

EXPLANATORY MEMORANDUM TO
THE EXPORT CONTROL (AMENDMENT) (No. 2) ORDER 2012

2012 No. 1910

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

2.1 The Export Control (Amendment) (No.2) Order 2012 (“the 2012 Order”) amends the Export Control Order 2008 (“the 2008 Order”). This 2012 Order implements Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (“the Directive”), as amended by Directive 2012/10/EU as regards the list of defence-related products. The 2012 Order also incorporates changes to the control lists agreed in the Wassenaar Arrangement (this Arrangement is an international control regime). In addition it makes some amendments as a consequence of changes to Council Regulation 428/2009 for the control of exports, transfer, brokering and transit of dual-use items and to Council Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. It decontrols the movement of historic military vehicles. It further adds another medicinal product propofol to the list of human and veterinary medicinal products that are prohibited for export to the United States of America.

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

3.1 None.

4. **Legislative Context**

4.1 The UK is obliged to implement the Directive as amended. Paragraphs 2, 5, 7, 8, 10, 11 and 15 of the Schedule to the Order are the relevant amendments. See Annex for detailed transposition note.

4.2 Schedule 2 of the 2008 Order is amended to implement the changes to the Wassenaar Arrangement setting out control lists. These are also reflected in the Annex to the Directive as amended.

4.3 Paragraphs 1, 6, 9 and 12 of the Schedule to the 2012 Order amend the 2008 Order to reflect changes made to Council Regulation 428/2009 (the Dual-use Regulation).

- 4.4 The Impact Assessment relates only to amendments to the Directive as amended. The remaining changes are of a technical nature and will only have a minimum impact and accordingly an assessment of their impact was not considered necessary.
- 4.5 An Explanatory Memorandum on the Draft Directive on Simplifying Terms and Conditions of Transfers of Defence-Related Products within the Community (16534/07 + ADD 1-2 / COM (07) 765) was cleared from scrutiny by the House of Commons European Scrutiny Committee on 17 December 2008 and the House of Lords Select Committee on the European Union on 18 December 2008.

5. Territorial Extent and Application

- 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 resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

- 7.1 The main body of the changes relate to the UK's requirement to implement the Directive. The purpose of the Directive is to reduce national obstacles to the circulation of defence-related products within the Internal Market and to reduce distortions of competition by simplifying and harmonising licensing conditions and procedures. There are few practical implications for the UK as the Directive allows the UK to operate a system very close to the UK's existing arrangements. Some changes are required where UK arrangements are not entirely consistent with the Directive.
- 7.2 The Directive applies to the transfer of all items specified in the EU Common Military List (EU CML), including Article 4.1 of the Directive requiring prior authorisation of transfer of defence related products between Member States. The EU CML includes a specific reference to the provision of "technical assistance" related to military goods which is absent from the current UK Military List. In the Government's view most, if not all, the activities covered by a control on the provision of technical assistance are already covered by the existing controls on the transfer of technology. However, for the avoidance of doubt, it is our intention implement a specific control on technical assistance but we have not yet done so as we are still assessing its potential impact on business.
- 7.3 Changes to the control lists are a direct consequence of the UK's membership of the international control regime (Wassenaar

Arrangement) and the need to keep the control lists up to date and relevant to changing circumstances and technological developments. These changes are largely technical in nature and seek to clarify and amend existing controls.

- ***Consolidation***

7.4 It is intended to consolidate the 2008 Order on the occasion when further amendments are required as a consequence to amendments to the Directive or when provisions relating to technical assistance are implemented.

8. Consultation outcome

8.1 There was no formal consultation undertaken with respect to the implementation of the Directive as the views of UK industry had been sought on a regular basis during negotiations. The Directive as adopted permits the UK to operate a system very close to its current licensing arrangements. On this basis formal consultation was not deemed necessary.

8.2 The changes to the Wassenaar Arrangements require technical amendments to implement the goods schedules of the 2008 Order so that the UK commitments to the international non-proliferation regime are met. UK officials consulted appropriate industry sectors prior to agreeing to the adoption of changes to the regime. Industry comments were incorporated into the UK negotiating position in order to achieve an acceptable level of change and ensure that burdens on business would be minimised. It was also necessary to ensure that counter-proliferation concerns were considered before removing licensing requirements in certain goods. The amendments clarify existing text, remove ambiguity and ensure consistent interpretation amongst participating states and as such no formal consultation was considered necessary.

