

**EXPLANATORY MEMORANDUM TO**  
**THE EXPORT CONTROL (AMENDMENT) (NO. 2) ORDER 2009**

**2009 No. 1852**

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

The instrument makes clear that the prohibitions on exportation in the Export Control Order 2008 (“the 2008 Order”) are prohibitions with respect to goods. This ensures that enforcement provisions in the Customs and Excise Management Act 1979 (“CEMA”) are available to deal with breaches of the 2008 Order.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The provision inserted by the instrument may appear tautologous. However, the Department is advised that there is an important difference between prohibitions in the form “the exportation of . . . is prohibited” and prohibitions in the form “no person shall export . . .”. There appears to be a risk that the latter (the type appearing in the 2008 Order) cannot be enforced using provisions in CEMA designed to supplement prohibitions “with respect to . . . goods” (e.g. section 68). Given the subject matter of the 2008 Order (it relates to strategic items, including military goods), it is vital to eliminate any doubt about this.

3.2 This is also the Department’s reason for breaching the 21-day rule. To the extent that there are problems in enforcing the 2008 Order, there is some urgency in remedying them. It is important to note in this connection that the goods affected by the prohibitions in the 2008 Order have not changed at all. The amendment is a technical one to ensure that the 2008 Order can be enforced as intended.

3.3 The Department has sought advice from the SI Registrar on whether the procedure for free issue should be applied in these circumstances and agrees with him that it should not.

4. **Legislative Context**

4.1 The 2008 Order includes a number of controls related to export of goods, transfer of software and technology, trade in goods outside the United

Kingdom and the provision of technical assistance. Controlled activities can only be carried out under the authority of a licence issued by the Secretary of State.

4.2 The bulk of these controls are enforced by way of offences in the 2008 Order itself. However, for controls on physical export of goods, although there are some offences in the 2008 Order related to suspicion or knowledge of WMD end-use, the main enforcement mechanism is supposed to be in CEMA. If there is a doubt about how that works, it is important to eliminate it and this is what the instrument seeks to do.

## **5. Territorial Extent and Application**

This instrument applies to all of the United Kingdom.

## **6. European Convention on Human Rights**

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 The 2008 Order (along with European Community legislation on goods that could be used for both civil and military purposes and on goods that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment) is the main source of the law on strategic exports, including military goods. A licence is required for the exportation of goods controlled by the 2008 Order. The policy is that, in the case of an unlicensed export, the goods should be liable to forfeiture and the exporter to prosecution. The instrument ensures that the 2008 Order can be enforced in line with this policy.

- *Consolidation*

7.2 No consolidation of the 2008 Order is planned.

## **8. Consultation outcome**

This is a purely technical amendment so no consultation was necessary.

## **9. Guidance**

Comprehensive guidance on the 2008 Order is available on the BIS website (<http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/licensing-policy/index.html>).

**10. Impact**

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

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

**11. Regulating small business**

The legislation applies to small business.

**12. Monitoring & review**

The general review of the 2008 Order (the anticipated timetable for which is set out in the explanatory memorandum to that Order at [http://www.opsi.gov.uk/si/si2008/em/uksiem\\_20083231\\_en.pdf](http://www.opsi.gov.uk/si/si2008/em/uksiem_20083231_en.pdf)) will include a review of this Order.

**13. Contact**

Neil Capp at the Department for Business, Innovation and Skills, Tel: 020 7215 3494 or email: [Neil.Capp@bis.gsi.gov.uk](mailto:Neil.Capp@bis.gsi.gov.uk) can answer any queries regarding the instrument.