

EXPORT CONTROL ACT 2002

Review of Export Control
Legislation (2007)
Government's Further
Response to the Public
Consultation

21 JULY 2008

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Introduction

On 18 June 2007, the Government launched a public consultation on UK export controls. The public consultation document, “2007 Review of Export Control Legislation: A consultative document”, sought the views of respondents, both on the impact and effectiveness of the controls that were introduced in 2004, and on a number of options for further change. The consultation closed on 30 September 2007.

The Government received 23 substantive responses and 5,134 brief E-Mails and letters. All the substantive responses¹, and a sample of the brief E-Mail responses, have now been posted to the BERR website (<http://www.berr.gov.uk/consultations/page39910.html> - for main consultation page; <http://www.berr.gov.uk/europeandtrade/strategic-export-control/legislation/export-control-act-2002/review/index.html> - for ECO consultation page) and are available for viewing. We thank all those who responded for their contributions.

The Government published its initial response to the consultation on 6 February 2008. That response said that there was a need for more detailed work and further analysis in some areas, and that the Government would issue a further response on these areas. This is that further response. It also provides an update on what we have done so far. Where changes were announced as part of the initial response, they have now been costed; details are provided in the Impact Assessment which can be found at <http://www.berr.gov.uk/files/file47075.pdf>.

1. Update on actions so far

Good progress has been made in taking forward the changes announced in our initial response. Specifically:

- We introduced a new control on sting sticks on 6 April 2008
- The initial response announced that the trade controls would be re-structured as follows;
 - Category A (with activity coverage similar to the existing “restricted goods” category) to cover Torture Equipment and cluster munitions. As now, the supply of any controlled military goods to an embargoed destination would be subject to similar controls.
 - Category B (with activity coverage to be determined but including activities of UK persons anywhere in the world) to cover Small Arms and Light Weapons, Long Range Missiles (including Unmanned Air Vehicles) and MANPADs.

¹ This does not include copies of responses that respondents have been asked to be kept confidential.

- Category C (with activity coverage similar to the existing “controlled goods” category) to cover all other goods on the Military List not covered by Categories A or B.
- We are on track to create the three Category structure on 1 October 2008. On that date, we will move small arms and MANPADs into Category B and cluster munitions into Category A. This will bring under control trading activities of UK persons anywhere in the world in relation to these items;
- We are on track to move to light weapons into Category B on 6 April 2009. This will bring under control the trading activities of UK persons anywhere in the world in relation to those weapons;
- We will move Unmanned Aerial Vehicles (UAVs) and Long Range Missiles (LRMs) into Category B on 6 April 2009 (this has had to await a decision on what activities would be covered by Category B);
- We are on track to correct a current legal anomaly on the treatment of non-military explosive goods by 1 October 2008. This will bring a wider range of activities relating to the trading of those goods to embargoed destinations under control. In particular, this will include trading activities of UK persons anywhere in the world.

2. Update on further work

Our initial response identified several areas where further work was needed, and we report on that further work below:

(i) Whether to extend trade controls on activities by UK persons anywhere in the world to cover other weapons i.e. beyond cluster munitions, small arms, light weapons, LRMs, UAVs and MANPADs (trade controls already apply to all weapons if trading activity is carried out by anyone in the UK)

NGO and industry stakeholders are considering this and will make recommendations by the autumn. We will aim to implement any further changes arising from this by 6 April 2009. If this is not possible, further legislation may be necessary at a later stage. We will provide an update by the end of the year.

(ii) Controls on other activities relating to Category B Goods

We have considered which other supporting activities (i.e. sole provision of transport, finance, insurance and general advertising or promotion) should be controlled in relation to Category B goods. Transport is dealt with at (iii) below.

We have concluded that we should not control sole provision of finance or insurance services on the basis that this is not linked closely enough to core trading activities, and that to introduce controls on these activities in relation to goods in which there will be significant legitimate trade would be a disproportionate burden for industry.

In relation to advertising and promotion, we have concluded that general advertising and promotion should not be controlled for Category B goods, but that active or targeted promotional activities aimed at securing a particular business deal should.