8.3 The technical changes to Council Regulation 428/2009 and Council Regulation 1236/2005 do not change the scope of the controls and no formal consultation was deemed necessary in this regard.

9. Guidance

9.1 Comprehensive guidance on the 2008 Order and subsequent amendments is already available on the Department for Business, Innovation and Skills website. Further notices including detailed Q&A will be published giving details of the latest changes. Notices are circulated automatically to those organisations and individuals registered with the Export Control Organisation. Details are available at <http://www.bis.gov.uk/exportcontrol> and <http://www.businesslink.gov.uk/exportcontrol>.

10. Impact

- 10.1 The impact on business, charities and voluntary bodies is minimal (no costs) as the changes being implemented do not significantly alter the scope of strategic export controls already in operation in the UK.
- 10.2 The impact on the public sector is minimal with existing export control arrangements used to implement Directive 2009/43/EC and changes to the scope of the control lists also operate within existing licensing structures.
- 10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

- 11.1 The legislation applies to small business.
- 11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to have regard to the concerns of small business in the respective negotiations. There are no burdens on business introduced through the 2012 Order.
- 11.3 The basis for the final decision on what action to take to assist small business is not applicable as there are no burdens or costs introduced through the Order.

12. Monitoring and review

- 12.1 There is a duty to review this legislation by 2016 (the details of which are contained in the Impact Assessment paragraph 28).

13. Contact

- 13.1 Ian Bendelow at the Department for Business, Innovation and Skills, Tel: 0207 215 8692 or e-mail Ian.Bendelow@bis.gsi.gov.uk can answer any queries regarding this instrument.

The Export Control (Amendment) (No 2) Order 2012

Transposition Note

This Transposition Note, in tabular form, explains how the Export Control (Amendment) (No 2) Order 2012 (“the amending Order”) transposes Directive 2009/43/EC of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (the Directive) as amended by Directive 2012/10/EU. The transposition takes effect through amendments to the Export Control Order 2008 (“the 2008 Order”).

The table explains how the provisions of the Directive are being transposed, including cross-references to the specific provisions of the amending Order and the 2008 Order.

Copy out has been used wherever possible. However, copy out has not been used in cases where this would create inconsistency with existing provisions in the 2008 Order (for example inconsistency in the terminology which is used). The table explains where copy out has been not used.

The amending Order does not go beyond what is necessary to implement the Directive.

Although the Directive requires Member States to control the provision of technical assistance within the EU, Council Common Position 2008/944/CFSP (on exports of military technology and equipment) also requires Member States to control the provision of technical assistance outside of the EU. This provision is not implemented through the amending Order although current provisions in the 2008 Order extend to military goods, software and technology.

Transposition Table

In this table:

- “ECA” means the Export Control Act 2002
- “2008 Order” means the Export Control Order 2008
- “the amending Order” means the Export Control (Amendment) (No 2) Order 2012

Article	Objectives	Cross-reference in the amending Order	Implementation in the 2008 Order
1	Sets out the subject matter of the Directive.	-	No specific provision is required.
2	Sets out the scope of the Directive i.e. it applies to the items set out in the Annex to the Directive.	New definition of “European military items” Schedule paragraph 1(d)	The amending Order introduces the defined term “European military items” which is used to limit the amendments to the 2008 Order to the items within the scope of the Directive. No other specific provision is required.
3	Defines certain terms used in the Directive	-	<p>No specific provision required, but note that the terms and “transfer” and “export” are used in both the Directive and 2008 order but have different meanings:</p> <ul style="list-style-type: none"> • In the Directive, “transfer” refers to exports to other EU countries. In the 2008 Order, “transfer” refers to the transmission of software and technology. • In the Directive, “export” refers to exports to non-EU countries. In the 2008 Order, “export” refers to the removal of goods from the UK to a destination outside the UK. <p>The amending Order uses the definitions in the 2008 Order in order to maintain clarity and consistency.</p>

