EXPLANATORY MEMORANDUM TO

THE EXPORT CONTROL (AMENDMENT) ORDER 2010

2010 No. 121

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

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

2. Purpose of the instrument

2.1 The Export Control (Amendment) Order 2010 ("the 2010 Order") amends the Export Control Order 2008 ("the 2008 Order"). The changes have the effect that electro-statically powered explosive detectors are controlled for export to Afghanistan and Iraq. At the same time, they ensure that where (as here) dual-use items are controlled for export to specific destinations, they cannot be sent via other countries.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 There are serious doubts about the efficacy of the equipment to which article 3 of the 2010 Order relates. The continued export of these devices, which we understand have been used at security checkpoints in Iraq, increases the likelihood of successful bomb attacks on buildings accommodating or frequented by UK military personnel. Consequently, the imposition of the new control has been treated as a matter of urgency. The Department acted as soon as it became aware of the issue and we have decided to bring the Order into force earlier than the usual 21 days after laying.

3.2 Article 2 of the 2010 Order corrects an error in the 2008 Order which itself derived from the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (one of the Orders that the 2008 Order replaced). The Department regrets that this problem was not picked up at the time of the consolidation.

3.3 There are two regimes for controlling dual-use goods. The main one is of EU origin. There, most controlled items can move freely within the EU but need an authorisation for export outside. However, there is a member State option under which exports to another member State can be controlled if the exporter knows the goods are just going to be re-exported out of the EU. The UK has taken up this option (see article 7 of the 2008 Order).

3.4 The other regime is of UK origin. There, goods are controlled either for all destinations or for a specific destination. However, where the control is for a specific destination, the legislation has always provided for controls on indirect exports. Unfortunately, having been originally drafted at a time when more UK dual-use controls related to all destinations outside the EU, and being based on the similar EU provisions, the controls extend only to indirect exports via the EU. This creates an unintended loophole, now addressed by the 2010 Order.

3.5 Given the inter-relationship between articles 2 and 3 of the Order (article 3 has a new UK control on the movement of dual-use goods to specific destinations which will be affected by the amendments made in article 2), we consider it is appropriate to bring both into force at the same time.

3.6 Having regard to paragraph 3.4.13 of *Statutory Instrument Practice*, we consulted the S.I. Registrar at HMSO about whether the free issue procedure should be applied in this case, given

that the 2010 Order combines the correction with the new amendment in article 3. HMSO's view, with which the Department agreed, was that the free issue procedure should be applied because the correction is a significant element of the instrument.

4. Legislative Context

4.1 Schedule 3 to the 2008 Order contains a list of dual-use goods, software and technology made subject to export control for national security reasons. Some items require an export licence for all destinations; others just for selected countries.

4.2 The 2010 Order adds a type of explosive detector to the list for the reasons set out above. It is unusual for export controls to extend to items that are of doubtful utility. However, section 5 and the Schedule to the Export Control Act 2002 allow controls to be imposed in relation to goods whose export or use is capable of having an adverse effect on the security of members of the armed forces of the United Kingdom, an EU member State or other friendly State. For the reasons given above, our view is that electro-statically powered explosive detectors fall into that category. This is particularly the case where the destination is Iraq or Afghanistan and we have limited the new control to those destinations.

4.3 Articles 4 and 5 of the 2008 Order were the substantive provisions relating to the export, etc. of Schedule 3 items, so the amendment in article 2 of the 2010 Order, correcting those provisions, is of direct relevance in this context.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the 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 principal purpose of the 2010 Order is to respond to concerns about a certain type of explosive detector. These detectors are "electro-statically powered" and work by a process that is a matter of some controversy. There are serious doubts about their efficacy (which has never been satisfactorily proven). They have been marketed to Iraq (where they are already in use) as well as other destinations. Sales of the detectors to Iraq have sparked some media interest.

7.2 The consequences should the detectors fail are, of course, grave. Accordingly, we have decided to bring them under export control. Before doing so, we considered whether other policy responses would be appropriate (for example, use of consumer legislation). However, the fact that the devices are being exported decreases the scope for alternative action.

- ***Consolidation***

7.3 No consolidation of the 2008 Order is planned.

8. Consultation outcome

8.1 This is an urgent measure undertaken because of UK national security concerns. Few manufacturers are affected so no general industry consultation was undertaken although internal discussions between interested UK Government Departments took place.

9. Guidance

9.1 Comprehensive guidance on the 2008 Order is available on the BIS website (http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/licensing-policy/index.html).

