

2012 No. 1910

CUSTOMS

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

Made - - - - - *18th July 2012*

Laid before Parliament *20th July 2012*

Coming into force - - - *10th August 2012*

The Secretary of State is a Minister designated(a) for the purpose of section 2(2) of the European Communities Act 1972(b) in relation to defence-related products.

The Secretary of State, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and by sections 1, 2, 3, 4, 5 and 7 of the Export Control Act 2002(c), makes the following Order.

Citation and commencement

1. This Order may be cited as the Export Control (Amendment) (No. 2) Order 2012 and comes into force on 10th August 2012.

Amendments to the Export Control Order 2008

2. The Export Control Order 2008(d) is amended as set out in the Schedule.

18th July 2012

Mark Prisk
Minister of State for Business and Enterprise
Department for Business, Innovation and Skills

(a) S.I. 2010/761.

(b) 1972 c. 68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c. 51), section 27(1) and the European Union (Amendment) Act 2008 (c. 7), section 3(3) and Schedule, Part 1.

(c) 2002 c. 28.

(d) S.I. 2008/3231; relevant amending instruments are S.I. 2009/1852, S.I. 2009/2151, S.I. 2010/121, S.I. 2010/2007, S.I. 2010/2843, S.I. 2012/929.

SCHEDULE

Article 2

AMENDMENTS TO THE EXPORT CONTROL ORDER 2008

1. In article 2(1) (interpretation)—
 - (a) after the definition of “CEMA” insert—

““certificate” means a certificate referred to in article 28A(1);”;
 - (b) omit the definition of “The Community General Export Authorisation”;
 - (c) after the definition of “the customs territory” insert—

““the defence-related products Directive” means 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(a)”;
 - (d) after the definition of “embargoed destination” insert—

““European military items” means goods, software or technology listed in Schedule 2 except in entry PL5017 or PL5001;”;
 - (e) after the definition of “importation” insert—

““individual” in relation to a licence, means granted to a particular person;”;
 - (f) after the definition “UK licence” insert—

““the Union General Export Authorisation” has the same meaning as in Article 2(9) of the dual-use Regulation;”.

2. After article 2 (interpretation), insert—

“Crown application

2A.—(1) The following articles bind the Crown—

- (a) article 4 (movement of UK controlled dual-use goods, etc. to certain destinations);
- (b) article 6 (WMD purposes end-use control supplementing the dual-use Regulation);
- (c) article 7 (control on transfers within the customs territory supplementing the dual-use Regulation);
- (d) article 8 (transit controls supplementing the dual-use Regulation); and
- (e) article 9 (provisions supplementing the torture Regulation).

(2) The Crown is not criminally liable as a result of a contravention of any of those articles.

(3) Paragraph (2) does not affect the application of those articles to persons in the public service of the Crown.”.

3. In article 4A, in paragraph (1) after “pancuronium bromide” insert “or propofol”.

4. After article 14 (exceptions for vessels), insert—

“Exception for historic military vehicles

14A.—(1) The prohibition on the export of military goods in article 3 does not apply to the export of a vehicle or component falling within entry ML6 in Schedule 2 provided that the following conditions are met.

(2) The conditions are that—

(a) OJ No L 146, 10.6.2009, p1.

- (a) the vehicle or component was manufactured more than 50 years before the date of exportation;
- (b) the exportation is to a destination in Belgium, France or Germany;
- (c) the exportation is for the purposes of a military re-enactment, commemorative event or recreational activity; and
- (d) the vehicle or component is to be returned to the United Kingdom within 3 months of the date of exportation.”.

5. In article 17 (transit or transshipment exception), for sub-paragraph 4(a) substitute—

- “(a) the goods in question either—
- (i) remain on board a vessel, aircraft or vehicle for the entire period that they remain in the United Kingdom or are goods on a through bill of lading, through air waybill or single transport contract and in any event are exported before the end of the period of 30 days beginning with the date of their importation; or
 - (ii) are European military items which were originally exported from a member State and the destination of the goods following exportation from the United Kingdom is within the EU;”.

6. In article 28(1)(b) for “Community General Export Authorisation” substitute “Union General Export Authorisation”.

7. After article 28 (registration with the Secretary of State), insert—

“Certificates (European military items)

28A.—(1) For the purposes of Article 9(1) of the defence-related products Directive, the Secretary of State is empowered to grant certificates to recipients established in the United Kingdom of European military items under authorisations granted by competent authorities in other member States.

