**Implementation Plans of the US Export Control Rule Changes in the FY24 National Defense Authorization Act**

Background

This is related to issues associated with the hoped for successful delivery of the trinational AUKUS initiative, which is the trilateral defence partnership between Australia, the UK and the US, announced in September 2021. AUKUS comprises of 2 “Pillars” and has been designed to facilitate close cooperation between the three nations on a broad range of defence capabilities. Pillar 1 is focused on conventionally-armed, nuclear-powered submarines, whilst Pillar 2 is focused on a number of different high-technology capability areas such as: cyber capabilities, artificial intelligence, quantum technologies, additional undersea capabilities, hypersonic and counter-hypersonic capabilities, electronic warfare, innovation, and information sharing; however, this will not preclude the potential adding at a later date of further capability areas, if deemed necessary. Naturally, it has been clearly identified that the successful delivery of such an ambitious multinational development and production initiative will require the need to address a number of perceived practical barriers, especially including the three nation’s export control systems, to enable the frictionless flow of defence technologies between the three nations.

Consultations with Industry

On Wednesday 1st May 2024, the Directorate of Defence Trade Controls (DDTC) at the US Department of State published, a draft proposed rule outlining its proposals for the Exemption under the International Traffic in Arms Regulations (otherwise known as ITAR) related to the delivery of AUKUS. This can be found at: <https://public-inspection.federalregister.gov/2024-08829.pdf>.

This publication was linked to similar proposed changes related to the parallel Export Administration Regulations (otherwise known as EAR) system which were released on Thursday 18th April 2024 (<https://www.bis.gov/press-release/commerce-significantly-streamlines-export-controls-australia-and-united-kingdom>), which, in turn, was followed by the UK’s own Notice to Exporters 2024/09, which was also released on Wednesday 1st May 2024 (<https://www.gov.uk/government/publications/notice-to-exporters-202409-update-on-aukus>), and the launch of the UK Government’s own consultation period for an AUKUS-related Open General Export Licence.

Meanwhile, the Australians also launched their own consultations on their proposals, further details of which are available at: <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-act-2024-defence-trade-legislation-amendment-regulations-2024> and <https://www.defence.gov.au/news-events/releases/2024-05-01/aukus-countries-export-licence-free-environment-takes-flight>.

It has to be stated, first and foremost, that the three governments had to be warmly congratulated for learning the lessons of the failed UK/US Defense Trade Cooperation Treaty (and its Australian equivalent), and not repeating the same mistakes that fatally undermined their potential utility and usefulness. The proposed ITAR Exemption is **NOT** Treaty Mark II! This has been potentially a once in a generation opportunity to change things in a fundamental and constructive way that actively facilitates and enables multinational collaborative development programmes between close allies. Also, the formal consultation periods are to be especially warmly welcomed by all parties, as this is in marked contrast to the way in which the Treaties were implemented, when Industry was given no scope for consultation to try to ensure that the utility of the Treaties could be maximized. Thus, Industry had an opportunity to try to influence the final outcome and ensure that the innate potential problems caused by the national export control systems for the successful delivery of AUKUS could be effectively minimized.

It is highly noticeable that, whilst the changes to the EAR were met with unanimously highly positive comments from export control experts, the responses and assessments on the proposals relating to the proposed ITAR changes and the UK’s OGL were much more focused on a large number of unanswered areas where clarity was needed on a number of practical issues.

It was noted that the parallel EAR Interim final rule 89 FR 28594, issued by the Bureau of Industry & Security (BIS) at the US Department of Commerce, has offered both Australia and the UK a near total slate of exemptions without imposing any additional conditions on the recipients, which does result in some questions as to why the same should not also apply for the ITAR, and why enforcement of the Exemption should not reside totally with the UK (and Australian) governments, without the need for any uncertainty arising from possible DDTC activity.

ADS Group, on behalf of the UK element of the AUKUS Advanced Capability Industry Forum, undertook wide consultations across UK Industry (as well as engaging with counterpart organisations in both Australia and the US to ensure the consistency of messaging), and organized a range of activities to enable UK firms to be briefed on what was happening and being proposed. As a result of the inputs thus generated, formal submissions were made to DDTC (30th May 2024), BIS (31st May 2024) and ECJU (28th June 2024) to present UK Industry’s views on the proposals as they then stood. In addition, following an approach that was received from the UK MoD about proposed changes to its F680 system to help to deliver an aspect of the proposed changes that would be needed, ADS again undertook a speedy and much more focused consultation exercise with potentially interested UK Industry experts and submitted comments on 29th July 2024, as well as then participating in some further conference call discussions with the UK MoD on what was being proposed.