4.1			
	<p>The first part of Article 4.1 sets out the requirement for prior authorisation (i.e. a licence) in relation to the items listed in the Annex to the Directive.</p>		<p>Existing article 3 of the 2008 Order provides that the export or transfer of “military goods, software and technology” is prohibited, subject to existing Article 26 which provides that such acts are permitted if authorised by a licence. The term “military goods, software and technology” is defined as meaning the items listed in Schedule 2 to the 2008 Order (excluding items listed as “PL...” which are purely national controls). This includes all of the items listed in the Annex to the Directive.</p> <p>However the Order does not contain an explicit reference to the control of technical assistance in respect of goods, software or technology listed in Schedule 2 as required under the Directive. It is likely that most, if not all, such technical assistance is already caught by the existing control on transfer of technology. However, for the avoidance of doubt it is our intention to include an explicit reference to technical assistance in a further amendment to the Order once we have completed an assessment of the potential impact on business.</p>
	<p>The second part of Article 4.1 provides that Member States should not impose controls on goods in transit.</p>	<p>Schedule paragraph 5</p>	<p>Existing article 17 of the 2008 Order provides an exemption for goods in transit. This has been extended to apply to goods in transit which are within the scope of the Directive.</p>
4.2	<p>This sets out permitted exemptions from the requirement in article 4.1 to obtain a licence.</p>	<p>Schedule paragraph 2</p>	<ul style="list-style-type: none"> Article 4.2(a) of the Directive relates to crown immunity. The existing position was that, applying the principle of crown immunity, the Crown was not bound by the relevant provisions of the 2008 Order because there was no express or implied provision to the contrary. However, article 4.1 and 4.2(a) of the Directive can be interpreted as meaning that the Directive applies to the Crown unless this is expressly excluded. Therefore, to ensure that the position remains clear, new article 2A of the 2008 Order provides expressly that the relevant provisions do not apply to the Crown.

		-	<ul style="list-style-type: none"> The activities referred to in article 4.2(b) of the Directive are already exempt as a result of existing immunity and privilege Orders for the relevant organisations, so no further provision is considered necessary. The scenario referred to in article 4.2(c) of the Directive is most likely to involve the Crown acting as exporter. In such cases, the principle of crown immunity (set out expressly in new article 2A) will apply so that no licence is required. To the extent that crown immunity does not apply, the activities referred to in article 4.2(c) will be covered by an open general licence. Again, the scenarios referred to in article 4.2(d) of the Directive are most likely to involve the Crown acting as exporter. In such cases, the principle of crown immunity (set out expressly in new article 2A) will apply so that no licence is required. To the extent that crown immunity does not apply, the activities referred to in Article 4.2(d) will be covered by an open general licence. The activities referred to in article 4.2(e) of the Directive will be covered by an open general licence.
4.3	This provides a power for the Commission to amend Article 4.2.	-	No specific provision is required.
4.4	This provision introduces articles 5, 6 and 7 which require Member States to have certain general licences in place and to provide for suppliers to be able to apply for global or individual transfer licences.	-	No specific implementation of this provision is required. Refer to comments on articles 5, 6 and 7 of the Directive.
4.5	This provides that Member States shall determine the type of licence and products covered by a licence.	-	Existing article 26(6)(a) and (b) of the 2008 Order provides that a licence granted by the Secretary of State may be either general or granted to a particular person (i.e. an individual licence).

4.6	This provides that Member States shall determine the terms and conditions of licences and sets out some of the matters which should be given regard to when determining this.	-	Existing article 26(6)(c) of the 2008 Order provides that a licence granted by the Secretary of State may be subject to, or without, conditions and any such conditions may require any act or omission before or after the doing of the act authorised by the licence. Article 4.6 also sets out some of the matters which should be given regard to when determining conditions. Guidance is to be published under section 9 ECA setting out the matters taken into account by the Secretary of State (under section 9 ECA, this guidance must be laid before Parliament and the Secretary of State must have regard to it).
4.7	This provides that Member States shall determine the terms and conditions of licences for components and sets out some of the matters which should be given regard to when determining this.	-	Existing article 26(6)(c) of the 2008 Order. The comments above in relation to article 4.6 also apply here.
4.8	This limits the circumstances in which export limitations can be imposed in relation to components.	-	Guidance is to be published under section 9 ECA setting out the circumstances in which export limitations may be imposed in relation to components.
4.9	This provides that Member States may withdraw, suspend or limit the use of licences and sets out the grounds for doing so.	-	Existing article 32 of the 2008 Order provides a power to amend, suspend or revoke licences. The existing guidance (published under section 9 ECA) on revoking etc of licences will be updated to set out the circumstances in which licences may be amended, suspended or revoked. Under section 9 ECA, this guidance must be laid before Parliament and the Secretary of State must have regard to it.
5.1	This introduces articles 5.2 which requires Member States to have certain general licences	-	Existing article 26(6)(a) of the 2008 Order provides that a licence granted by the Secretary of State may be a general licence. A