(2) Before granting a certificate, the Secretary of State must establish the reliability of the recipient undertaking and in particular its capacity to observe limitations on the export of European military items which are received under an authorisation granted by a competent authority in another member State. The recipient’s reliability must be assessed according to the following criteria—

- (a) proven experience in defence activities, taking into account in particular—
 - (i) the undertaking’s record of compliance with export restrictions including any relevant court decisions;
 - (ii) any authorisation held by the undertaking to produce or market European military items;
 - (iii) the employment of experienced management staff by the recipient;
- (b) relevant industrial activity in European military items within the EU and in particular capacity for system or sub-system integration;
- (c) the appointment of a senior executive as the dedicated officer personally responsible for exports and transfers;
- (d) the provision of a written undertaking, signed by the senior executive referred to in sub-paragraph (c), that the undertaking will take all necessary steps to observe and enforce any specific condition of an authorisation granted by a competent authority in another member State relating to end-use and re-export of any specific component or product received;
- (e) the provision of a written undertaking, signed by the senior executive referred to in sub-paragraph (c), that the undertaking will provide to the Secretary of State upon request detailed information concerning the end-users or end-use of all European

military items exported, transferred or received under an authorisation granted by a competent authority in another member State; and

- (f) the provision of a written description, signed by the senior executive referred to in sub-paragraph (c), of the undertaking's internal compliance programme or export and transfer management systems. This description must provide details of the organisational, human and technical resources allocated to the management of exports and transfers, the chain of responsibility within the undertaking, internal audit procedures, awareness-raising and staff-training, physical and technical security arrangements, record-keeping and traceability of exports and transfers.

(3) A certificate granted by the Secretary of State must contain the following—

- (a) the name of the competent authority issuing the certificate;
- (b) the name and address of the recipient;
- (c) a statement of the recipient's conformity with the criteria referred to in paragraph 2;
- (d) the date of issue and the period of validity of the certificate.

(4) The period of validity of a certificate granted by the Secretary of State must not exceed five years.

(5) A certificate granted by the Secretary of State may be subject to conditions relating to—

- (a) the provision of information necessary to verify compliance with the criteria set out in paragraph (2);
- (b) its suspension or revocation.

(6) The Secretary of State may by notice amend, suspend or revoke a certificate.”.

8. In article 29 (record-keeping), for paragraph (1) substitute—

“(1) The following must keep detailed registers or records—

- (a) a person who acts under the authority of a general licence granted by the Secretary of State;
- (b) a person who acts under the authority of the Union General Export Authorisation whilst established in the United Kingdom; and
- (c) a person who acts under the authority of an individual licence to export or transfer European military items within the EU.”.

9. In article 30 (Registration and record keeping – information security items) in paragraph (1) for “Community General Export Authorisation” substitute “Union General Export Authorisation”.

10. After article 33 (licence refusals, etc. and appeals), insert—

“Certificates: refusals, etc. and appeals

33A.—(1) If the Secretary of State decides not to grant a certificate to an applicant, that person must be provided with a written notification setting out the reason for the decision.

(2) If the Secretary of State decides to suspend, revoke or amend a certificate, the certificate holder must be provided with a written notification setting out the reason for the decision.

(3) A person who has a right under paragraph (1) or (2) to a written notification may within 28 days beginning with the date of the written notification submit an appeal against the decision by notice in writing to the Secretary of State, Export Control Organisation, Department for Business, Innovation and Skills.

(4) A notice of appeal must specify the grounds on which it is made and may provide further information or arguments in support of the appeal.

(5) Pending determination of an appeal the Secretary of State’s decision continues to have effect.”.

11. In article 37 (misleading applications for licences)—

- (a) for the heading “Misleading applications for licences” substitute “Misleading applications for licences or certificates”; and
- (b) in paragraph (1), after “licence” (in each place) insert “or certificate”.

12. In article 38(1) for “Community General Export Authorisation” (in each place) substitute “Union General Export Authorisation”.

13. After article 45 (revocations and transitional arrangements), insert—

“Review of the implementation of the defence-related products Directive

46.—(1) The Secretary of State must from time to time—

- (a) carry out a review of articles 3, 17, 26, 28, 28A, 29, 31, 33A, 34, 37, 38 and 41 of this Order to the extent that those provisions implement the defence-related products Directive,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how the defence-related products Directive is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by the articles referred to in sub-paragraph 1(a) to the extent that those provisions implement the defence-related products Directive;
- (b) assess the extent to which those objectives are achieved; and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of five years beginning with 30th June 2012.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.”.

14. In Part 2 of Schedule 1 (category B goods)—

- (a) in paragraph 10(a), for “paragraph 11” insert “paragraph 9”;
- (b) in paragraph 10(aa), for “paragraph 11” insert “paragraph 9”;
- (c) in paragraph 12, for “paragraph 13” insert “paragraph 11”;
- (d) in paragraph 14, for “paragraphs 13 or 14” insert “paragraphs 11 or 12”.

