

# EXPORT CONTROL ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Section 1: Export controls*

8. *Subsection (1)* provides the Secretary of State with order-making powers to introduce controls on the export of any goods and to make provision about matters connected with the imposition of export controls. It is intended that the existing controls on the export of goods will be reviewed and (where necessary) revised under this power.
9. It is envisaged that the DTI will use these powers to consolidate existing secondary legislation on export controls, namely the Export of Goods (Control) Order 1994 (as amended) and the greater part of the Dual-Use Items (Export Control) (Regulations) 2000 (made under the European Communities Act 1972). In particular, the secondary legislation will specify the goods or classes of goods whose export will be subject to control. With regard to future secondary legislation on strategic export controls, it is expected that all such legislation should in future be made under the powers contained in the Act.
10. It is envisaged that the DCMS will establish controls over the export of any goods (with limited exceptions for personal papers etc.) manufactured or produced more than 50 years before the date of exportation.
11. *Subsection (3)* allows controls to be placed on the export of goods wholly or partly on grounds of the uses or possible uses to which the controlled goods may be put, or because of information obtainable from the goods, eg. information obtainable from a computer disk. An example of legislation which, amongst other things, applies export controls by reference to the end use to which goods may be put as opposed to their physical description is Council Regulation (EC) No 1334/2000 of 22 June 2000 (which is implemented in the UK in respect of certain enforcement provisions by the Dual-Use Items (Export Control) Regulations 2000).
12. *Subsection (4)* provides that the power to impose export controls is subject to section 5, which places general restrictions on the imposition of control orders.
13. *Subsection (5)* ensures that the Secretary of State by an order made under this section may make provision supplementing controls imposed by Community regulations on the export of goods, for example provision for the enforcement of such a regulation.
14. *Subsection (6)* clarifies that goods subject to export control include vehicles, vessels and aircraft themselves, whether or not they are moving under their own power or contain cargo or passengers.

#### *Section 2: Transfer controls*

15. *Subsection (1)* provides the Secretary of State with order-making powers to introduce transfer controls on any type of technology and to make provision about matters connected with the imposition of such controls.

16. The Secretary of State can use these powers to control the transfer of technology by any means and to specify the technology or classes of technology to be controlled.
  17. This power will (together with the powers in section 3) allow implementation of the European Union Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (2000/401/CFSP) agreed by the UK and other EU Member States.
  18. *Subsection (2)* defines what is meant by “transfer controls”, making it clear that the Secretary of State may prohibit or regulate transfers of technology such as transfers by e-mail, fax and telephone (defined in *subsection (6)* as the transfer of technology by any means, including by oral communication, other than the export of physical goods) that are made:
    - by a person or from a place within the UK to a person or place outside the UK;
    - by a person or from a place outside the UK to a person or place also outside the UK, where the transfer is done by or is within the control of a UK person;
    - by a person or place within the UK to a person or place also within the UK where there is reason to believe that the technology may be used outside the UK;
    - by a person or from a place outside the UK to a person or place within the UK where there is reason to believe that the information may be used outside the UK and the transfer is by or within the control of a UK person.
- “United Kingdom person” and “place” are defined in section 11.
19. *Subsection (4)* provides that the power to impose transfer controls is subject to section 5, which places general restrictions on the imposition of control orders.
  20. *Subsection (5)* ensures that the Secretary of State by an order made under this section may make provision supplementing controls imposed by Community regulations on the transfer of technology, for example provision for the enforcement of such a regulation.
  21. *Subsection (6)* defines “transfer” and “technology”.

### ***Section 3: Technical assistance controls***

22. *Subsection (1)* provides the Secretary of State with order-making powers to introduce technical assistance controls on the provision outside the UK of technical assistance of any description and to make provision about matters connected with the imposition of such controls.
23. *Subsection (2)* defines “technical assistance controls” as the prohibition or regulation of participation in provision of technical assistance outside the UK, and “technical assistance” as services provided, used, or capable of use, in connection with development, production or use of goods or technology. For example, technical assistance might take the form of maintenance of or repairs to equipment used in connection with a weapons of mass destruction programme overseas.
24. *Subsection (3)* allows controls to be placed on the provision of technical assistance wholly or partly on the grounds of the uses to which the technical assistance itself, or the goods or technology in connection with which it is provided, may be put. This power will enable the implementation of the European Union Joint Action as described above.
25. *Subsection (4)* provides that the power to impose controls on provision of technical assistance overseas may only be exercised for the purpose of imposing controls corresponding to or connected with export or transfer controls imposed under sections (1) or (2), or in connection with any directly applicable European Community provision on the export of goods or technology transfer. The power is also subject to [section 5](#), which places general restrictions on the imposition of control orders.