We are still considering with stakeholders whether there is scope for varying the activities coverage for Category B goods according to the risk presented by specific types of transactions. If possible we will implement any further changes arising from these discussions by 6 April 2009. If this is not possible, further legislation may be necessary at a later stage. We will provide an update by the end of the year.

(iii) Provision of Transport

We said in our initial response that we had decided on balance not to introduce a requirement for transport providers who transport controlled goods between countries overseas to provide documentary evidence that those goods had been appropriately licensed by the overseas authorities. However, we accept that it is right to control the provision of transport where the circumstances and risk justify doing so, bearing in mind that the provision of transport is more closely connected to trading than other ancillary activities, in that it is essential in order for the trade to take place.

We have now concluded that it is appropriate to introduce additional controls on the provision of transport in the highest risk circumstances. We have decided that the most effective approach would be to link controls on transport to the new categories of the trade controls, because the categories are based on the relative sensitivity of the goods they cover. The trade controls will therefore be amended as follows:

- The controls for Category A goods – those of the greatest concern – will be similar to those currently applied to “restricted goods”. Consequently, Category A will cover a wide range of activities, including all forms of transport provision or supporting services where those involved know or have reason to believe that (broadly) they are contributing to the movement of Category A goods between overseas countries. As mentioned above, activities of UK persons anywhere in the world will be controlled;

- Because Category B goods are traded legitimately, but are of heightened concern, the trade controls for Category B goods will cover certain activities of transport providers when carried out by UK persons anywhere in the world. In order to keep the burden proportionate to the risk, we need to do further work with stakeholders to ensure we keep outside the scope of the control those activities that are of no concern. In broad terms, the intention would be to catch those who have direct involvement in transferring or arranging the transfer of Category B goods between two countries overseas where they know or have reason to believe that they are Category B goods;
- Category C goods are not of heightened concern. The trade controls for Category C goods will therefore remain much as they currently are for “controlled goods” (i.e. goods on the Military List other than “restricted goods”), and will not cover the provision of transport.

These changes will be introduced on 6 April 2009.

(iv) Torture end use control

Our initial response noted our intention to negotiate a torture end use control in the EU. It also said that this further response would include a costed Impact Assessment which aimed to quantify compliance costs to the best of our ability. That Impact Assessment can be found in <http://www.berr.gov.uk/files/file47075.pdf>.

The UK representative to COARM put forward the Government’s ideas on amending EU Regulation 1236/2005 to members of the working group on 10 June. All representatives present supported the initiative. The Council Secretariat is now producing a note from COARM to the Commission calling on them to bring forward a proposal. (COARM is the EU Working Group on Conventional Arms Exports. The group meets formally in Brussels 6 times a year and is responsible for "providing information and consultation on matters of arms export policy of general interest for all member States of the European Union".)

This international work has been the focus of our attention at this early stage of the process. We remain committed to providing full guidance to exporters and to raising awareness by other means in industries likely to be affected; but we believe that the best time to do this would be when we are clearer on the likely timescale for EU approval and introduction. We will provide a progress update by the end of the year.

(v) Additional Controls on Equipment for use in Destinations of Concern / Overseas production

Our initial response noted that we had concluded that there was not a convincing case for enhancing controls on the exports of controlled goods. However, we accepted in principle that there was a stronger case for tightening controls on the export of non-controlled goods. The cases where issues have arisen have all related to military end use of items which were not controlled when exported from

the UK, in embargoed destinations or other destinations of concern. This suggested moving the focus towards an expanded military end use control.

The current Military End Use Control (MEUC), does not control complete items that, whilst not strategically controlled, could nevertheless be of significant use to the military in an embargoed destination; neither does it control any exports to non-embargoed destinations, some of which might be of considerable concern.

We have therefore decided that we will aim to negotiate an enhanced EU Military End Use Control under which licences will be required for export from the EU of any non-controlled goods which the exporter knows are intended for use in listed destinations, by the military, police or security forces, or has been informed by the Government that the goods are or may be so used, but only where there is a clear risk that the goods might be used for internal repression, breaches of human rights, or against UK forces or those of allies.