Formal Announcements

The announcements from the three governments outlining the outcomes of their detailed assessments of the submissions received as a result of the consultations were published on Thursday 15th and Friday 16th August 2024, and comprised:

Interim Final Rule for the proposed ITAR Exemption (<https://www.federalregister.gov/documents/2024/08/20/2024-18043/international-traffic-in-arms-regulations-exemption-for-defense-trade-and-cooperation-among>);

An ECJU Notice to Exporters (number 2024/17) relating to the proposed F680 changes (<https://www.gov.uk/government/publications/notice-to-exporters-202417-changes-to-the-mod-form-680-process>);

An ECJU Notice to Exporters (number 2024/18) relating to the proposed Open General Licence (<https://www.gov.uk/government/publications/notice-to-exporters-202418-update-on-aukus-and-publication-of-new-open-general-licence/nte-202418-update-on-aukus-and-publication-of-new-open-general-licence>);

Authorised User Community Guidance Notice (<https://www.gov.uk/government/publications/open-general-licence-aukus-nations/aukus-authorised-user-community-guidance-note>);

UK Government announcement about the appointment of an official adviser to maximise the benefits of AUKUS (<https://www.gov.uk/government/news/new-government-adviser-to-maximise-benefits-of-aukus-partnership>);

A statement by the DDTC on the comparability of the Australian and UK export control systems to ITAR (<https://www.state.gov/aukus-defense-trade-integration-determination/>);

An official statement from the UK Government (<https://www.gov.uk/government/news/historic-breakthrough-in-defence-trade-between-aukus-partners>);

An official Australian press release (<https://www.minister.defence.gov.au/media-releases/2024-08-16/generational-export-reforms-boost-aukus-trade-and-collaboration>);

An official US State Department press release (<https://www.state.gov/aukus-defense-trade-integration-determination/>).

On Tuesday 20th August 2024, DDTC published the details of an interim final rule (IFR) to amend the ITAR to further facilitate defense trade between and among Australia, the UK, and the US.

This rule is designed to harness and maximize the innovative power residing in the three nations’ defense industrial bases by facilitating billions US$s in secure license-free defense trade. The vast majority of commercial defense trade between and among the US, Australia, and the UK, for both AUKUS and non-AUKUS programs, is eligible for transfer under the Exemption. With this Exemption, the US Government aims to enhance the three nations’ collective efforts to address the security challenges of the future and promote security and stability in the Indo-Pacific and around the World.

The § 126.7 exemption is available for use beginning on the effective date of the IFR, which will be Sunday 1st September 2024. The Authorized User list will be posted in the Defense Export Control and Compliance System (DECCS) on Friday 30th August 2024.

A further 90-day public comment period also will begin on Tuesday 20th August 2024 (to expire on Monday 18th November 2024). Based on the comments received, DDTC may make additional revisions in a future rule. Responses to this further consultation can be submitted to:

E-Mail: DDTCPublicComments@state.gov, with the subject title being: “Australia, the United Kingdom, and the United States ITAR Exemption” or via the Internet at [www.regulations.gov](http://www.regulations.gov) search for a notice using the Docket: DOS-2024-0024.

Key elements of the ITAR § 126.7 exemption:

\* Authorized Locations: Per § 126.7(b)(1), transfers must be to or within the physical territories of Australia, the UK, and the US.

\* Authorized Users: Per § 126.7(b)(2), the transferor and recipient(s) must be:

• US persons registered with the DDTC and eligible under § 120.16;

• A US Government department or agency; or

• UK or Australian Authorized Users identified in the Defense Export Control and Compliance System (DECCS) (after having completed an enrollment process initiated through their respective national-level governments).

• Note: Non-US Person Brokers must be registered with DDTC pursuant to § 129.3, eligible under § 120.16, and identified on the Authorized User List in DECCS.

\* Excluded Technology List (ETL) and the US Munitions List (USML):

• The vast majority of defense articles and defense services described on the USML are eligible for transfer via the § 126.7 exemption.

• Those defense articles and defense services that are ineligible for transfer via the § 126.7 exemption are identified in the ETL (see Supplement No. 2 to Part 126).

• To determine whether an article or service you wish to transfer is excluded by the ETL, you must determine whether any entry on the ETL excludes that article or service: Identify the USML paragraph(s) that describe(s) the article or service,

• Identify all entries in the ETL where the “USML Entry” column includes the USML paragraph(s) identified in step 1, and

• For those ETL entries that apply, determine whether the text in the ETL “Exclusion” column describes the article or service.

