

PARLIAMENTARY DEBATES

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OFFICIAL REPORT

Sixth Delegated Legislation Committee

DRAFT EXPORT CONTROL (AMENDMENT)
(EU EXIT) REGULATIONS 2020

Tuesday 8 December 2020

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The Committee consisted of the following Members:

Chair: MRS MARIA MILLER

Anderson, Fleur (<i>Putney</i>) (Lab)	† Hart, Sally-Ann (<i>Hastings and Rye</i>) (Con)
† Bhatti, Saqib (<i>Meriden</i>) (Con)	† Jayawardena, Mr Ranil (<i>Parliamentary Under-Secretary of State for International Trade</i>)
Byrne, Ian (<i>Liverpool, West Derby</i>) (Lab)	† Levy, Ian (<i>Blyth Valley</i>) (Con)
† Caulfield, Maria (<i>Lewes</i>) (Con)	Moore, Robbie (<i>Keighley</i>) (Con)
Davies, Geraint (<i>Swansea West</i>) (Lab/Co-op)	† Thomas, Gareth (<i>Harrow West</i>) (Lab/Co-op)
Dowd, Peter (<i>Bootle</i>) (Lab)	† Vickers, Martin (<i>Cleethorpes</i>) (Con)
† Fell, Simon (<i>Barrow and Furness</i>) (Con)	Nicholas Taylor, <i>Committee Clerk</i>
† Fletcher, Colleen (<i>Coventry North East</i>) (Lab)	
† Fletcher, Mark (<i>Bolsover</i>) (Con)	
Grady, Patrick (<i>Glasgow North</i>) (SNP)	
† Hammond, Stephen (<i>Wimbledon</i>) (Con)	† attended the Committee

Sixth Delegated Legislation Committee

Tuesday 8 December 2020

[MRS MARIA MILLER *in the Chair*]

Draft Export Control (Amendment) (EU Exit) Regulations 2020

9.25 am

The Chair: Before we begin, I would like to remind everyone about the social distancing regulations. Spaces available to hon. Members are clearly marked with a tick, and I would be really grateful if you stuck to those spaces only. *Hansard* colleagues would be really grateful if you sent any speaking notes to them via email.

The Parliamentary Under-Secretary of State for International Trade (Mr Ranil Jayawardena): I beg to move,

That the Committee has considered the draft Export Control (Amendment) (EU Exit) Regulations 2020.

It is a pleasure to serve under your chairmanship, Mrs Miller. The draft regulations were laid before the House on 15 October. The regulations are necessary to ensure a functioning export control regime at the end of the transition period on 31 December. The aim of the regulations is to take forward the transposing of the existing system, which is reliant on EU law, into the United Kingdom's own law. At the same time, they implement certain EU regulations in Northern Ireland to the extent required by the Northern Ireland protocol. They are not intended to make any change in export control policy.

At this point, I wish to be open with right hon. and hon. Members. My Department has taken forward these regulations in good faith, and I both acknowledge and welcome the report of the Joint Committee on Statutory Instruments following its meeting on 25 November. As you know, Mrs Miller, I am not a solicitor or parliamentary draftsman, and I am not sure how many of us here this morning are, which is why I welcome the scrutiny that the Joint Committee is able to provide. The Joint Committee has shown that the drafting of this statutory instrument could be improved, and I am grateful for that.

What I do know is that the purpose of new article 42N(2) of the Export Control Order 2008 is to re-enact, in relation to transfers from Northern Ireland, an existing exception that allows the transfer of software or technology that is or may be intended for weapons of mass destruction purposes from the United Kingdom by non-electronic means—most usually paper—if either the final destination of the software or technology is the customs territory of the European Union, or processing or working is to be performed on the software or technology in the customs territory of the European Union, in which case the law of the destination member state will be responsible for the control of any subsequent transfer.

Gareth Thomas (Harrow West) (Lab/Co-op): I am grateful to the Minister for acknowledging at the outset the error that the Joint Committee has identified. The noble Lord Grimstone, when commenting on its report, said:

“Nothing is weakened by this error; indeed, the situation is strengthened for this particular category of software that might be used for weapons of mass destruction.”—[*Official Report, House of Lords*, 2 December 2020; Vol. 808, c. GC202.]

Given the significance of the issue—we are talking about potential items that could be used to do huge damage—why not just leave the strengthened provision, albeit that it was originally conceived in error, on the statute book?

Mr Jayawardena: I welcome the shadow Minister's reflections on my noble Friend Lord Grimstone's remarks. I will come to the point about this being a strengthening of the regime, but also how it interplays with the Northern Ireland protocol, in a moment, if the hon. Gentleman will allow me.

