

**EXPORT CONTROL
ORGANISATION**

Response from Her Majesty's
Government to the European
Commission Green Paper on the
dual-use export control system
of the European Union

JANUARY 2012

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Overview

This paper sets out the UK Government's formal response to the European Commission's Green Paper on the future of the dual-use export control system.

Background

The **Green Paper on the dual-use export control system of the European Union: ensuring security and competitiveness in a changing world** was published by the European Commission on 30 June 2011 as a public consultation exercise.

The Green Paper can be downloaded from:

http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148020.pdf

The aims of this consultation process are to gather views on:

- the detailed provisions of the current dual-use export control framework in order to prepare the review of the system
- the progressive reform of the EU dual-use export control system in order to adapt it to the rapidly changing circumstances of the modern world.

The Green Paper includes a broad summary of export controls (Part 1) and details of the current EU dual-use export control system (as set out in [Council Regulation No 428/2009](#)) (Part 2). Part 3 seeks to start a debate on the possible evolution of EU dual-use controls.

The EU Commission invited input to a total of 55 questions contained within the Green Paper.

Responses were sought from non-governmental organisations, academia, civil society and industry (particularly small and micro businesses) and EU Member State governments.

It is within this context that the UK Government's formal response is issued by the Export Control Organisation, the UK's regulatory authority for strategic export controls.

Points to note about this response

This response sets out the view of HM Government in response to the specific questions asked of "all stakeholders" or "licensing authorities" in the Green Paper.

We have not attempted to answer those questions addressed only to "exporters" – these are indicated with a "Not Applicable" or "N/A".

In some cases a single answer has been provided for a group of questions. Where we consider that an issue is particularly sensitive we have indicated that we would be happy to provide comments to the Commission on a confidential basis.

Contact for further details

Any questions regarding this response should be addressed to:

Export Control Organisation
Department for Business, Innovation and Skills
1 Victoria Street
London, SW1H 0ET

Helpline: 020 7215 4594

Email: eco.help@bis.gsi.gov.uk

Website: <http://www.bis.gov.uk/exportcontrol> or
<http://www.businesslink.gov.uk/exportcontrol>

Response to questions in the Green Paper

Importance of the dual-use sector to the EU economy

To exporters:

- (1) In your view what is the importance of the dual-use sector the EU economy?
- (2) What is the importance of dual-use exports for your business? What are the associated costs of compliance? Please provide figures

Not applicable

To competent authorities of the Member States:

- (3) What is the value of dual-use exports from your Member State (in absolute terms and as a percentage of all your exports)?

In 2010 the value of UK goods exports (i.e. excluding exports of services) to third (i.e. non-EU) countries was approximately £122bn¹, or about 45% of total UK exports of goods. In the same year the UK issued 4637 Standard Individual Export Licences (SIELs) for export to third countries of dual-use items². The value of the dual-use items licensed for export under SIEL was approximately £4bn, or 3% of total non-EU exports. However, this is likely to be a significant underestimate of the total value of dual-use exports. Just under half of non-EU exports by value (approx £57bn or 47%) were to the seven countries listed in the Community General Export Authorisation (CGEA) (i.e. Australia, Canada, Japan, New Zealand, Norway, Switzerland and USA) but only 284 SIELs (with a value of approx. £300m) were issued for these destinations. We have no data on actual values of exports under the CGEA but, given that half of all non-EU exports were to these countries, it seems reasonable to assume that also half of all dual-use exports were to these countries. In addition, there are a number of global licences (Open Individual Export Licences, or OIELs) and national general licences (Open General Export Licences, or OGELs) permitting exports of dual-use goods. Again we have no data on the actual value of exports under these licences. Given all of the above, however, we might estimate the total value of dual-use exports to be around £8-10bn, or 6-8% of all non-EU country exports, and therefore approximately 3-4% of all UK exports.

¹ UK Trade Statistics website: <http://www.uktradeinfo.com>

² Includes 159 SIELs for export of both dual-use and military items.

Dual-use export controls in an evolving world

To all stakeholders:

(4) What is the impact of the foreign availability of certain controlled items on the competitiveness of EU dual-use exports?

