EXPLANATORY MEMORANDUM TO

THE EXPORT CONTROL (AMENDMENT) (No. 2) ORDER 2017

2017 No. 193

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.

2. Purpose of the instrument

2.1 The Export Control (Amendment) (No.2) Order 2017 ("the Order") amends the Export Control Order 2008 (the "2008 Order"). The amendments to the 2008 Order are required following publication of Regulation (EU) 2016/2134 of the European Parliament and of the Council (the "Amending Regulation") which amends the EU trade control regime in relation to trade in certain goods that could be used for capital punishment or torture or other cruel, inhuman or degrading treatment or punishment.

3. Matter of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 On 23 November 2016, the European Council adopted the Amending Regulation. The Amending Regulation was published in the Official Journal of the European Union on 13 December 2016.

4.2 The Amending Regulation makes a number of amendments to Council Regulation (EC) No 1236/2005 (the "torture Regulation"). The torture Regulation is the principal EU legal instrument regulating trade in goods that could be used for capital punishment or torture or other cruel, inhuman or degrading treatment or punishment. The torture Regulation is part of EU law and directly applicable in the UK.

4.3 The torture Regulation covers an area of exclusive EU competence. Article 17 of the torture Regulation requires EU Member States to lay down rules on penalties applicable to infringements of its provisions.

4.4 The torture Regulation details measures to regulate trade in certain goods, including a ban on the export and import of equipment that could only be used for torture or capital punishment (listed in Annex II to the torture Regulation). There are also provisions that make licensable the export of goods used legitimately for law enforcement purposes or for other legitimate export reasons (listed in Annex III to the torture Regulation).

4.5 The Amending Regulation contains new prohibitions in relation to Annex II goods (i.e. goods which have no practical use other than for the purpose of capital punishment or the purpose of torture or other cruel, inhuman or degrading treatment or punishment), as well Annex III goods (i.e. goods which are primarily used for law enforcement purposes and which present a material risk of use for torture or other cruel, inhuman or degrading treatment or punishment) and Annex IIIa goods (i.e. subject to certain exceptions goods that could be used for capital punishment and have been approved or actually used for capital punishment). The Order introduces into domestic law criminal offences for breach of these prohibitions:

- transit within the customs territory of the EU is prohibited for Annex II goods and, in certain circumstances, Annex III and Annex IIIa goods.
- brokering services are prohibited for Annex II goods.
- training is prohibited for Annex II goods.
- the display or offering for sale of any Annex II goods at an exhibition or fair taking place within the EU (unless such display/sale does not promote the sale or supply of the goods to a person or entity in a third country) is prohibited for Annex II goods.
- the sale or purchase of advertising time or space is prohibited for Annex II goods.

4.6 The Amending Regulation allows for:

- more flexible licensing of Annex III goods as they may have legitimate uses.
- more flexible licensing of drugs used in medicines but also potentially used in execution by lethal injection. Such goods were previously listed under Annex III and are now listed in a separate Annex IIIa. At same time, the Amending Regulation includes a new Union General Export Authorisation (or "EU GEA") which is a pre-published form of licence to all destinations that have prohibited capital punishment. This licence is listed under new Annex IIIb of the Regulation.
- the option to grant a 'global authorisation' for repeat exports of Annex III and Annex IIIa goods (which are referred to as Open Individual Export Licences or OIELs under the UK's export control procedures).

4.7 The Order makes provision for EU GEAs to be granted by removing the prohibition in Article 26(6)(a) of the 2008 Order on the granting of general licences under the torture Regulations.

4.8 The Amending Regulation also introduces new authorisation requirements on brokering and on the provision of technical assistance in relation to items listed in Annex III and in the new Annex IIIa. The Order creates criminal offences where those services are provided without the necessary authorisation being in place.

4.9 The Amending Regulation also includes a new formal mechanism by which Member States may ask the Commission to amend the Annexes to the torture Regulation on an urgent basis.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 As this 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 Government is supportive of measures that strengthen EU wide controls in trade that supports capital punishment or that could be used to perpetrate torture or other cruel, inhuman or degrading treatment or punishment. The Government also encourages simplified procedures for legitimate trade.

7.2 The Order's principal purpose is to provide for new criminal sanctions in respect of the new prohibitions introduced by the Amending Regulation in relation goods listed in Annex II, III and IIIa to the torture Regulation (as amended) and also for the failure to seek a licence for licensable services covered by the Amending Regulation.

Consolidation

7.3 None.

8. Consultation outcome

8.1 The Order consists of a technical implementation of a directly applicable EU Regulation. Accordingly, no consultation was necessary.

9. Guidance

9.1 A Notice to Exporters will be published explaining the purpose and effect of the amendments to the torture Regulation.

10. Impact

10.1 The impact on business, charities or voluntary bodies is minimal (no costs) as the changes being implemented do not significantly alter the scope of strategic export controls already in operation in the UK.

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

This legislation applies to activities that are undertaken by small businesses. There are no burdens on business introduced through the 2017 Order (No.2).

12. Monitoring & review

12.1 The Department will review the Regulation within 5 years.

13. Contact

13.1 Christopher Chew at the Department for International Trade, Tel: 020 7215 8088 or email: chris.chew@bis.gsi.gov.uk can answer any queries regarding the instrument.