15. In Schedule 2 (military goods, software and technology)—

(a) for entry ML2.c., substitute—

- “c. Weapon sights and weapon sight mounts:
 - 1. specially designed for military use, and
 - 2. specially designed for weapons specified in ML2.a.”;

(b) in entry ML4.b.—

- (i) for “the handling, controlling, activating, powering with one-time operational output, launching, laying, sweeping, discharging, decoying, jamming, detonating, disrupting or detecting of” substitute ““activities” relating to”; and
- (ii) after “improvised explosive devices” insert—

Technical Note:

For the purpose of ML4.b.2. “activities” applies to handling, controlling, activating, powering with one-time operational output, launching, laying, sweeping, discharging, decoying, jamming, detonating, disrupting, detecting or disposing.”;

- (c) for entry ML6.b., substitute—

“b. Other ground “vehicles” and components, as follows:

- 1. All-wheel drive “vehicles” capable of off-road use which have been manufactured or fitted with metallic or non-metallic materials or components to provide ballistic protection to level III (NIJ 01.08.01, September 1985, or comparable national standard) or better.
- 2. Components having all of the following—
 - a. specially designed for “vehicles” specified in ML6.b.1.; and
 - b. providing ballistic protection to level III (NIJ 0108.01, September 1985, or comparable national standard) or better.

Technical Note:

NIJ 0108.01 means the National Institute of Justice standard for Ballistic Resistance for Protective Materials.

N.B.: *See also ML13.a. for armoured plate.*

Note 1: *ML6.b. does not control “vehicles” designed or fitted out for the transportation of valuables or funds.*

Note 2: *ML6.b. does not control “vehicles” fitted with, or designed or modified to be fitted with, a plough, flail or tiller for the purpose of land mine clearance.”;*

- (d) omit entry PL5035;

- (e) in entry ML7.a.—

- (i) for “and” substitute “or”; and
- (ii) after “materials” insert “,”;

- (f) for entry ML7.i.2., substitute—

- “2. Biological systems containing the genetic information specific to the “production” of “biocatalysts” specified in ML7.i.1. as follows:
 - a. “Expression vectors”;
 - b. Viruses; or
 - c. Cultures of cells.”;

- (g) in note 1f. to entry ML7 for “Not used;” substitute “This entry is not used;”;

(h) delete entry ML8.a.32.g. and insert—

“g. This entry is not used;”;

(i) re-number the notes following ML8.c.5.b. as “Note 1” and “Note 2” and after them insert—

“*Note 3 ML8.c.5.b. only applies to metal fuels in particle form when they are mixed with other substances to form a mixture formulated for military purposes such as liquid propellant slurries, solid propellants or pyrotechnic mixtures.*

N.B.: See also IC of Annex I to “the dual-use Regulation”.”;

(j) for entry ML8.f.4.c., substitute—

“c. Ferrocene carboxylic acids including:
1. Ferrocene carboxylic acid (CAS 1271-42-7),
2. 1,1'-Ferrocenedicarboxylic acid (CAS 1293-87-4)
3. Other Ferrocene carboxylic acids;”;

(k) for entry ML10 substitute—

“**ML10** “Aircraft”, “lighter-than-air vehicles”, unmanned airborne vehicles, aero-engines and “aircraft” equipment, related goods, and components, specially designed or modified for military use, as follows:

N.B. Electronic guidance and navigation equipment is controlled in ML11.a..

- a. Combat “aircraft” and specially designed components therefor;
- b. Other “aircraft” and “lighter-than-air vehicles”, specially designed for military use, including military reconnaissance, assault, military training, transporting and airdropping troops or military equipment, logistics support, and specially designed components therefor;
- c. Unmanned airborne vehicles and related equipment, specially designed or modified for military use, as follows, and specially designed components therefor:
 - 1. Unmanned airborne vehicles including remotely piloted air vehicles (RPVs), autonomous programmable vehicles and “lighter-than-air vehicles”;
 - 2. Associated launchers and ground support equipment;
 - 3. Related equipment for command and control;
- d. Aero-engines specially designed or modified for military use, and specially designed components therefor;
- e. Airborne equipment including airborne refuelling equipment, specially designed for use with the “aircraft” specified by ML10.a. or ML10.b. or the aero-engines specified in ML.10.d. and specially designed components therefor;
- f. Pressure refuellers, pressure refuelling equipment, equipment specially designed to facilitate operations in confined areas and ground equipment developed specially for “aircraft” specified by ML.10.a. or ML.10.b. or for aero-engines specified by ML.10.d;
- g. Military crash helmets and protective masks, and specially designed components therefore; pressurised breathing equipment and partial pressure

suits for use in “aircraft”, anti-g suits, liquid oxygen converters used for “aircraft” or missiles, and catapults and cartridge actuated devices for emergency escape of personnel from “aircraft”;