The UK Government has no evidence on this point. The Commission are right to point out the dynamic between ensuring sensitive items are subject to control whilst ensuring that those items that are more readily available are removed from control. There are many examples of items being removed from control because of their wide availability outside the membership of the export control regimes. However foreign availability is not the only factor in determining whether an item should be controlled; the sensitivity of the items in question and the broader non-proliferation context must also be considered. It is also important to note that production and supply of controlled items is generally a criterion for entry to the regimes, so it is inevitable that there will be some availability outside the regimes. It is just as important that the regimes, the EU and the Member States conduct active outreach to encourage other states to adopt effective export controls and, where appropriate, to bring those states into the regimes.

(5) How competitive are EU dual-use exporters as compared to exporters from third countries? How is this competitiveness affected by export control reforms being undertaken in third countries?

We have no evidence on the competitiveness point - and of course export controls will be only one of many factors affecting competitiveness. The Green Paper states that “many supplier countries...have embarked on ambitious reforms...” We are not aware of any country other than the USA embarking on an export control reform programme. The US’ reform efforts are focussed on the so-called “4 singles”: a single control list; single licensing agency; single IT system; and single enforcement body. This is essentially the model that the UK has worked to for very many years so it is interesting to note that the US reforms will make the US system more like that of the UK, rather than less. It is also important to note that the US’ efforts are directed mainly at reform to the controls on defence exports (i.e. the controls under the ITAR – International Traffic in Arms Regulations). So far only one of the US’ “singles” is complete (the single enforcement agency) so it is clearly too early to tell what effect the reform programme will have on competitiveness.

(6) How would you rate the current EU export control system as compared to the export control systems of third countries?

By “system” we assume the question refers to the framework set out in Regulation 428/2009, including the control list at Annex I of the Regulation, rather than the implementation of that framework which is done at a national level. If so, we consider that the EU system compares favourably in that the legislation is relatively concise, there is a single control list covering the control lists of all the international export control regimes (and that list has been adopted by many other states) and there is scope and flexibility for Member States to take additional measures as and when appropriate.

(7) What is the impact of dual-use export controls on activities of international collaboration in research and innovation? Should the EU legislative framework contain certain provisions for such activities?

We have no specific evidence on this point. In our view, export controls should be applied to these activities in the usual way, taking into account the particular circumstances and level of risk associated with them.

Differences in national approaches to dual-use export controls

To all stakeholders:

(8) Have you encountered any problems due to differences in the application of export controls across the EU Member States? What was the nature of these problems?

We have encountered some enforcement-related problems. However this is a sensitive issue and we will make our views known to the Commission through other channels.

A level playing field for EU exporters

To all stakeholders:

(9) Do you think that the current EU dual-use export control framework provides a level playing field for EU exporters? If not, how is any unevenness demonstrated? Please provide examples.

These are primarily questions for exporters. We have no comments at this time.

Types of authorisations available

To all stakeholders:

(10) Is the framework of licences available in the EU sufficient? If not, how should it be changed?

A framework of individual, global and general licences would appear to provide sufficient flexibility to meet the needs of exporters while allowing adequate, risk-based controls of exports of sensitive items and to sensitive destinations.

(11) What is the time needed to obtain an individual or global licence?

Our target is to process 70% of all SIELs (i.e. individual licences), both for military and dual-use items, within 20 working days, and 60% of OIELs (i.e. global licences) within 60 working days. In 2010 we achieved 64% and 57% respectively. (Note these figures are for all licences issued by the ECO; it is not possible to provide separate figures for dual-use exports.) The time taken to reach a decision on a licence application is clearly influenced by many factors, particularly the sensitivity of the goods and destination and the overall figures mask large variations between destinations. Median licence processing times, and the percentages processed within the targets, are given for each destination in

the UK Government's Annual and Quarterly Reports on Strategic Export Controls, available here: <https://www.exportcontroldb.bis.gov.uk>

(12) Do existing types of export authorisations ensure fair treatment of exporters across the EU and a level playing field?

