

REALITY CHECK: BREXIT – THE EFFECT ON EXPORT CONTROLS

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There had been much debate since the Referendum decision to leave the EU. The EGADD Executive committee thought that it could be useful to produce a short paper on the risks and opportunities created by this decision, as far as reasonably possible, ahead of the invoking of Article 50 and the necessary diplomatic negotiations with our former partners in the EU to achieve our desired ends. Much of the legislation in place in relation to Export Controls and Sanctions will not be impacted; however, there will be need for negotiation in relation to EU legislation pertaining to Dual-Use goods and the Intra Community Transfers Directive for Military Goods.

The issues surrounding Authorised Economic Operator (AEO) and the Union Customs Code (UCC) will not be addressed here as there are other, more relevant committees focused on these issues.

Legislation

The Export Control Act 2002 provides the UK (the relevant Government Secretary of State) with the statutory power to implement export controls in relation to Military and Dual-Use goods. The UK, therefore, has the primary legislative basis, with secondary legislation and administrative measures relating to the EU Common Military List, Dual-Use List, Intra-Community Transfers Directive for Defence Goods and EU sanctions now requiring possibly significant amendment and/or replacement.

In particular, the EU Dual-Use Regulation (428/2009) and other relevant EU Regulations (e.g. on Iran and Russia sanctions), which have direct effect in all Member States, will cease to apply to the UK. While it seems at this stage unlikely that the UK government will want to make significant changes when adopting these into UK law, as an industry we will want to encourage the government to look for opportunities to streamline the requirements and lighten the administrative burden, while maintaining effective controls.

Control Lists

The UK will remain a member, in its own right, of the multilateral export control regimes (The Wassenaar Arrangement, Missile Technology Control Regime, Australia Group, Nuclear Suppliers Group and Zangger Committee). Membership is not dependent on being in the EU.

There remains an open question as to how the UK would reflect control list changes in secondary legislation. Non-EU 'third countries' such as Norway, Switzerland and even South Africa follow the EU Control List changes as they are amended. Whether the UK adopts a direct reference to the EU lists or simply mirrors them through its own secondary legislation remains to be seen. It would be preferable, however, for the UK to maintain its own lists based closely, as now, on the lists of the Export Control Regimes: avoiding both the delays in changes to the EU lists being adopted, choosing whether to adopt any EU-specific controls (e.g. those relating to 'Human Security') and maintaining its ability to include UK-specific controls.

With the UK remaining a member of the regimes it will be possible to maintain a high degree of harmonization with the EU and other regime member control lists. This is important for industry in order to maintain commonality of control across industry's European (and global) supply chains.

UK-EU Co-ordination

Continued coordination between the EU and UK will be essential. For the next few years, even the next decade, the unpicking of policy, regulatory and commercial positions will need to ensure that industry on either side of the Channel isn't disrupted or disadvantaged.

UK Government and Industry will have to work hard to ensure that exports (particularly those relating to dual-use) can continue to flow in each EU Member State through licensing arrangements that are at least as favourable as they are now. This will be a challenge. Additional administrative burden on industry in the EU will be inevitable, less so perhaps in the UK. Much will depend on likely linkages made between access to the Single Market and free movement of labour. This will not be clear until the UK invokes Article 50 and the EU-27 respond to proposals made by the UK – a position made clear by Germany.

EU Member State governments and the UK will wish to make sure they don't lose the mutually beneficial arrangements that support international peace and security – including: the exchange of denials; no undercut; information sharing; enforcement cooperation and; responses to new and emerging technology risks. This will potentially work in the UK's favour, but will require a mechanism for regular dialogue.

Continued dialogue and, potentially, the involvement of the UK in working groups will be critical. Whether this dialogue can be agreed will depend on the depth and mood of the relationship with the EU, the framework that's agreed (Associate Member, EEA, bilateral agreement, etc.) and what accommodations each side reach in securing the goal of free access to and from the Single Market. This took many years to develop and relied heavily on a spirit of like-mindedness and cooperation. It is particularly important that UK Industry continue to play a role in European trade associations such as ASD to ensure the UK voice is heard.

The UK and EU Consolidated Criteria for Arms Exports - The criteria adopted across the EU, for judging license applications on a case-by-case basis, are based on those that the UK introduced nationally in 1997 and championed (with France) in the EU in 1998 (and which built significantly on Common Criteria introduced in the EU in 1990/1). They were agreed as a legally-binding EU Common Position in 2008 but this would cease to be binding on the UK after Brexit. However, the UK retains a leading role on such criteria and the concept is one to which the UK Parliament and NGOs attach particular importance. The UK is also a State Party to the Arms Trade Treaty (ATT), which will continue to impose a legally-binding requirement on the UK government to apply a similar, though narrower, set of criteria. Its ability to ratify and implement the ATT was aided by its Consolidated EU and National Arms Export Licensing Criteria, requiring only minor amendment to broaden the scope of controls on arms brokering. Against this background, it is highly unlikely that the UK's National Arms Export Criteria will be changed significantly in the foreseeable future. Maintaining equivalent access to, through and from, the Single Market would likely demand commonality in terms of arms export criteria.

