

EXPLANATORY MEMORANDUM TO
THE TRADE ETC. IN DUAL-USE ITEMS AND FIREARMS ETC. (AMENDMENT)
(EU EXIT) (NO. 2) REGULATIONS 2019

2019 No. 806

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 These Regulations are made to correct drafting defects in *the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* which in turn addressed inoperabilities and deficiencies in retained EU law arising from the withdrawal of the United Kingdom from the EU and to ensure EU-derived domestic export control legislation operates effectively post-exit.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Regulations amend provisions in the following domestic legislation *the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* which amend provisions in the following retained EU legislation:
- 2.3 Council Regulation (EC) No 428/2009 of 5 May 2009, (the Dual-Use Regulation) which sets up a Community regime for the control of exports, transfer, brokering and transit 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.
- 2.4 Regulation (EU) No 258/2012 of the European Parliament and of the Council (the Firearms Regulation) lays down rules on exporting, importing and transporting firearms, their parts and components, and ammunition and therefore 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.

Why is it being changed?

- 2.5 The *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* contain a number of drafting errors:
- Regulation 3(32) omits Annex IV of Dual-Use Regulation because the Annex deals with intra-Community trade. However, the list of goods in Annex IV is relied on by Annex IIg to ensure certain goods are not included in general export authorisations, rather than individual authorisations which are subject to an appropriate level of scrutiny. It is important that it is re-instated before EU exit day;
 - Regulation 3(22)(h)(ii) amends the Dual-Use Regulation to “*whose design or production origins are either Wassenaar*” and the Dual-Use Regulation requires amendment to read “*whose design or production origins are either non-Wassenaar*”.
 - Regulation 3(5)(f) is corrected to remove a redundant reference to Member States; and
 - The words “*this regulation shall be binding in its entirety and directly applicable in all Member States*” which appear after Article 28 of the Dual-Use Regulation and Article 22 of the Firearms Regulation are omitted by this correcting Regulation.
- 2.6 These corrections will ensure that EU law retained on exit day will function effectively. The changes are being made because the provisions either relate to reciprocal arrangements or are otherwise redundant upon exit from the EU. There are also amendments to references to EU instruments which are no longer appropriate.

What will it now do?

- 2.7 These Regulations make corrections to *the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019*. These corrections will ensure appropriate amendments to the retained EU Regulations so that the retained EU Regulations function after EU exit.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made using the urgent procedure. The necessary statement is provided in Part 2 of the Annex.
- 3.2 This Regulation corrects the errors referred to by the Joint Committee on Statutory Instruments (“JCSI”) in its Fifty-third Report of Session 2017-19 in the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019*. The JCSI drew the special attention of both Houses to the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* Regulations on the grounds that they required elucidation in one respect and were defectively drafted in three respects.
- 3.3 The Department for International Trade provided an elucidating memorandum for JCSI on 19 March 2019. The Department explained the distinction between export for physical goods as meaning the removal of goods from the United Kingdom to a destination outside of the United Kingdom and the Isle of Man whereas, in respect of electronic transmission of such things as software or technology, export is defined as

transmission to a destination outside the United Kingdom was reflective of the policy intent and consistent with the Export Control Order 2008.

- 3.4 The JCSI reported regulation 3(5)(f) of the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 for defective drafting. These Regulations correct that error.
- 3.5 The JCSI reported regulation 3(22)(h) of the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 for defective drafting. These Regulations correct that error.
- 3.6 The Committee reported regulations 3(21) and 4(17) of the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 for defective drafting. These Regulations correct that error.

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)

- 3.7 The territorial application of this instrument includes 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 Minister for Investment, Graham Stuart has made the following statement regarding Human Rights:

“In my view the provisions of the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) (No.2) Regulation 2019* are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations are made to correct drafting defects in the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* which in turn addressed inoperabilities and deficiencies in retained EU law arising from the withdrawal of the United Kingdom from the EU and to ensure EU-derived domestic export control legislation operates effectively post-exit.
- 6.2 The export control regime is made up of six pieces of legislation. Three are domestic (the Export Control Act 2002, the Export Control Order 2008 and Radioactive Sources (Control) Order 2006). Three are EU Regulations (the Torture Regulation, the Dual-Use Regulation and the Firearms Regulation). All require amendment if they are to function after EU exit.
- 6.3 *The Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) (No. 2) Regulations 2019* is a made affirmative procedure instrument. It corrects technical and drafting errors in the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019*.

7. Policy background

What is being done and why?

- 7.1 It is necessary to amend directly applicable EU legislation for it to continue to function after EU exit. This instrument corrects technical and drafting errors in the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* which amended retained EU law.

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

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 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 the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

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

10. Consultation outcome

- 10.1 This instrument corrects technical and drafting errors in the *Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019* to amend deficiencies arising from withdrawal from the EU and the continues operation of the legislation being amended after the UK exits the EU. No consultation was necessary.

11. Guidance

- 11.1 The Government has published a technical notice to inform stakeholders how export controls would be affected if the UK leaves the EU with no deal <https://www.gov.uk/government/publications/notice-to-exporters-201821-government-publishes-no-deal-technical-notice-on-export-control-regulation/notice-to-exporters-201821-government-publishes-no-deal-technical-notice-on-export-control-regulation> . Further guidance will be published ahead of this legislation coming into force if the UK leaves the EU with no deal.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is a new requirement for dual-use export licences to the EU which will be mitigated for many exporters by an easily obtainable open general export licence, available for immediate use following registration.
- 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 it has no significant impact on the private or voluntary sector.

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 prevent, remedy or mitigate deficiencies arising from the withdrawal of the United Kingdom from the EU.

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 EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Peter Monday at the Department for International Trade. Telephone: 0207 215 8810 or email: peter.monday@trade.gov.uk can be contacted with any queries regarding the instrument.

15.2 Edward Bell at the Department for International Trade can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Investment 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/ESIC |
| Appropriateness | 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 | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |

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| | | powers in Schedule 2 to create a criminal offence | |
| 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 13, 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 16, 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) 2018 Act

1. Appropriateness statement

- 1.1 The Minister for Investment, Graham Stuart, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 1.2 “In my view the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) (No.2) Regulations 2019 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 Minister for Investment, Graham Stuart has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 2.2 “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 Minister for Investment, Graham Stuart has made the following statement(s) “The 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 Minister for Investment, Graham Stuart has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 3.3 “In relation to the instrument I, Graham Stuart, 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.

5. Urgency

- 5.1 The Minister for Investment, Graham Stuart has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 5.2 “In my view by reason of urgency, it is necessary to make Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) (No.2) Regulations 2019, without a draft of the instrument containing the regulations being laid before, and approved by a resolution of, each House of Parliament, because it is necessary to correct errors in the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 before it comes into force. Without these corrections, the retained EU regulation

will not function as intended which will undermine the effective operation of the UK's export controls.”