EXPLANATORY MEMORANDUM TO

THE EXPORT CONTROL (AMENDMENT) (EU EXIT) (NO. 2) REGULATIONS 2020

2020 No. 1510

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for International Trade and is laid before Parliament by Command of Her Majesty.

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

2. Purpose of the instrument

2.1 This instrument amends regulation 7(9) of the Export Control (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1502) before that regulation comes into force.

Explanations

What did any relevant EU law do before exit day?

2.2 Article 4(5) of Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ No. L 134, 29.5.2009, p. 1, as amended; "the EU dual-use Regulation"), allows a member State of the European Union to impose additional controls on the export of dual-use items in certain circumstances but only on exports other than those to the customs territory of the European Union.

2.3 After the transition period, the EU dual-use Regulation will continue to have effect in the United Kingdom (in respect of Northern Ireland) as in accordance with the European Union withdrawal agreement.

Why is it being changed?

2.4 Article 4(5) of the EU dual-use Regulation is not being changed. This instrument corrects a drafting error (explained in Section 6.2) that relates to the exception to the control in article 12 of the Export Control Order 2008 (S.I. 2008/3231, as amended).

2.5 Article 12 of the Export Control Order 2008 prohibits a person from transferring software or technology from the United Kingdom by *non-electronic means* without an export licence if the Secretary of State informs the person that the software or technology is, or may be, intended, or the person is otherwise aware is intended, entirely or in part, for WMD purposes.

2.6 Article 12 of the Export Control Order 2008 is additional to the control in Article 4(1) of the EU dual-use Regulation, which prohibits the transfer of software or technology under the same circumstances by *electronic means*.

2.7 The exception disapplies the control in article 12 of the Export Control Order 2008 to transfers of software or technology from Northern Ireland to the customs territory of the European Union if the final destination of the software is the customs territory of the European Union or processing or working is to be performed on it in that customs

territory. This exception ensures the control in article 12, after the transition period, is both robust and compatible with the EU dual-use Regulation as it has effect by virtue of the Protocol on Ireland/Northern Ireland in the European Union withdrawal agreement.

2.8 The term "non-electronic means" is defined in regulation 2(1) of the Export Control Order 2008 as "disclosure of software or technology by any means (or combination of means), including oral communication, other than as the exportation of goods or the transfer by electronic means". This definition is purposefully broad in order to capture every possible type of transfer not regulated by Article 4(1) of the EU dual-use Regulation and includes, for example, the cross-border distribution of a technical drawing on paper.

2.9 The term "WMD purposes" is defined in regulation 2(1) of the Export Control Order 2008 as "use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons". This definition reflects Article 4(1) of the EU dual-use Regulation.

What will it now do?

2.10 The exception to the control in article 12 of the Export Control is required to meet the commitments of the United Kingdom under the Protocol on Ireland/Northern Ireland in the European Union withdrawal agreement.

2.11 The correction means the exception will continue after the transition period as it currently has effect but only in relation to exports from Northern Ireland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument corrects the drafting error in the Export Control (Amendment) (EU Exit) Regulations 2020 that the Joint Committee on Statutory Instruments reported in its Thirty Second Report of Session 2019-21.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure, there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This instrument is made to correct a drafting error in regulation 7(9) of the Export Control (Amendment) (EU Exit) Regulations 2020 before that regulation comes into force.

6.2 The Joint Committee on Statutory Instruments, in its Thirty Second Report of Session 2019-21, explained that the exception to article 12 of the Export Control Order 2008 to be provided in new article 42N(2) of that Order (as inserted by virtue of regulation 7(9)) was drafted too narrowly in requiring both the conditions in sub-paragraphs (a) and (b) to be met and that it is inconsistent with the existing exception to article 12 as it currently has effect before the end of the transition period (the effect of this error is explained in Section 7.2).