10. Impact

10.1 The impact on business, charities or voluntary bodies is limited.

10.2 The impact on the public sector is difficult to quantify.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business for the reasons given in the small firms impact test (see the Impact Assessment).

12. Monitoring & review

12.1 The explanatory memorandum to the 2008 Order contained the following commitment: "Within three to five years of the legislation coming into effect, we will review the legislation internally which may lead to further public consultation and, if appropriate, changes to the legislation."

13. Contact

13.1 Jim Bouttell at the Department for Business, Innovation and Skills, Tel: 020 7215 4648 or email: jim.bouttell@bis.gsi.gov.uk. can answer any queries regarding the instrument.

Department for Business, Innovation and Skills
25th January 2010

Summary: Intervention & Options

Department /Agency:	Title:	
BIS	**Impact Assessment of Export Control(Amendment) Order 2010**	
Stage: Final	**Version:** 1	**Date:** 25th January 2010
Related Publications: None		

Available to view or download at:

http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/ind

Contact for enquiries: Jim Bouttell **Telephone:** 0207 215 4648

What is the problem under consideration? Why is government intervention necessary?

To make an amendment Order to control the export of electro-statically powered equipment for detecting explosives to Iraq and Afghanistan which have recently been identified as falling outside the current scope of strategic export controls. Government intervention is necessary to find an effective and proportionate way to guard against the risk of undesirable export and related activities. This follows concerns raised by recent media coverage on the effectiveness of the product and a number of enquiries received on current licensability status of the product.

What are the policy objectives and the intended effects?

The legislation aims to maintain a responsible, effective, open and transparent strategic export control regime, which the Government is committed to, and where gaps in those controls are identified to put forward options to ensure the gaps are closed. The intended effect of the measure is to maintain an effective system of control that does not have an adverse impact on the security of UK and friendly forces.

What policy options have been considered? Please justify any preferred option.

Discussions between UK Government Departments with an interest in this area have taken place, including FCO, MOD, HMRC and BIS. The options for action are:
1 - do nothing; 2 - non-legislative; 3 - legislative.

Opions 1 and 2 are both unacceptable as neither provide adequate safeguards for prevention of supply. Option 3 is the government's preferred option. Because this is an emergency measure - it is the option being taken forward. This is the only feasible option and an amending Order under the Export Control Act 2002 is the most efficient and timely way of achieving the Government's objective. It would provide the legal framework for assessing and potentially prohibiting the supply/export of goods.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy on export controls is undertaken as part of a regular review measure.

Ministerial Sign-off For final stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Ian Lucas

.....Date: 25th January 2010

Summary: Analysis & Evidence

Policy Option: 3 - legislative	Description: Additional controls on specific detection equipment

COSTS

ANNUAL COSTS	
One-off (Transition)	**Yrs**
£ not quantified	10
Average Annual Cost (excluding one-off)	
£ not quantified	

Description and scale of **key monetised costs** by 'main affected groups'

Because the measure affects a relatively small amount of equipment exported, and because the equipment may vary in price, it is difficult to quanitify costs. Minimal costs are most likely to be subsumed into existing export control mechanisms.

Total Cost (PV) **£** not quantified

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS	
One-off	**Yrs**
£ not quantified	10
Average Annual Benefit (excluding one-off)	
£ not quantified	

Description and scale of **key monetised benefits** by 'main affected groups'

Because the measure affects a relatively small amount of equipment exported, it is difficult to quanitify the benefits.

Total Benefit (PV) **£** not quantified

Other **key non-monetised benefits** by 'main affected groups'

These additional controls are expected to restrict UK involvement in the export of goods, which would have an adverse effect on the security of UK and friendly forces

Key Assumptions/Sensitivities/Risks

There will be effective compliance and enforcement measures in place once the new control is implemented.

Price Base Year 2009	Time Period Years 10	**Net Benefit Range** (NPV) **£** not quantified	**NET BENEFIT** (NPV Best estimate) **£** not quantified

What is the geographic coverage of the policy/option?			UK exporters	
On what date will the policy be implemented?			January 2010	
Which organisation(s) will enforce the policy?			HMRC	
What is the total annual cost of enforcement for these organisations?			£	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			No	
What is the value of the proposed offsetting measure per year?			£ N/A	
What is the value of changes in greenhouse gas emissions?			£ N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **N/Q**	Small **N/Q**	Medium **N/Q**	Large **N/Q**
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ 0 Decrease of £ 0 **Net Impact** **£** 0

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Issue

To use powers provided under the Export Control Act 2002 to impose controls on goods which may have an adverse effect on the security of members of the armed forces of the UK, any Member States or other friendly State.