26. *Subsection (5)* defines the type of “participation” that falls within the scope of subsection (1).
27. *Subsection (6)* allows the Secretary of State by an order to make provision for giving effect to a directly applicable Community provision on participation in the provision of technical assistance.
28. *Subsection (7)* provides that controls may be imposed under this section on things done outside the UK where the activity subject to control is conducted by a UK person or a person acting under the control of a UK person, for example assistance abroad provided by a UK company through a foreign employee.
29. It is envisaged that the Secretary of State will, for example, use the powers conferred by subsection (1) to make an order prohibiting or regulating the provision outside the EC of technical assistance where the provider of the technical assistance knows or is informed by Government that the activity in question is intended for use in connection with a weapons of mass destruction (WMD) or related missile programme. Powers given under this section will allow implementation of the European Union Joint Action (mentioned in paragraph 18 under section 2 above). The Joint Action commits Member States to bring forward legislation to control the provision of technical assistance outside the EU which is intended or which the provider is aware is intended for use for WMD or missiles capable of their delivery. The Joint Action requires controls to be introduced only in respect of activities undertaken outside the EU.

#### ***Section 4: Trade controls***

30. *Subsection (1)* provides the Secretary of State with order-making powers to introduce trade controls in relation to goods of any description and to make provision about matters connected with the imposition of such controls.
31. It is envisaged that the Secretary of State will use these powers to introduce controls on the acquisition, disposal and movement overseas of certain military and paramilitary equipment which is currently subject to export controls and on any equipment covered by an arms embargo. It is not envisaged that the Secretary of State will use these powers to impose trade controls on the acquisition, disposal or movement of goods where those goods remain within a single overseas country.
32. *Subsection (2)* defines “trade controls” as the prohibition or regulation of the acquisition, disposal or movement of goods, or other activities that facilitate or are otherwise connected with such acquisition or disposal. (Such activities are sometimes called trafficking and brokering.)
33. *Subsection (3)* allows controls to be placed on the trade in goods wholly or partly on the grounds of the uses to which those goods may be put.
34. *Subsection (4)* provides that the power to impose trade controls may only be exercised for the purpose of imposing controls corresponding to or connected with export or transfer controls imposed under sections (1) or (2), or in connection with any directly applicable European Community provision on the export of goods or technology transfer. The power is also subject to section 5, which places general restrictions on the imposition of control orders.
35. *Subsection (5)* allows the Secretary of State by an order to make provision for giving effect to a directly applicable Community provision on, or on activities which facilitate or are otherwise connected with, the acquisition, disposal or movement of goods.
36. *Subsection (7)* makes it clear that controls can be imposed on the actions of persons other than actual parties to a sales contract. For example, a person who acts as an agent bringing parties to a deal together could be subject to controls even though he would not himself be a party to a sales contract.

37. *Subsection (8)* provides that the powers in subsection (1) may be exercised in relation to activities conducted outside the UK and the Isle of Man (which is in a customs union with the UK) where these are conducted by a UK person or by a person acting under the control of a UK person.

### ***Section 5: General restriction on control powers***

38. *Subsection (1)* provides that the powers given to the Secretary of State to make control orders may only (subject to certain exceptions set out in section 6) be used where authorised by this section.
39. *Subsection (2)* states that controls may be imposed to give effect to any Community provisions or other international obligation (as defined in subsection (3)) of the United Kingdom.
40. *Subsections (3) to (8)* Export, transfer or technical assistance controls may also be imposed in relation to any description of goods, technology or technical assistance within one or more of the categories specified in the Schedule to the Act and trade controls may be imposed in relation to any description of goods within one or more of the categories specified in the Schedule to the Act.

### ***Section 6: Exceptions from the general restriction***

41. *Subsection (1)* provides that the restrictions in section 5 do not apply to the making of an order where the control order expires within 12 months.
42. *Subsection (2)* provides that the restrictions in section 5 do not apply in relation to provisions in orders that revoke, amend an earlier order, or re-enact provisions (with or without modifications) of an earlier order which are being revoked, except where these provisions impose new controls or strengthen controls previously imposed.
43. *Subsection (3)* explains that the reference to an “earlier order” does not include temporary orders which are excepted by subsection (1).

