 7.1 This instrument is being made in part to address deficiencies in retained EU law and to accommodate the NI Protocol. It relates to the withdrawal of the United Kingdom from the European Union.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made in part under section 8(1) of the Withdrawal Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act, the Minister has made any relevant statements in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 There are currently no plans to consolidate the legislation amended by this statutory instrument.

10. Consultation outcome

- 10.1 This instrument provides for the technical amendments arising from withdrawal from the EU. No consultation was necessary.

11. Guidance

- 11.1 HM Government has published a technical notice to inform stakeholders how export controls are affected by the Northern Ireland Protocol. Further guidance will be published ahead of this legislation coming into force.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the instrument relates to the maintenance of existing regulatory standards.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is only to make changes required to (a) prevent, remedy or mitigate deficiencies arising from the withdrawal of the United Kingdom from the EU; or (b) implement the EU withdrawal agreement.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is to closely monitor any representations that are received. Any issues that are raised will be fully investigated with a view to finding an acceptable solution.
- 14.2 As this instrument is made under the Withdrawal Act, no review clause is required in relation to the provisions made under the Withdrawal Act.

15. Contact

- 15.1 Peter Monday at the Department for International Trade can be contacted with any queries regarding the instrument by telephone on 020 7215 8810 or email at peter.monday@trade.gov.uk.
- 15.2 Shainila Pradhan, Director for Export Control Joint Unit, at the Department for International Trade can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Ranil Jayawardena MP, Parliamentary Under Secretary of State, at the Department for International Trade can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) Act 2018

1 Appropriateness statement

- 1.1 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view, the Export Control (Amendment) (EU Exit) Regulations 2020 does no more than is appropriate. This is the case because these Regulations are made to address inoperabilities and deficiencies of retained EU law arising from the withdrawal of the United Kingdom from the EU”.

2 Good reasons

- 2.1 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These Regulations are made to address inoperabilities and deficiencies of retained EU law arising from the withdrawal of the United Kingdom from the EU”.

3 Equalities

- 3.1 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement(s):

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 3.2 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Ranil Jayawardena MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

4 Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.