Maintaining a Licensing Architecture in the UK – It seems safe to assume that the UK would continue to control its military exports to the EU-27 broadly unchanged, including by maintaining and continuing to develop a wide range of Open General Export Licences (OGELs). For Dual-Use goods, technology and software, we would expect the government to seek to maintain free movement as far as possible, for example by adopting one or more OGELs that would encompass the EU-27. As EGADD, we will want to ensure that the burden on industry is kept to a minimum: records of intra-community transfers should already be kept but new requirements, in particular the compliance auditing of companies using such OGELs, should be avoided.

What is more difficult to predict is whether the EU-27 and the Commission would immediately and comprehensively include the UK in European Union General Export Authorisations (EU GEAs) and Global Trade Licences under the ICT Directive. Much will depend on the continued coordination and alignment of UK export control policy, practices and control lists with the EU (through the regimes,

bilaterally with the EU and multilaterally with each Member State). The status of the UK's relationship and the tone of negotiations will be crucial. One cannot at this stage predict how accommodating each of the EU-27 will be. The balance of interest, however, should logically place the UK arguably ahead of but at least in the same group as the US, Canada, Australia, New Zealand, Japan, etc. and provide for minimal individual licensing of dual-use items.

Sanctions

With the exception of EU-specific sanctions the UK will maintain its role and choice regarding UN, OSCE and, of course, UK national measures. It remains to be seen how far the UK would want to coordinate with the EU-27, create its own separate UK policy, or look towards the US for direction on its sanctions policy. Realistically the UK will do all of these things and make its judgements based on the foreign and security interests of the UK its allies. Rather than taking the opportunity to impose lighter sanctions than the EU-27, there seems more likely to be a risk that the instincts of the UK government will be to impose tougher measures that could put UK industry at a disadvantage.

UK statutory instruments implementing EU sanctions legislation state that the European Communities Act 1972 confers the power on the UK Treasury to create the UK sanctions legislation. If and when the ECA 1972 is repealed, the UK might need to create new primary legislation in order to permit imposition of sanctions.

With regard to Iran, the UK's role in the agreement reached under the Joint Comprehensive Plan Of Action (JCPOA) was by virtue of its UNSC P5 status – separate but complementary to the role played by the EU. Agreement of the JCPOA did not remove or alleviate all sanctions. The UN arms embargo on Iran remains and is interpreted by the EU as a full-scope embargo. Remaining restrictions on dual-use trade and the entities subject to denial are also implemented through EU measures that would have to be fully reflected in UK regulations.

In light of this, what can remain and what needs to be replaced?

What remains:

The UK's licensing architecture of **Single Individual Licences (SIELs)**, **Open Individual Licences (OIELs)**, **Open General Licences (OGELs)** will remain as will the mechanisms for licence application and the criteria by which applications are judged (see above).

Trade Control Licences for the overseas trade or transfer of military and dual-use goods, which come under the category of 'trafficking and brokering'. This power is granted via the UK Export Control Order 2008 (Military Goods) and the European Union Dual-Use Regulation (Dual-Use Goods).

Open General Trade Control Licence (OGTCL) allowing the trading of most goods found on the UK Military List.

UK Military List (Schedule 2 of the Export Control Order 2008) - prohibited goods, software and technology (definitions), military, security and paramilitary goods, software and technology and arms, ammunition and related materiel.

UK Dual-Use List (Schedule 3 of the Export Control Order 2008) - specific prohibited dual-use goods, software and technology including explosive-related items.

UK National Security and Paramilitary List (Article 9 of Export Control Order 2008) - prohibited security and paramilitary goods to destinations in EU member states

UK National Radioactive Sources List (Schedule referred to in Article 2 of Export of Radioactive Sources (Control) Order 2006) - prohibited radioactive sources

What needs to be replaced?

Dual-Use List (Annex I of the EU Dual-Use Regulation 428/2009) - list of Dual-Use Items and technology prohibited from export to non-EU member states. It includes:

- Category 0 - Nuclear Materials, Facilities and Equipment
- Category 1 - Materials, Chemicals, Micro-organisms and Toxins
- Category 2 - Materials Processing
- Category 3 - Electronics
- Category 4 - Computers
- Category 5 - Telecommunications and Information Security
- Category 6 - Sensors and Lasers
- Category 7 - Navigation and Avionics
- Category 8 - Marine
- Category 9 - Aerospace and Propulsion

Annex IV to EU Dual-Use Regulation 428/2009 - dual-use items requiring an export licence to all destinations, including those in an EU Member State.