### ***Section 7: Control powers: supplementary***

44. *Subsection (1)* deals with various matters which may be addressed in orders made under the Act. These matters may include provision about the use of any information held under or in connection with the order, and the persons to whom it may be disclosed. They may also include provision to require persons to keep records and to provide an authority specified in the order with information about their activities. These will ensure that the UK is able to comply with its international obligations to provide information, for example to the United Nations Conventional Arms Register or to the Wassenaar Arrangement.
45. The current maximum penalty for new or existing export control offences is 7 years’ imprisonment. The Act provides powers for the maximum penalty to be increased to 10 years’ imprisonment. It is envisaged that the power will be used to ensure greater consistency across the spectrum of export control offences so that individual maxima reflect the seriousness of the particular offence.
46. *Subsection (2)* allows, among other things, for orders to be made which bind the Crown. This is necessary in connection with European Community legislation that binds the Crown.

### ***Section 8: Protection of certain freedoms***

47. *Subsection (1)* states that the Secretary of State may not make a control order that has the effect of prohibiting or regulating certain specified activities unless the interference by the order in the freedom to carry on the activity in question is necessary (and no more than necessary).

48. *Subsection (2)* states that it is for the Secretary of State to determine that any interference in any of the activities described in the section is necessary in the light of the circumstances prevailing at the time and having considered the reasons for seeking to control the activity in question and the need to respect the freedom to carry on the affected activity.

### ***Section 9: Guidance about the exercise of functions under control orders***

49. *Subsection (2)* makes clear that the Secretary of State may issue guidance about any matter relating to the exercise of any licensing powers to which this section applies.
50. *Subsections (3) and (4)* make it a requirement for the Secretary of State to give guidance about the general principles to be followed when exercising licensing powers to which this section applies and for this guidance (as a minimum) to address issues relating to sustainable development and issues relating to any possible consequence of the activity being controlled that are of a kind mentioned in the Table in paragraph 3 of the Schedule.
51. *Subsection (8)* makes clear that the consolidated EU and National Arms Export Licensing Criteria announced to Parliament on 26<sup>th</sup> October 2000 are to be treated as guidance issued under section (8) which fulfils the duty imposed by subsection (3) to give guidance about general principles to be followed when exercising licensing powers.

### ***Section 10: Annual reports***

52. This provides for the Secretary of State to report annually to Parliament on the operation of the Act both as regards the export of objects of cultural interest and as regards other matters relating to the operation of the Act. “Other matters” are, in practice, likely to relate to the exercise of strategic export controls.

### ***Section 12: Power to modify the Schedule***

53. This section allows the Secretary of State to make an order amending the Schedule (by affirmative resolution procedure – see section 13(4)).

### ***Section 13: Orders***

54. *Subsection (2)* requires orders that contain provisions made by virtue of section 6(1) (i.e. orders which impose export or transfer controls and provide for their own expiry in 12 months or less) to be subject to the affirmative resolution procedure of both Houses of Parliament. The effect in this case is that any order made may have immediate effect but will cease to have effect if not approved by both Houses before the end of a 40 day period.
55. *Subsection (4)* requires that orders that are made under section 12 (i.e. orders that amend the Schedule) shall be subject to the affirmative resolution procedure of both Houses of Parliament.
56. *Subsection (5)* requires orders made under sections 1, 2, 3 and 4, other than those made by virtue of section 6(1), and any orders made under section 16(3) of the Act, to be subject to the negative resolution procedure of both Houses of Parliament.

### ***Section 15: Consequential repeals***

57. **Section 15** repeals provisions of the 1939 Act in so far as they relate to the prohibition or regulation of the export of goods.

### ***Section 16: Short title, etc***

58. This section deals with the short title, commencement and territorial extent of the Act and also gives the Secretary of State powers to introduce by order transitional provisions

and savings as appropriate in connection with the coming into force of any provision in the Act.

**Schedule: Categories of goods, technology and technical assistance**

59. The Schedule, together with section 5, sets out the categories of goods, technology or technical assistance upon which export, technology transfer, technical assistance and trade controls may be imposed. Controls may be imposed in relation to military equipment and technology irrespective of the consequence which its export, transfer or trade might have or which technical assistance provided in relation to it might have.
60. The Table to the Schedule sets out a list of relevant consequences. The Schedule states that export, transfer or technical assistance controls may be imposed in relation to goods and technology the exportation (in the case of goods), transfer (in the case of technology), provision (in the case of technical assistance) or use of which is capable of having a relevant consequence. It also states that trade controls may be imposed in relation to any goods, the acquisition, disposal, movement or use of which is capable of having a relevant consequence.