If there is a problem it is not the "types" of licence that is the problem, it is the different licensing practices (e.g. different licence validity periods or conditions of use) between Member States. Superficially, there may be some attraction in harmonisation of such practices. However, given that harmonisation is likely to result in a compromise between existing practices it is important to ensure it does not produce more dis-benefits than benefits. For example, in the UK individual and global licences are generally valid for 2 and 5 years respectively. In other Member States validity periods of 1 and (up to) 3 years respectively are typical. In the absence of agreement that all individual and global licences should be valid for 2 and 5 years we would have difficulty supporting a compromise which reduced the validity periods of UK licences. This would increase costs both for UK exporters (in having to apply for licences more often) and for the licensing authority (we would have to issue more licences). The costs to the UK of harmonisation would clearly outweigh the benefits in such a scenario.

(13) What is the usefulness of National General Export Authorisations as compared to EU General Export Authorisations?

National General Export Authorisations can be tailored to the specific needs of national exporters. It is also far quicker and easier to develop, amend or revoke a national general licence than an EU general licence; they therefore allow the licensing authorities to respond to changing circumstances more readily than can be achieved across the EU.

(14) How could the benefits of NGAs be extended to exporters established in other Member States?

The obvious solution is to agree further EU General Export Authorisations with equivalent scope to existing NGAs. Recent experience suggests that in practice this is actually rather difficult. Allowing exporters to use an NGA issued by another Member State is problematic because it would be very difficult to audit compliance with, and enforce the provisions of, a general licence issued by another Member State.

To exporters:

(15) What licence type/s do you primarily use? Are there any particular problems with obtaining any specific types of licences?

Not applicable

To licensing authorities:

(16) How many licences did you issue in 2010 (per type of licence)?

We issued 4637 individual licences (Standard Individual Export Licences, or SIELs) and 74 global licences (Open Individual Export Licences, or OIELs) for dual-use items in 2010. In addition, there were 183 new registrations for the CGEA (687 registrations in total) and 275 new registrations for National General Authorisations (1091 registrations in total).

Catch-all controls

To all stakeholders:

(17) Are you satisfied with the way the current catch-all mechanism functions? If not, what problems have you encountered?

(18) Does the current system of catch-all controls lead to distortions within the Single Market and to an uneven playing field for EU exporters?

(19) How would you improve the application of catch-alls across the EU?

We are broadly satisfied with the way the WMD end-use (catch-all) controls currently function. They are an important and valuable tool that allows us to apply greater scrutiny to, and where necessary prevent, transactions which are only of concern because of the specific nature of those transactions. However we do recognise that they create uncertainty for exporters and that there are some differences in how some Member States apply the controls. A particular problem is that such controls are often based on very sensitive information which we may not be able to share.

Regarding the military end-use control our view is that the current control is too narrow. It currently only applies to transfers to embargoed destinations of unlisted items intended for a “military end-use” where “military end-use” is defined as: (i) incorporation into military-list items; (ii) use of production, test or analytical equipment for the development, production or maintenance of military items; or (iii) use of any unfinished products in a plant for production of military list items. In our view this means that we cannot prevent the export of complete items which are to be used as complete items. For example, we could prevent the export of an unlisted item intended to be used as a component in a military vehicle but we could not prevent the export of a complete civilian vehicle that was to be used by the military or internal security forces of the destination country even where that country is subject to arms embargo. It is also unclear whether the military end-use control permits us to prevent the export of an unlisted item that is to be modified for military purposes, either in the destination country or in an intermediate destination. We have come across a number of cases of this type. We would therefore like to see the Commission address this shortcoming when bringing forward proposals to amend the Regulation. We can provide draft text if necessary.

To exporters:

(20) Have you encountered situations where a catch-all has been imposed for your export transaction, while your competitors continued to trade the same items and possibly to the same end-user or destination? Please describe.

Not applicable

Transit and brokering controls

To all stakeholders:

(21) What is the usefulness of current brokering controls?

The controls on brokering and transit were introduced into Regulation 428/2009 in order to allow Member States to meet their obligations under UN Security Council Resolution 1540. They are a valuable additional tool against the proliferation of WMD.