- h. Parachutes, paragliders and related equipment, as follows, and specially designed components therefor:
 - 1. Parachutes not specified elsewhere in this schedule;
 - 2. Paragliders;
 - 3. Equipment specially designed for high altitude parachutists;
 - i. Automatic piloting systems for parachuted loads; equipment specially designed or modified for military use for controlled opening jumps at any height, including oxygen equipment.”;
- (l) in entry ML13 for “NB 2” substitute “NB 2: Military high altitude parachutists’ protective headgear is controlled in ML10.h3.”;
- (m) for entry ML16, substitute—
- “**ML16** Forgings, castings and other unfinished “goods”, specially designed for any of the “goods” specified in ML1 to ML4, ML6, ML9, ML10, ML12 or ML19.”;
- (n) in entry ML19.f., for “Continuous wave or pulsed laser” substitute ““Laser””;
- (o) in entry PL5001—
- (i) in paragraph h, replace “,” with “.”;
 - (ii) delete paragraph i.

16. In Schedule 3 (UK controlled dual-use goods, software and technology) in entry PL 9009 b, for “Not used;” substitute “This entry is not used;”.

EXPLANATORY NOTE

(This note is not part of the Order)

This 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”). It amends the Export Control Order 2008 (“the 2008 Order”) to provide for licensing, certificates, enforcement and penalties in relation to activities within the scope of the Directive. It also incorporates changes made to the Wassenaar Arrangement control lists in 2010 and 2011. The Wassenaar Arrangement is an international non-proliferation regime.

This Order also makes miscellaneous amendments to the 2008 Order which do not relate to the implementation of the Directive or the Wassenaar Arrangement.

Paragraph 1 of the Schedule amends article 2 of the 2008 Order (interpretation) and in particular introduces a definition of “European military items”.

Paragraphs 1, 6, 9 and 12 make amendments to the 2008 Order as a consequence of amendments to Council Regulation 428/2009 (O.J. L134, 29.5.2009, p.1) setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

Paragraph 2 introduces a provision on Crown application. This states the existing position which is that the controls in the 2008 Order which relate to dual use items (articles 4, 6, 7 and 8) and torture equipment (article 9) apply to the Crown. It also states the existing position which is that the other provisions of the Order do not apply to the Crown.

Paragraph 3 adds propofol to the list of human and veterinary medicinal products that are prohibited for export to the United States of America where it is in a form suitable for injection or for preparation of an injection.

Paragraph 4 introduces a new article 14A to provide an exception allowing the temporary export of historic military vehicles where certain conditions are satisfied.

Paragraph 5 extends the exception relating to goods in transit so that it applies to goods in transit via a vehicle and in relation to activities within the scope of the Directive.

Paragraph 7 introduces a new article 28A to provide for the granting of certificates to recipients and sets out the basis on which applications for certificates are to be determined. The granting of a certificate allows the recipient to receive European military items under general licences granted by competent authorities in other member States.

Paragraph 8 amends article 29 so that the record keeping requirements also apply to persons acting under the authority of individual licences relating to the items listed in the Annex to the Directive.

Paragraph 10 introduces a new article 33A to provide for appeals against decisions relating to certificates.

Paragraph 11 amends article 37 to provide for a criminal offence relating to misleading applications for certificates.

Her Majesty’s Revenue and Customs will enforce the provisions of the Order.

Paragraph 13 introduces a new article 46 which requires the Secretary of State to review the operation and effect of those provisions which implement the Directive and to publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether the relevant provisions should remain as they are, be revoked or be amended. A further instrument would be needed to revoke the relevant provisions or to amend them.

Paragraph 14 corrects minor drafting errors in Part 2 of Schedule 1 to the 2008 Order which arose as a consequence of previous amendments to that Part.

Schedule 2 to the 2008 Order lists military goods, software and technology which are subject to export control. The content of this list derives primarily from the Wassenaar Arrangement. Paragraph 15 amends Schedule 2 to reflect changes made to the Wassenaar Arrangement control lists.

A transposition note and an impact assessment of the effect that the amendments made by paragraphs 5, 7, 8 and 10 of the Schedule to this instrument will have on the costs to business and the voluntary sector are available from the BIS website (www.bis.gov.uk). They are also annexed to the Explanatory Memorandum which is available alongside the instrument on the www.legislation.gov.uk website. Copies have also been placed in the Libraries of both Houses of Parliament.

In relation to the amendments made by the other paragraphs of the Schedule, a full regulatory impact assessment has not been produced as minimal or no impact on the private or voluntary sectors is foreseen.

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STATUTORY INSTRUMENTS

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

£5.75

E4068 07/2012 124068 19585

ISBN 978-0-11-152757-3



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