European Union (EU) Human Rights List (Annexes II and III of 2005 EC Regulation 1236/2005) - prohibited goods to non-EU member states, which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

OGEL – Certified Companies: Published to comply with the UK's obligations under the European Union Directive 2009/43/EC of 6 May 2009 (known as the Intra-Community Transfer or 'ICT' Directive). Whilst the ICT Directive allows for the free movement of certain military goods within the EU, its uptake and implementation has been patchy. It is currently being reviewed by the Commission. Post-Brexit it is doubtful the UK would participate in, or benefit from, the Directive.

UK OGELs provide a licensing route that provides all the benefits of the ICT Directive (without some of the associated bureaucracy) but it is unclear whether similar arrangements would be available to EU-based companies supplying to the UK under the Directive.

European Union General Export Authorisations (EU GEAs) (Annex II of the EU Dual-Use Regulation 428/2009 and Council Regulation (EC) No 1232/2011) - these are the EU equivalent of an Open General Export Licence (OGEL) - they authorise the export of specified dual-use items throughout the EU to specific non-EU destinations. Council Regulation (EC) No 428/2009 (otherwise known as the European Union Dual-Use Regulation) establishes an EU-wide regime for the control of exports of dual-use items, software and technology. There are six EU GEAs that came into force on 7 January 2012:

- EU001 - exports to Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Liechtenstein) and the United States - NOTE: this was previously known as the Community General Export Authorisation or CGEA.
- EU002 - export of certain Dual-Use Items to certain destinations
- EU003 - export after repair/replacement
- EU004 - temporary export for exhibition or fair
- EU005 - telecommunications
- EU006 - chemicals

It would be within the gift of the UK to replicate, reduce or expand the scope of these arrangements by the introduction of OGELs.

The Military End-Use Control is detailed in the EU Dual-Use Regulation (otherwise known as Council Regulation (EC) No. 428/2009), which set up an EU regime for the control of exports of dual-use items and technology. The control applies in respect of a destination that is subject to an arms embargo which is one of the following:

- an arms embargo imposed by a binding resolution of the United Nations Security Council (UNSC) – the UK would remain bound by such resolutions.
- a decision of the Organisation for Security and Co-operation in Europe (OSCE) – the UK would remain bound by such decisions
- decided by a common position or joint action adopted by the European Council – The UK would have to decide whether, in future, it chooses to abide by such decisions. Access to the Single Market may dictate whether this is discretionary or not.

What came out of the EGADD Main Meeting on 14th September 2016

There were very detailed discussions during one of the afternoon workshops at the Main Meeting, which were led and moderated by Mr Spencer Chilvers, of Rolls-Royce.

In addition to the above issues, the following were amongst the points which were raised during these discussions:

Any proposed new OGEL to be published by the British Government to cover dual-use exports to EU Member States should be as bureaucratically “light touch” as possible, with minimal record-keeping requirements;

The UK would need to have to be seen to be in step with the EU on sanctions;

The UK would have to try to be readily perceived as continuing to be a reliable collaborative partner by EU Member States;

Being outside the EU's Weapons Directive (<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0051&from=en>) would be likely to have a major impact on the business activities of UK firms involved in this sector, especially when they seek to import weapons components from the EU.

Possible Objectives for EGADD

In the light of the above, the Executive Committee has drafted the following as initial proposals for what we consider should be the UK government's export control and sanctions-related objectives in the Brexit process. While we recognise that these will not be among the government's highest or most urgent priorities, they are nonetheless important for a significant number of UK companies, both importers and exporters. We would propose to communicate them to the Export Control Joint Unit and, through ADS, to the appropriate Ministers and Departments as part of our wider priorities:

- 1) to continue to ensure responsible exports in the most efficient way and to maintain a level international playing field;
- 2) to preserve as far as possible free movement of UK dual-use items to the EU, under similar record keeping requirements as currently required for intra-community transfers, and with minimal licensing and no auditing requirements;
- 3) to ensure as far as possible free movement of EU dual-use items to the UK, through a UK-specific EUGEA or at least by adding the UK to EU001;
- 4) to prevent any reduction in access by exporters to the UK in non-EU jurisdictions to export licensing authorisations and exceptions allowed to EU Member States;

- 5) to minimise any divergence between UK and EU sanctions regimes that would disadvantage UK companies;
- 6) a co-operative dialogue to identify opportunities created by Brexit for improvements, , to the UK's licensing policy and process.
- 7) A clear message that the UK will remain open to participation in current and future collaborative defence programmes with EU partners.
- 8) Maintenance of the import/export and reporting mechanisms established under the Weapons Directive to reduce the impact of BREXIT on UK firms and their European supply chain.

The Executive Committee would very much welcome any comments from Members on this paper and on these draft objectives by **Friday 14th October 2016**.

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