	in place.		general licence is defined in existing article 2 as “not granted to a particular person but available for use generally”.
5.2	This provides for general licences to be published covering the activities set out in paragraphs (a) to (d).	-	Guidance is to be published under section 9 ECA setting out that general licences will be granted covering the activities provided for in paragraphs (a) to (d) of article 5.2. Under section 9 ECA, this guidance must be laid before Parliament and the Secretary of State must have regard to it.
5.3	This provides that a general licence may be published covering inter-government cooperation programmes.	-	No specific provision required.
5.4	This provides that Member States may require registration in order to use general licences.	-	Existing article 28 of the 2008 Order requires persons using general licences to register with the Secretary of State in advance.
6.1	This article, read together with Article 7, provides that where an individual licence is granted this will be a global transfer licence, with individual transfer licences permitted in limited circumstances.	-	Guidance is to be published under section 9 ECA setting out that, where an individual licence is granted, that licence will be a general transfer licence unless the circumstances set out in article 7 exist (in which case an individual transfer licence may be granted). Under section 9 ECA, this guidance must be laid before Parliament and the Secretary of State must have regard to it.
6.2	This relates length of global transfer licences.	-	Existing article 26(6)(b) of the 2008 Order provides that a licence may be limited so as to expire on a specified date unless renewed. Guidance is to be published under section 9 ECA setting out that global licences will be granted for a period of three years, which may be renewed.
7	This article, read together with Article 6, envisages that where an individual licence is granted this will be a global transfer licence, with individual transfer licences permitted in limited circumstances.	-	Guidance is to be published under section 9 ECA setting out that where an individual licence is granted, that licence will be a general transfer licence unless the circumstances set out in article 7 exist (in which case an individual transfer licence may be granted). Under section 9 ECA, this guidance must be laid before Parliament

				and the Secretary of State must have regard to it.
8.1	This sets out an obligation on exporters to inform recipients of any terms and conditions of a licence relating to end use or re-export	-		Article 26(6) of the 2008 Order provides a power to make licences subject to licence conditions. Licenses will contain a condition requiring licensees to inform recipients of any term or conditions relating to end-use or re-export and to keep records to show compliance with this obligation. Article 38(1)(a) of the 2008 Order makes it a criminal offence to fail to comply with a licence condition. Article 38(1)(b) of the 2008 Order makes it a criminal offence to fail to keep records
8.2	This sets out an obligation to inform the relevant competent authority on the first occasion on which a general transfer licence is used.	-		Existing article 28 of the 2008 Order requires persons using general licences to give written notice to the Secretary of State not later than 30 days after using a general licence for the first time.
8.3	This set out record-keeping requirements on exporters and requires Member State to monitor and enforce compliance.	Schedule paragraph 8		Existing article 29 of the 2008 Order (record-keeping requirements) is amended so that it will also apply to <i>individual</i> licences to export/transfer items within the scope of the Directive (it previously only applied in relation to <i>general</i> licences). Existing article 38 of the 2008 Order also applies.
8.4	This set out how long records must be kept for.	-		Existing article 29(3)(b) of the 2008 Order requires records to be kept for at least three years.
9.1	This requires Member States to designate a competent authority to carry out the certification of recipients.	Schedule paragraph 7 Schedule paragraph 1(a)		New article 28A(1) of the 2008 Order provides the Secretary of State with the power to grant certifications. Amended article 2(1) of the 2008 Order defines "certification" by reference to the Directive.
9.2	This set out the criteria which Member States must apply when deciding whether to grant a certification.	Schedule paragraph 7		New article 28A(2) of the 2008 Order sets out the criteria for the granting of a certification. These provisions are copied out from the Directive.
9.3	This set out what information certificates should	-		No specific provision is required. The template set out in the

