

# **EXPORT CONTROL ACT 2002**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Export Control Act 2002. They have been prepared by the Department of Trade and Industry (DTI) and the Department for Culture, Media and Sport (DCMS) in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So, where a section or part of a section does not seem to require any explanation or comment, none is given.

### **BACKGROUND**

3. The Import, Export and Customs Powers (Defence) Act 1939 (“the 1939 Act”), and in particular section 1, provides the Secretary of State with a general power to impose import and export controls on goods. The 1939 Act was considered to be a temporary measure to deal with the emergencies of the time. However, the 1939 Act has remained in force ever since (although it was amended by the Import and Export Control Act 1990 to allow it to continue in force without relying on the continued existence of “the emergency” that existed in 1939).
4. The Scott Inquiry (Sir Richard Scott’s *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* in February 1996 (HMSO, 0-10-262796-7)) identified a number of limitations in the 1939 Act, including the lack of parliamentary scrutiny of secondary legislation made under the Act and the absence of any indication of the purposes for which export controls may be imposed. In July 1998 the Government published a White Paper on *Strategic Export Controls* (Cm 3989), which set out proposals for new primary export control legislation. These took into account the recommendations made by Sir Richard Scott (now Lord Scott of Foscote) and are reflected in the Act.

### **SUMMARY**

5. The Act provides for:
  - parliamentary scrutiny of secondary legislation made under the Act (section 13); and
  - restrictions upon the use of control powers to control goods, technology and technical assistance (section 5 and the Schedule).
6. The Act includes powers to:
  - impose controls on exports from the UK;
  - impose controls on the transfer of technology from the UK and by UK persons anywhere by any means (other than by the export of goods);
  - impose controls on the provision of technical assistance overseas;

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- impose controls on the acquisition, disposal or movement of goods or on activities which facilitate such acquisition, disposal or movement (this is often referred to as trafficking and brokering);
- apply measures in order to give effect to EU legislation on controls on dual-use items (i.e. items with a civil and potential military application);
- prescribe licensing procedures in respect of any of the controls imposed;
- require the Secretary of State to report annually to Parliament on the controls imposed on both strategic and cultural exports under the Act;
- require the Secretary of State to issue guidance about the general principles to be followed when exercising licensing powers;
- enable penalties for export control offences to be imposed, increased or varied to reflect the seriousness of the offences.

The Act also contains provisions that prevent the Secretary of State from making a control order which prohibits or regulates certain activities (such as the making of information generally available to the public) unless the interference by the order in the freedom to carry on the activity in question is necessary (and no more than necessary).

7. The powers in the Act are conferred on the Secretary of State. In practice the Departments with direct responsibility for export controls are the DTI, who are responsible for strategic export controls, and the DCMS, who are responsible for the export control of objects of cultural interest.

## **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.

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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

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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.

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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.

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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.

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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.

**COMMENCEMENT**

61. Following a 12 week public consultation in the autumn of 2002 on draft versions of the secondary legislation which will give effect to the new controls under the Act, it is expected that the Export Control Act and the planned new controls under it will enter into force in the second half of 2003. The Export Control Act, when it comes into force, will replace entirely the export control provisions of the Import, Export and Customs Powers (Defence) Act 1939.

**HANSARD TABLE**

<b>Parliamentary Stage</b>	<b>Date</b>	<b>Hansard Reference</b>
Introduction into the House of Commons	26 June 2001	Col 511
Second Reading	9 July 2001	Col 542
Committee	17 July 2001	Col 2
First sitting	17 July 2001	Col 39
Second sitting	19 July 2001	Col 53
Third sitting	16 October 2001	Col 83
Fourth sitting	16 October 2001	Col 121
Fifth sitting	18 October 2001	Col 135

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Sixth sitting		
Report	8 November 2001	Col 382
Third Reading	8 November 2001	Col 455
Introduction into the House of Lords	12 November 2001	Col 369
Second Reading	8 January 2002	Col 468
Committee First sitting Second sitting	7 February 2002 4 March 2002	Col 758 Col 16
Report	18 April 2002	Col 1096
Third Reading	20 May 2002	Col 519
Commons Consideration of Lords' Amendments	24 June 2002	Col 629
Lords' Consideration of Commons' Reasons	23 July 2002	Col 190
Consideration of Lords Amendments in lieu of an Amendment to which the Commons have disagreed	24 July 2002	Col 1046
Royal Assent	24 July 2002	Col 1079