(22) Would there be a need to extend the scope of these controls to also cover transactions from the EU to third countries?

In our view the current scope of the brokering controls is adequate. There is no need to apply them to transactions from another Member State because in this case the items would still be exported from the EU and the relevant export provisions of the Dual-Use Regulation will apply. Applying brokering controls in these cases would either mean that 2 authorisations (brokering and export) were required for the same transaction or would create confusion as to which licence (brokering or export) was actually required. It is difficult to see how this would improve the effectiveness of the controls and would likely impose additional burdens on businesses and on licensing authorities.

(23) How is the current transit control system functioning? What is the impact of the limited territorial validity of prohibitions?

From an enforcement perspective transit control has its operational difficulties which are due more to the very nature of transit movements than because of deficiencies in the law. For example, transit goods may remain on board vessels and aircraft, we do not get a full customs declaration, we usually know little about the exporters because they are based abroad, etc.

It is not entirely clear what is meant by “limited territorial validity of prohibitions.” If it refers to Article 6(3) of Regulation 428/2009, which states that Member States can extend the requirement for export authorisations for non-listed items to countries subject to arms embargo then this does not have a major impact for enforcement, because we cannot look at transits to all destinations in detail, and we would tend to focus our attention on embargoed destinations anyway.

However, in general there is not a problem with the ‘system’ as such, in the sense that we do not require any changes to the law.

Additional controls imposed by Member States

To all stakeholders:

(24) How are you impacted by the provisions of the Dual-Use Regulation that allow additional controls to be introduced by Member States?

(25) What is the impact of these additional national controls on competitiveness, trade flows and on security?

The ability to impose national controls is necessary to allow MS to control items of specific national security concern (including items only available from that MS) and to respond rapidly to particular circumstances. We have no evidence on the effect of these measures on competitiveness or trade flows. In our view the ability to impose such controls enhances national security.

Criteria used to decide on an export authorisation

To all stakeholders:

(26) Do you think that the criteria set out in Article 12 are clear and precise enough or not?

(27) Is there a need to harmonise to a greater degree the criteria used by Member States to assess export applications? If so, how?

While it is true that Article 12 sets out a non-exhaustive list of considerations that Member States shall “take into account” in assessing licence applications – suggesting that individual MS may apply additional/different criteria – recent discussions between MS suggest that there are not, in practice, significant differences between the criteria that MS actually apply. The UK assesses licence applications for both dual-use and military items against the 8 Criteria set out in Common Position 2008/944/CFSP. If there were to be a harmonisation of the criteria used by MS to assess dual-use licence applications we would prefer to see it done in a manner consistent with the Common Position.

Denials

To all licensing authorities:

(28) What are your views concerning the current system of denials and the denial consultation mechanism? How could this mechanism be improved?

(29) Considering the amount of work needed to perform a review and the number of denials in force, what are your views on introducing a 3 year validity period for each denial – after which, in the absence of any amendment or renewal, the denial would be automatically revoked?

We would rather not comment on denials in a public document. We will make our views known to the Commission through other channels.

Intra-EU transfer controls

To all stakeholders:

(30) What is your view concerning the current system of controls on intra-EU transfers? Have you observed procedural differences between Member States?

(31) Is it appropriate to apply the same level of assessment to intra-EU transfers as to exports to 3rd countries?

(32) How could the intra-EU transfer control provisions be reformed?

Our view is that the current system of controls on intra-EU transfers works well. It is important to remember that such controls only apply to the most sensitive items, or those items for which such controls are necessary to meet Member States' international obligations. We have no proposals for reform at this time.

To exporters:

(33) What is the impact of intra-EU controls on your business and the Single Market? Do these controls affect your competitiveness vis-a-vis exporters from 3rd countries who export to the EU? Please explain.

(34) What is the approximate time needed to obtain a licence for an intra-EU transfer of an Annex IV item?

Not applicable

To licensing authorities:

(35) What measures could be taken to relax intra-EU transfer controls, while ensuring that international obligations are adhered to?

We have no proposals at this time.

EU Control List**To all stakeholders:**

(36) How would you rate the quality of the EU control list? Is it updated regularly enough?