More detailed work will need to be done on the exact wording and coverage of the control. However, certain routine goods (food, clothing etc) would not, by their nature, fall within this definition (ie they could not be used for internal repression, breaches of human rights, or against UK or other forces) and therefore would not be caught by the control. Further consultation on the new control is continuing with industry and NGOs, and we will report back on that before the end of the year. We will then aim to negotiate the changes at EU level in order to avoid both putting UK exporters at a competitive disadvantage to those in other Member States, and the risk of unscrupulous exporters circumventing UK controls by exporting from other Member States. We will aim to link this control to the new torture end use control in the interests of clarity for exporters.

We are still considering whether including conditions relating to contracts on the licence would add anything to the military end use control approach.

(vi) Pre-Licensing Registration System for Traders

Our initial response noted that this is an extremely complex area and that an operational model of how such a system might work in practice would need to be developed in order to determine whether it could deliver benefits without imposing disproportionate burdens.

Having carried out that work, we are not yet fully convinced at this stage that the benefits of a pre-licensing registration system would justify the burden it could impose on legitimate business, particularly in view of other steps we are taking in this area.

We believe concerns centre around the potential misuse of open trade control licences. In recent months, we have taken significant steps to address these concerns: the Secretary of State may now revoke or suspend the right of any entity to use an Open General Export or Trade Control Licence, or

an Open Individual Export or Trade Control Licence where the terms of that licence have not been adhered to, or where other actions, such as conviction for an export control related offence, make revocation or suspension necessary. We are now concentrating our compliance effort on open general or open individual licence users whose compliance is not satisfactory, and have these powers to revoke and suspend OGLs for use in cases where the necessary improvements are not made. We are also committed to refocusing our awareness effort to give priority to those using Open General and Open Individual Trade Control Licences, and will be working with industry to develop a new Open Trade Licence awareness strategy throughout 2009.

We believe that these actions, taken together, may achieve similar benefits to a pre-licensing registration system. On that basis, we propose not to proceed directly to implementation at this stage, but to assess first whether the new administrative measures that we have introduced achieve the desired result.

(vii) Transit and transhipment

Our initial response noted that we had concluded that goods in new Category A or B of the trade controls should require a licence to transit or tranship via the UK. We can now confirm that we will put this into effect by adjusting the scope of the current legislative exemptions in relation to transit and transhipment so that there is no exemption for Category A goods. For Category B goods, we will remove the exemption only for specified destinations of concern (and we will review the current destinations list in Schedule 3 of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 to see if this needs to be revised for Category B goods or generally).

In addition, the system under which EU Member States are notified that goods are on their way to the Community will be further enhanced in July 2009, when EU Member States are due to introduce advanced import safety and security messages. This will ensure that goods entering the Community will be notified to the country through which they will enter the Community within prescribed time limits, e.g. for maritime transport 24 hours before loading in the country of export.

Included in these safety and security messages will be either a goods numeric commodity code or a goods description that conforms to guidance on a set range of acceptable goods descriptions, thus giving all Member States more advanced warning of imports, and enhancing their ability to target specific transactions.

We also accept that there is scope to improve our guidance and awareness effort in this complex area of the controls. HMRC and BERR are therefore liaising with representatives of industry and NGOs to identify how best to achieve this.

(viii) Trade Controls: “Receipt of a fee or commission”

In the current legislation, (Article 4(3) of the Trade in Goods (Control) Order 2003), certain supplementary trading activities (namely doing, or agreeing to do, “any act calculated to promote the arrangement or negotiation of a contract for the acquisition or disposal of any controlled goods” where the person responsible “knows or has reason to believe that such a contract will or may result in the removal of those goods from one third country to another third country”) are only controlled if they have been undertaken “in return for a fee, commission or other consideration”. The consultation document sought views on whether this limitation on the scope of the control should be removed. Industry had serious concerns about removing it, because in their view to do so would have a significant impact on legitimate activity, in particular offset and advice on sourcing.

