

EXPLANATORY MEMORANDUM TO

THE EXPORT CONTROL (AMENDMENT) (No. 3) ORDER 2017

2017 No. 697

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 Export Control (Amendment) (No. 3) Order 2017 (“the Third 2017 Order”) amends Schedule 2 to the Export Control Order 2008 (“the 2008 Order”). The Third 2017 Order implements amendments to Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 (“the ICT Directive”) made by (EU) Directive 2017/433 of 7 March 2017 (“the 2017 Directive”) as regards the list of defence-related products (subject to export and similar controls) set out in the Annex to the former Directive. Schedule 2 to the 2008 Order reflects this list (as well as purely domestic controls) and changes to the ICT Directive necessitate changes to Schedule 2 to the 2008 Order. The Third 2017 Order also makes some other, largely minor, changes to Schedule 2 to the 2008 Order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 In its Twenty-sixth Report of Session 2016-17, the JCSI reported the Export Control (Amendment) Order 2017 (S.I. 2017/85) – an instrument which likewise amended the 2008 Order – on the grounds that it failed to comply with accepted drafting practice in one respect and was defectively drafted in another. The failure to comply with accepted drafting practice was on account of the fact that the new Schedule 2, inserted into the 2008 Order by S.I. 2017/85, contained the term “pyrotechnic(s)”. This failure is corrected by this instrument which substitutes “pyrotechnics” for “pyrotechnic(s)”. The defective drafting concerned item ML17.p. in Schedule 2 to the 2008 Order. This had referred to fuel cells “other than those specified elsewhere” in Schedule 2. In point of truth, no such cells were specified elsewhere. This instrument substitutes a replacement item ML17.p. remedying the defect.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The UK is obliged to implement the changes being made to the ICT Directive by the 2017 Directive to meet international and EU commitments.
- 4.2 The Third 2017 Order implements the changes made to the European Common Military Control List (“the CML”) following the agreement of technical changes made in the Wassenaar Arrangement – an international export control regime. The CML forms the Annex to the ICT Directive and the 2017 Directive substitutes a new Annex reflecting these changes. Copy out has been used wherever possible. This has not occurred where the text of the CML is either inconsistent with the language in the 2008 Order, such that it would be confusing to use it, or where, in the judgement of the Department, the text used is superfluous (e.g. many technical notes are not included as the Department believes they are covered by the entry control headings). No additional burdens are placed on UK industry by this limited departure from copy out.
- 4.3 An impact assessment has not been deemed necessary as the changes are of a technical nature and will only have a minimum impact.
- 4.4 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.
- 4.5 The UK implementing legislation, the Export Control (Amendment) (No.2) Order 2012 (SI 2012 No.1910), was designated as an “instrument of interest” in the House of Lords Secondary Legislation Scrutiny Committee Report published on 11 October 2012 (10th Report of Session 2012/13).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the whole of the United Kingdom.
- 5.2 The territorial application of this instrument is the whole 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 Changes to the control lists are a direct consequence of the UK’s membership of the international export control regime (the Wassenaar Arrangement) and of the European Union. The control lists are kept up to date and relevant to changing circumstances and technological developments. In the main, the amendments to Schedule 2 to the 2008 Order reflect the changes being made to the ICT Directive and these changes are largely technical and minor in nature –for the most part they seek to clarify existing controls. Examples of the changes being made include supplying a definition of “airship”; confirming that “explosives” include “explosive co-crystals” (and

explaining what “explosive co-crystals” are); and placing items within quotation marks, thereby making the reader aware that such items are defined terms. Other changes include those referred to in paragraph 3.1 above.

- 7.2 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply European Union legislation.

Consolidation

- 7.3 This is not currently required – the Export Control (Amendment) Order 2017 (S.I. 2017 No. 85) replaced Schedule 2 to the 2008 Order and thereby consolidated all previous changes to the list of military goods, software and technology which are subject to export controls. The changes now being made to Schedule 2 are few in number such that a further substitution of Schedule 2 is not warranted.

8. Consultation outcome

- 8.1 There was no formal consultation undertaken with respect to the implementation of the 2017 Directive as the views of UK industry are sought on a regular basis during negotiations concerning the Wassenaar Arrangement.
- 8.2 The changes made in the Wassenaar Arrangement are technical in nature - amendments to the existing control lists contained in Schedule 2 to the 2008 Order. Wassenaar Arrangement technical reviews are ongoing and conducted on an annual basis. The changes which are agreed need to be incorporated into UK control lists to reflect the UK commitment to the international non-proliferation regime. UK officials consulted appropriate industry sectors prior to agreeing 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 to ensure that burdens on business would be minimised. It was also necessary to ensure that counter-proliferation concerns were considered before removing licensing requirements on 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.

9. Guidance

- 9.1 Comprehensive guidance on the 2008 Order and subsequent amendments is already available on the www.Gov.uk website. A further Notice to Exporters will be published giving details of the latest changes. These notices are circulated automatically to those organisations and individuals registered with the Export Control Joint Unit.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is minimal (no costs) as the effect of the changes being implemented on the scope of strategic export controls already in operation in the UK is negligible.
- 10.2 The impact on the public sector is minimal – these minor changes to the relevant current control lists will have little effect on the administration of the existing export control regime.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to have regard to the concerns of small businesses in the Wassenaar Arrangement negotiations. The Department does not consider that new burdens are placed on business as a consequence of the Third 2017 Order.

11.3 The basis for the final decision on what action to take to assist small businesses is not applicable as there are no new burdens or costs introduced through the Third 2017 Order.

12. Monitoring & review

12.1 The Third 2017 Order does not contain a review clause. As indicated above, the changes made to the scope of existing export controls by this Order are immaterial. In the circumstances, it is not appropriate to make provision for review – a review would be disproportionate given the absence of any discernible economic impact on activities carried out by businesses for the purposes of their businesses.

13. Contact

13.1 Ian Bendelow at the Department for International Trade, Telephone: 020 7215 8692 or email: ian.bendelow@trade.gsi.gov.uk can answer any queries regarding the instrument.