The EU control list is the "model" list that has been adopted by many non-EU States. Significantly, the US encourages other countries to adopt the EU list as part of its export control outreach effort. The change in legislative procedure introduced by the Lisbon Treaty has caused delays to the update to the list. This is a problem that needs to be addressed, and has led to criticism from other countries that use the list. We welcome the opportunity to explore alternatives to the current procedure.

(37) How you experienced any differences in interpretation of control list entries across the EU Member States? Please explain.

We are aware of occasional differences in interpretation of control list entries between Member States. These usually result from ambiguities in the control text agreed in the export control regimes. However it should be noted that the regimes operate on the principle that interpretation of control lists is ultimately a matter for the participating states. While we would want to minimise any difficulties this causes exporters we would not like to see an overly prescriptive approach to resolving differences. Usually bilateral discussion between the Member States concerned is sufficient.

(38) Is the EU control list noticeably stricter than the control lists of 3rd countries? Has this ever caused you any problems?

The EU control list is the “model” list adopted by very many states, including a number which are not members of the international export control regimes. Clearly the EU list will be “stricter” than the control lists of states that are not members of the regimes or that have not adopted control lists based on those of the regimes. However the solution to this “problem” is for the EU to encourage all states to adopt robust and effective export controls based, where appropriate, on the EU control list.

Organisation of EU export controls in the future

To all stakeholders:

(39) What are your views concerning a possible new EU export control model based on a network of existing licensing authorities operating under more common rules?

In principle, we would support closer working with other MS’ licensing authorities, better information sharing, and use of common tools and procedures. However, we remain cautious about how easily this could be achieved within existing resources and without creating additional burdens. Also, there are certain elements of the Commission’s “model” – such as phasing out of National General Authorisations – which we would oppose. Further comments on the individual aspects of the model are given in the answers which follow.

Common risk assessment and appropriate review procedures

To all stakeholders:

(40) What are your views concerning the establishment of a common approach to risk assessment, which would be used by all licensing authorities for the purpose of licensing procedures?

We are willing to explore such an approach; after all, Member States already follow a common approach to risk assessment in relation to exports of military goods through Council Common Position 2008/944/CFSP and the associated User’s Guide. However it must be recognised that a common approach to risk assessment will not eliminate perceived differences in decision making. Such decisions, based as they are on an assessment of risk relating to a particular set of circumstances at a specific point in time, will always be susceptible to accusations of inconsistency. In our experience “similar situations” are rarely as “similar” as they first appear, and of course circumstances change over time. It is also important to avoid a mechanistic, “tick-box” approach to decision making.

Systematic information exchange

To all stakeholders:

(41) What is your opinion about the information exchange model outlined above?

(42) What other types of information would have to be exchanged among licensing authorities in order to ensure uniform application of export controls across the EU?

In principle we welcome improved information exchange. We would want to ensure the amount and type of information shared is proportionate to, and justified by, the objectives outlined in the Green Paper. There would need to be a simple and cost-effective mechanism for sharing and storing the information. It will be important to understand how such information will be used by the non-originating States, and to understand how and why the “pooling” of such information is preferable to bilateral information sharing. Confidentiality and commercial sensitivities will also need to be respected. Finally, we must ensure that the volume of such information is not so great as to prevent its effective use (i.e. to avoid “information overload”).

Extending the scope of EU General Export Authorisations

To all stakeholders:

(43) What are your views concerning the idea of phasing out NGAs if they would be replaced with EU General Export Authorisations? Such EU General Export Authorisations would have a similar item and destination scope, but would be available to exporters in all EU Member States.

Where an EU General Authorisation with identical or very similar scope to an existing NGA is adopted then clearly there is no need to retain that specific NGA. However, the UK does not support the phasing out of National General Authorisations as a whole.

(44) What new types of EU General Export Authorisations would you like to see implemented in the EU?

The most obvious candidates for additional EU General Authorisations beyond those recently agreed (the EU002 to EU006) are Low Value Shipments, Export For Repair, and Export After Exhibition/Demonstration.