6.3 Lord Grimstone of Boscobel Kt, Minister of State, in the course of the House of Lords debate on the Export Control (Amendment) (EU Exit) Regulations 2020 (Hansard, HL Grand Committee, 2nd December 2020), committed the Department of International Trade to correcting the drafting error by statutory instrument as soon as possible.

6.4 Ranil Jayawardena MP, Parliamentary Under Secretary of State, in the course of the House of Commons debate on the Export Control (Amendment) (EU Exit) Regulations 2020 (Hansard, HC Sixth Delegated Legislation Committee, 8th December 2020), committed the Department of International Trade to correcting the drafting error by statutory instrument as soon as possible.

6.5 This instrument gives effect to those commitments.

7. Policy background

What is being done and why?

7.1 In particular, this instrument corrects a drafting error that would otherwise be included in new article 42N(2) of the Export Control Order 2008 (which is inserted in that Order by virtue of regulation 7(9) of the Export Control (Amendment) (EU Exit) Regulations 2020).

7.2 In the drafting of new article 42N(2), an "and" instead of an "or" was used between subparagraphs (a) and (b). The effect of this drafting error was to make the exception to the control in article 12 of the Export Control Order 2008 (explained in Section 2.7) less permissive for exports from Northern Ireland after the transition period than the existing exception. At present, the prohibition applies to a transfer to the customs territory of the European Union only if the person knows that the final destination of the software or technology is outside the customs territory and no working or processing is to be performed on it within the customs territory.

7.3 New article 42N(2) means article 12 of the Export Control Order 2008, after the transition period, will be compatible with Article 4(5) of the EU dual-use Regulation as it has effect by virtue of the Protocol on Ireland/Northern Ireland in the European Union withdrawal agreement. This compatibility is required to meet the obligations of the United Kingdom under that Protocol.

7.4 The existing exception found in article 12(2) of the Export Control Order 2008, which relates to transfers from the United Kingdom to the customs territory of the European Union, will be removed at the end of the transition period by virtue of regulation

3(11) of the Export Control (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/137, as amended).

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union because it is being made under section 8C(1) of the European Union (Withdrawal) Act 2018 (c. 16). The Minister has made any relevant statements in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 The Department for International Trade does not intend to consolidate the relevant legislation.

10. Consultation outcome

10.1 No consultation took place.

10.2 The Department for International Trade submits consultation was not necessary. The instrument does no more than correct a drafting error in legislation before it comes into force.

11. Guidance

11.1 No guidance is required.

11.2 The Department for International Trade submits guidance is not necessary. The instrument does no more than correct a drafting error in legislation before it comes into force.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no impact on business is foreseen. The instrument does no more than correct a drafting error in legislation before it comes into force.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to correct a drafting error in legislation before it comes into force.

14. Monitoring & review

14.1 The Department for International Trade has no plans to monitor this instrument. The instrument is an amending instrument that does no more than correct a drafting error in legislation before it comes into force.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no statutory review clause is required.

15. Contact

15.1 Peter Monday at the Department for International Trade can be contacted with any queries regarding the instrument. Telephone: 020 7215 8810 or email: peter.monday@trade.gov.uk.

15.2 Shainila Pradhan, Director of the Export Control Joint Unit, at the Department for International Trade, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Ranil Jayawardena MP, Parliamentary Under Secretary of State, at the Department for International Trade, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1 Appropriateness statement

1.1 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view, the Export Control (Amendment) (EU Exit) (No.2) Regulations 2020 do no more than is appropriate. This is the case because these Regulations are made to correct a drafting error in the Export Control (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1502) that is made in connection with the Protocol on Ireland/Northern Ireland in the withdrawal agreement".

2 Good reasons

2.1 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These Regulations are made to correct a drafting error in the Export Control (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1502) that is made in connection with the Protocol on Ireland/Northern Ireland in the withdrawal agreement".

3 Equalities

3.1 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement:

"The instrument does not amend, repeal, or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

3.2 The Parliamentary Under Secretary of State, Ranil Jayawardena MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Ranil Jayawardena MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010".

4 Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.