	contain			Commission Recommendation of 11 January 2011 (2011/24/EU) will be used.
9.4	This provides that further conditions may be attached to certifications relating to provision of information and suspension/revocation	-		New article 28A(3) of the 2008 Order provides that conditions may be attached to certifications relating to provision of information and suspension/revocation. These provisions are copied out from the Directive.
9.5	This provides for Member States to monitor compliance with certificates.	-		No specific provision is required. Compliance will be monitored by the Export Control Organisation's Enforcement Unit.
9.6	This provides for the mutual recognition of certificates.	-		No specific provision is required.
9.7	This provides for Member States to take appropriate action where the criteria for certification are no longer satisfied or for non-compliance with any conditions attached to a certificate.	Schedule paragraph 7		New article 28A(4) of the 2008 Order provides for certifications to be amended, suspended or revoked. New article 33A sets out an appeal procedure where a certification is refused or suspended/amended/revoked.
9.8	This provides for a list of certified recipients to be published	-		No specific provision is required.
10	This requires applicants for licences to declare to the competent authority where they have received products from other Member States with export limitations attached.	-		Licence application forms will require applicants to state (where applicable) whether they have complied with limitations in licences granted by other Member States. Existing article 37(1) makes it a criminal offence to make a false statement in the course of a licence application.
11	This refers to customs procedures.			No specific provision required.
12	This relates to the exchange of information between competent authorities.	-		No specific provision required.

13 and 14	These articles relate to updates to the Annex to the Directive.	Schedule paragraph 15	The Annex as amended by Directive 2012/10/EU is set out in Schedule 2 to the 2008 Order.
15	This relates to safeguard measures.	-	No specific provision required.
16	This requires Member States to have penalties in place to ensure compliance with the provisions of the Directive.	Schedule paragraph 8	<p><u>Penalties relating to article 4.1 of the Directive</u></p> <p>Articles 34(1) and (5) of the 2008 Order set out criminal offences which will apply to the export or transfer of goods, software or technology listed in the Directive without a licence</p> <p><u>Penalties relating to article 8.1 of the Directive</u></p> <p>To enforce the obligation in article 8(1), licenses will contain a condition requiring licensees to inform recipients of any terms or conditions relating to end-use or re-export and to keep records to show compliance with this obligation (article 26(6) of the 2008 Order provides a power to make licences subject to licence conditions). Existing article 38(1)(a) of the 2008 Order makes it a criminal offence to fail to comply with a licence condition and existing article 38(1)(b) makes it a criminal offence to fail to keep records.</p> <p><u>Penalties relating to article 8.2 of the Directive</u></p> <p>Existing Article 38(1)(b) of the 2008 Order makes it a criminal offence to fail to notify the Secretary of State in relation to the use of general licences (the obligation to notify the Secretary of State is set out in existing article 28). This existing offence will be used to enforce the obligation in article 8.2.</p> <p><u>Penalties relating to article 8.3 of the Directive</u></p> <p>Existing article 38(1)(b) of the 2008 Order makes it a criminal offence to fail to comply with the record-keeping requirements in</p>

		<p style="text-align: center;">Schedule paragraph 11</p>	<p>article 29. Article 29 of the 2008 Order is extended so that it also applies to persons using individual licences within the scope of the Directive.</p> <p><u>Penalties relating to article 9.1 of the Directive</u></p> <p>Article 37 of the 2008 Order makes it a criminal offence to submit false information as part of a licence application. Article 37 will be extended to also make it a criminal offence to submit false information as part of an application for certification.</p> <p><u>Penalties relating to article 10 of the Directive</u></p> <p>To enforce the obligation in article 10, licence application forms will require applicants to state (where applicable) whether they have complied with limitations in licences granted by other Member States. The criminal offence in existing article 37 of the Order (relating to misleading applications for licences) will apply where a false statement is given.</p>
18	This requires Member States to adopt implementing measures by 30 June 2011, with the implementing measures to come into force on 30 June 2011.	Article 1	<p>Article 4(b) of the Directive specifies that the provisions implementing the Directive will come into force on 10th August 2012.</p>

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