(45) How do you compare the currently available EU General Export Authorisation EU001 and NGAs with similar types of authorisations available in third countries (eg license exceptions in the US)?

In our opinion the EU001 and UK NGAs compare favourably in terms of scope and usability with similar types of authorisations available in third countries.

A common approach to catch-all controls

To all stakeholders:

(46) Would you support the idea of obliging Member States to exchange information about imposed catch-all controls (authorisation requirements), which would replace the current approach of voluntarily exchanging information?

In principle we have no objection to sharing information on imposed catch-all controls. However we need to have a better understanding of how such controls operate in other Member States and what the impact of such information sharing would be. In particular we have concerns that information about an imposed catch-all might be seen as being equivalent to a denial, rather than as an opportunity to take a more reasoned assessment of a proposed transaction.

(47) Would you support the idea of creating a mechanism for the issuing of an EU wide catch-all control?

There is some merit in the idea but we need more clarity on how such a control might work. In the UK the end-use control (“catch-all”) is applied by “informing” a particular exporter that a specific transaction requires a licence when there are concrete concerns about that transaction. The exporter may then apply for a licence, which allows a more detailed assessment of the proposed transaction. There are two possible outcomes – either, the concerns are justified - in which case a licence is refused (and a denial notice is issued) - or else a licence is granted. In the latter case the end-use control is said to be “spent”, i.e. it does not apply to any further transactions. In contrast, the Commission’s approach appears to be a mechanism for imposing a (temporary?) control on a specific item across the EU. The operation of such a control raises a number of questions which we will want to explore with the Commission and other MS.

(48) What is your opinion about the idea of creating temporary lists of items and destinations which would be subject to controls under catch-all provisions?

In principle the possibility of creating temporary lists of items subject to control to specific destinations has some merit. However it is important to emphasise that these controls would be list-based controls, not catch-all controls. The mechanism for imposing such controls, including the legal basis, will need to be considered very carefully to ensure it is effective, can be deployed flexibly, and does not impose disproportionate burdens. The alternative would be to share, on a confidential basis, “watch lists” of sensitive items or end-users which Member States could then apply on a national level. However this would not create certainty for exporters as they would not have access to the lists and could still result in inconsistent application by Member States.

Working towards a fully integrated internal market for dual-use items

To all stakeholders:

(49) Would you support the objective of progressively reducing intra-EU transfer controls?

(50) Would you support the idea of replacing licence requirements for intra-EU transfers with a post-shipment verification mechanism?

(51) Would you agree with the idea of replacing licence requirements for intra-EU transfers with the introduction of certified end-users described above?

(52) Would you have any other ideas that would allow for a progressive reduction of intra-EU transfer controls?

The UK's current view is that existing intra-EU controls are proportionate, justified and effective in ensuring we meet our international obligations and retain control of the most sensitive items. We are not convinced that any of the proposed alternatives – e.g notification rather than authorisation, post-shipment verification, or certified end-users – would provide the same level of assurance as a licensing requirement.

Improved enforcement of export controls

To all stakeholders:

(53) What type of information would customs authorities need to properly enforce export controls at EU borders?

The UK already properly enforces export controls at the EU border, using the currently available customs information and licensing information. UK customs officers have the power to request any information relating to the importation or exportation of goods. However, a balance needs to be struck between enforcing controls and facilitating trade. Placing too many requirements on exporters to provide information can be detrimental to trade.

(54) Would customs find it useful to have access to pooled information concerning licenses issued in the EU and lists of exporters who have received licenses?

Yes, this would be useful, particularly when we have to process dual-use export licences issued by other Member States.

(55) How could AEO status be used within the export control framework?

AEO authorisation has not been specifically designed with export controls in mind, and therefore we should be cautious about using AEO status to grant special treatment to companies dealing in dual-use goods.

AEO status could be used by customs and licensing authorities as an indicator of good general compliance with customs controls, and this could be taken into account when assessing questions like the risk of diversion of goods.

However, even if a company has good internal controls, they could still theoretically be deceived by a front-company into supplying goods for a WMD programme. If AEO authorisation were to be used within the export control framework, further work would be needed to identify how this could be done in practice.

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