Other Requirements and Limitations of the § 126.7 Exemption. Similar to all ITAR exemptions, § 126.7 transfers are subject to other requirements and limitations, whether specifically identified in § 126.7(b)(4) and (5), or elsewhere in the ITAR.

\* Other changes in the rule: This rule codifies the requirement for DDTC to adjudicate licenses for Australia, the UK, and Canada within 30-45 days, to the extent practicable, when the transfer or activity cannot be undertaken under an ITAR Exemption and makes other changes to the ITAR to facilitate defense trade. It also changes § 126.18(e) to authorize the reexport and retransfer of classified defense articles to certain dual nationals under certain circumstances. The interim final rule, and details on submitting public comments, can be found on FederalRegister.gov.

What this means for UK companies

The new processes start to be implemented from **Sunday 1st September 2024**.

UK firms need to thoroughly read and understand what the potential implications might be for them and their commercial activities. It must be noted, as per a key message from QinetiQ, one of ADS’ larger Member Companies, that: “*The ITAR Exemption represents exemption from licensing requirements, not exemption from the ITAR*”. ITAR is NOT dead (as per another ill-informed observation), and is still in being.

If a technology is on the associated Excluded Technologies List (ETL), except for some “expedited licensing” requirements mandated by Congress, it will essentially be the normal licensing process for both Australia and the UK. That doesn’t mean something won’t be exported. It just means you still need some form of license or agreement. Thus, this merely represents a very welcome change in both ITAR and the UK’s associated regulations, to facilitate international co-development and co-production between the US, Australia and the UK.

For all three nations’ industries, the Exemption implementing rule and the ETL now effectively regulate the AUKUS partnership, and are crucial for its successful delivery. They reduce/remove altogether some licensing requirements for some exports, remove the need for DSP-83s (the ITAR certificate covering non-transfer and end-use), effectively reduce some aspects of the Missile Technology Control Regime (MTCR) and facilitate some licence-free exports of source codes. However, the ETL is still quite extensive and remains quite complicated to read and understand.

At the end of the day, the success of this initiative will be down to practical usage, as the officials of the three governments stated during the consultation phase; it will only work if companies from the three nations actually take up the presented opportunity to apply for Membership of the AUC, UK firms register to use the OGL and companies start to use it for their commercial activities. Thus, the frequency and extent of usage will dictate whether these changes have proven to be worthwhile and successful. All of the Members of the trinational AUKUS Advanced Capability Industry Forum are fully committed to helping AUKUS achieve this sought-after success, resulting in facilitating the co-development and co-production of the advanced technologies that are needed by our three nations.

Thus, all UK entities need to consider carefully seeking to apply for Membership of the Authorised User Community to make full use of the changes that are planned. The UK MoD I&IC Team have finalised a questionnaire/application form, which will be available through contacting the following group mailbox: desirg-ukauc@mod.gov.uk). The questionnaire will be available from Monday 26th August 2024 but cannot be submitted till Sunday 1st September 2024, which is the official go-live date. We have been working with the UK MoD to try to ensure that the process proposed is as simple and straightforward as possible and does not serve as an active disincentive to companies (especially SMEs) to consider applying for AUC Membership.

Also, all companies are to be actively encouraged to try to ensure that as many of their UK-based suppliers as possible are aware of AUC, and (especially for key, critical suppliers) that they are encouraged to consider applying for AUC Membership. The more UK companies who are Members of the AUC, the greater the likelihood of the success of this initiative.

All UK entities need to consider carefully registering for the ECJU’s Open General Licence, and to read carefully its associated terms and conditions (as with any Open Licence).

All UK entities need to understand the potential compliance implications for them of the proposed F680 changes. Since these proposals were first aired, Industry has been trying to engage with the UK MoD to try to ensure that they are as clear and concise as possible, and also impose the very least possible additional bureaucratic compliance burden on both UK Industry and UK Government, whilst achieving what is being sought.

What has been introduced is not the end of the story, but merely represents a significant change in the previous ways in which this activity had been controlled through the regular processes of the three nations. There is still work to be done to try to identify practical lessons that can be learnt, at both the Industry and also the Government level, to identify additional beneficial ways in which this initiative can further evolve in its efforts to facilitate the sort of collaboration that is being sought by the three close allies so as to achieve the real vision of the AUKUS partnership.