The Trade in Goods (Control) Order 2003 covers activities related to the movement of controlled goods between countries overseas. In practice it catches a very wide range of activity: controls on the following activities are not limited by the “fee, commission ...” provision, therefore they are controlled in all circumstances:

- Arranging the transfer of controlled goods
- Acquiring, disposing or agreeing to acquire or dispose of controlled goods, where the person doing this knows or has reason to believe that such an acquisition or disposal will or may result in the removal of those goods from one third country to another third country; and
- Arranging/negotiating, or agreeing to arrange/negotiate a contract for the acquisition or disposal of any controlled goods where the person doing this knows or has reason to believe that such an acquisition or disposal will or may result in the removal of those goods from one third country to another third country.

Furthermore the “fee, commission ...” provision does not apply to the trading of controlled goods to embargoed destinations, nor to any trading in “restricted goods”. In those cases the control is much wider, and applies to “any act calculated to promote” the supply or delivery of the goods, regardless of whether a fee or commission has been received. The same will apply to Category A goods when the trade controls are restructured.

Thus the “fee, commission ...” limitation applies only to a very small subset of activity, and one which is at one remove from trading.

We have therefore concluded that there is not a case for removing the provision, and that there are risks associated with doing so. However, given that there does appear to be some uncertainty over exactly what constitutes “commission or other consideration”, we will amend the wording of the legislation to clarify this.

(ix) Differing definitions of technology

Our initial response noted that we were taking legal advice on whether and how harmonisation of the different definitions of technology in the current legislation could be achieved; and whether it would have any undesirable consequences. The results of this analysis are set out below.

There are in effect, two definitions of technology in UK legislation. Provisions derived from the EU/international route uses a “necessity test” – ie demanding that the technology in question is necessary for the production or use of goods. Significant parts of domestic legislation however use the broader “capability test” – ie demanding only that the technology is capable of use in connection with certain designated activities.

It is not possible to change the EU derived definition of technology because it stems from international obligations. Therefore, harmonisation could only be achieved by abandoning the broader “capability test” used in the UK legislation. Our judgement is that to do so would limit the UK’s room for manoeuvre, and, potentially, result in us being unable to refuse applications in some high risk cases.

We therefore judge that it would be inappropriate to abandon the broader capability test, and that the current technology definitions should be retained. We will however update the ECO guidance to clarify the reasons for the two definitions.

3. Impact Assessment

The Impact Assessment at <http://www.berr.gov.uk/files/file47075.pdf> provides costings for the measures announced as part of the Government’s initial response of 6 February 2008. It therefore covers both changes which come into effect on 1 October 2008 and changes which come into effect on 6 April 2009 (namely the extension of Category B to include light weapons in addition to small arms and the cost reductions generated by moving Long Range Missiles and UAVs from Category A to Category B). It also costs the introduction of a torture end use control and the inclusion of the provision of transport as a controlled activity for Category B goods, using information obtained earlier in the consultation process. As a result, a large part of this further response has already been costed, although some marginal adjustments may be necessary.

Enhancement of the Military End Use Control is not covered by the Impact Assessment. However, given that the first step will be to start negotiating in the EU, we will at the same time work with stakeholders to arrive at costings when discussing the detail of the new control. We will then provide a further impact assessment on this and other changes covered in this response later in 2008.

We are confident that where the changes covered above have an impact on industry, they will affect specific transactions or circumstances, rather than having a widespread impact, and that they will not add significant extra business burdens. We will also implement the legislation and supporting systems as far as possible in a way that lessens business burdens, and will be working with industry very closely over the coming months in order to achieve this.

Where any further changes are proposed as a result of ongoing discussions, they will where appropriate be subjected to an impact assessment before implementation.

4. Next Steps

The draft legislation and guidance for the changes to be implemented on 1 October 2008 have been given to stakeholders for comment. They were laid before Parliament on 9 July 2008.

The draft legislation and guidance for the changes to be implemented on 6 April 2009 will be laid before Parliament no later than 12 January 2009. These will also be given to stakeholders in advance for comment.

We are developing a publicity and awareness strategy to raise awareness amongst UK citizens overseas who might be affected by the extra territorial trade controls. In addition to providing full guidance on the new controls on our website (which can be accessed world wide) we will produce additional material for dissemination via the network of British Chambers of Commerce overseas, and are considering whether there are any further measures we can take.

We will provide an update on the continuing work noted in this further response, including any further changes agreed, by the end of 2008.