To make an amendment Order to control the export of electro-statically powered equipment for detecting explosives to Iraq and Afghanistan which have recently been identified as falling outside the current scope of strategic export controls.

Government intervention is necessary to find an effective and proportionate way to guard against the risk of undesirable export and related activities. This follows concerns raised by recent media coverage on the effectiveness of the product and a number of enquiries received on current licensability status of the product.

This is a targeted measure intended only to apply in respect of exports to Iraq and Afghanistan where the security of UK forces and those of friendly States will be adversely affected.

It is expected that the new measures will only affect a minimum number of companies primarily those involved with the security equipment sector. Government Departments with an active interest in Export Controls and enforcement, e.g., BIS, FCO, MOD and HMRC will also be affected.

Objectives

The legislation aims to maintain a responsible, effective, open and transparent strategic export control regime, which the Government is committed to, and where gaps in those controls are identified to put forward options to ensure any gaps are closed. The intended effect of the measure is to maintain an effective system of control that does not have an adverse impact on the security of UK and friendly forces.

Options Identified and Analysis

Discussion between UK Government Department's including FCO, HMRC, MOD and BIS have taken place. There are 3 potential options available;

Option 1: Do nothing and maintain current level of controls; This would allow for the continued unrestricted supply of the product overseas.

Option 2: Non Legislative route; This could include a voluntary agreement between the Government and suppliers not to provide the product where it would adversely effect the security of UK forces and those of friendly States but would have no legal force.

Option 3: Legislative route. This is the Government's preferred option. It requires an amending Order under the Export Control Act 2002, which is the most efficient and timely way of achieving the Government's objective.

Neither options 1 or 2 would achieve the desired objective of legally preventing the supply of goods identified as a potential security concern to both UK and friendly forces.

Option 3 is the Government's preferred option. Because this is an emergency measure, it is the option being taken forward. It is the only feasible option, which would provide the legal framework for assessing and potentially prohibiting the supply/export of goods.

Costs and Benefits

It has not been possible to quantify the costs and benefits because the measure affects a relatively small range of equipment. Any minimal costs are likely to be subsumed into existing export control mechanisms.

Risks

Failure to undertake Option 3 - to provide a legal basis for prohibition of the export of the goods identified, would have an adverse impact on the security of UK Forces operating overseas and those of friendly States.

Option 1 would simply allow unrestricted supply to continue and have an adverse effect of the security of UK forces and those of friendly States.

Option 2 although it could limit the supply of such goods this would be on a voluntary basis and could not be legally enforced.

Enforcement

Any enforcement requirements needed as a result of the newly introduced controls will be subsumed into existing enforcement of strategic export controls measures already undertaken by HMRC (Her Majesty's Revenue and Customs).

Costs are expected to be minimal.

Implementation

When Option 3 is adopted, implementation would be through an amendment Order made under the provisions of the Export Control Act 2002.

The amendment Order giving details of the new controls will be available on line via the Office of Public Sector Information (OPSI) website at: http://www.opsi.gov.uk.

Monitoring and Evaluation

Introduction of new controls will necessitate the need to apply for authority to export the listed items. Such licences are recorded and details published in the Government's Strategic annual reports and can viewed at : **https://www.exportcontroldb.berr.gov.uk/eng/fox**

The policy on export controls is subject to regular review and changes made as required.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	***Results in Evidence Base?***	***Results annexed?***
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

SPECIFIC IMPACT TESTS

Competition Assessment

The equipment identified is very specialised and the changes will have no significant impact on the majority of UK exporters. The controls use a generic description and will maintain a level playing field for any businesses exporting these types of, or similar products.

Small Firms Impact Test

The changes are intended to apply to an identified type of product and would potentially apply to business of any size.

The UK Government's priority is to control unscrupulous transactions and activities regardless of whether it is a large company or a Small to Medium Sized Enterprise (SME) carrying them out and so legislation must include small companies. However, any special needs of small businesses will be addressed as appropriate through guidance and awareness activities, so that they are aware of any changes to requirements introduced by this measure.

Equalities Duties Assessment - Race, Disability, Gender

There will be no significant impact upon minority groups in terms of numbers affected or the seriousness of the impact as a result of this policy.

Human Rights Impact Test

There will be no significant impact on the human rights of companies as a result of this policy.

The following Specific Impact Tests have been considered: Sustainable Development, Carbon Assessment, Other Environment, Legal Aid, Health Impact Assessment and Rural Proofing Specific Impact Tests. After a screening of each Impact Test, it has been deemed that no significant impact is anticipated in any case.