Re-enactment is necessary overall because the existing exception, which applies in relation to the entire United Kingdom, is to be removed at the end of the transition period and export controls will be applied for exporting from Great Britain, so there is a distinction. As the shadow Minister has just said, the effect of the incorrect conjunction in article 42N(2)—“and” instead of “or”—between sub-paragraphs (a) and (b), is to make the exception less permissive. In other words, as he implies, it makes the exception less of an exception: it makes our export controls from Northern Ireland even tougher than intended, as exporters wishing to use the exception will need to comply with both conditions, not one or the other.

To be clear, the provision does not take effect today; it would only be in relation to transfers from Northern Ireland after the transition period. Given that the drafting makes the regulation tougher, not weaker, my Department did not consider the error to have sufficient impact to warrant the withdrawal and re-laying of these draft regulations. To do so would mean that appropriate export controls would not be transposed into the United Kingdom's own law at this point. That is not an outcome that anyone here would want.

For context, I should say that my Department assesses the likelihood that people and businesses transfer software or technology from Northern Ireland to the European Union by non-electronic means, despite awareness that the software is or may be intended, in entirety or in part, for WMD purposes, as very low—a very rare event. None the less, I have instructed my Department to correct the error later this month.

Gareth Thomas: I am grateful to the Minister for that explanation, but I genuinely say to him that he has not yet explained why we do not just leave the provision as it is. Will he get to that point?

Mr Jayawardena: Of course I will; the hon. Gentleman has not given me a chance yet. That is indeed my very next point. As I said, I have instructed my Department to correct the error later this month, and we will do so through an instrument using the negative procedure, as is appropriate in these circumstances.

To the point that the shadow Minister makes, I should say that the United Kingdom already has one of the strictest export control regimes in the world. Members will know that all export licence applications are assessed on a case-by-case basis against the consolidated EU and national arms export licensing criteria. In reaching a decision, the Department for International Trade receives advice from several Departments, including the Ministry of Defence and the Foreign, Commonwealth and Development Office. Together, we draw on all available information, including reports from non-governmental organisations and our diplomatic missions.

The consolidated criteria provide a thorough risk-assessment framework and require us to think hard about the impact of exporting any equipment. These are not decisions, whatever the use of the conjunction, that my Department would take lightly. We would not license in any circumstances the export of items where to do so would be inconsistent with the consolidated criteria. Those are our guiding principles.

The European Union (Withdrawal) Act 2018 enables a functioning statute book at the end of the transition period by providing Ministers with the tools to deal with deficiencies in domestic law arising because of our exit from the European Union.

Gareth Thomas: Will the Minister give way?

Mr Jayawardena: I will make a bit of progress.

Some hon. Members will recall that this House has already debated and approved legislation to ensure that there is continued functioning of retained EU law in Britain in respect of export controls. The Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 were debated here on 25 March 2019 and the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) (No. 2) Regulations 2019 were debated here on 13 May 2019.

Those new regulations are necessary because under the Northern Ireland protocol, which forms part of the withdrawal agreement, the EU regulations and directives relating to export control of dual-use items, civilian firearms and goods usable for capital punishment or torture will continue to apply directly to and in Northern Ireland.

Gareth Thomas: I am grateful to the Minister for giving way again. He will be aware that under the German presidency of the European Union, new rules have been provisionally agreed, allowing for “more accountable, competitive and transparent trade of dual-use items.”

Presumably, if the process of application continues, what has been agreed under the German presidency will apply to the rules in Northern Ireland very shortly. There will be one set of export control rules for the rest of the UK under domestic law and a slightly different set very quickly for Northern Ireland. Will the Minister comment on that point?

Mr Jayawardena: I am, of course, happy to comment on that point. The shadow Minister is right that Northern Ireland will be subject to slightly different rules than Great Britain. For example, under this instrument, unamended by any future negative statutory instrument that will be introduced, an exporter from Great Britain

would require an export licence full-stop, whereas an exporter from Northern Ireland would need to secure one only if the export were, first, from Northern Ireland and, secondly, to the European Union. The technology will be worked on in the European Union, as reflected in article 42N(2).

Going forward, we will correct that under the statutory instrument that I referred to earlier and, indeed, European Union law will apply in Northern Ireland as opposed to in Great Britain, where we will incorporate it into our own law using the European Union (Withdrawal) Act 2018.

I continue with my reflections on the draft regulations themselves. The provision of the European Union directive on the intra-Community transfer of defence-related products will also continue to apply to all movement of military goods between Northern Ireland and the EU. The regulations amend provisions of retained EU law to accommodate the Northern Ireland protocol, which is why they are important. Let me explain to Members how that will work. Beginning at 11 pm on 31 December, the export control rules applying in Great Britain will be derived solely from domestic law, as I referred to a moment ago, which will include retained EU law. In contrast, the export control rules applying in Northern Ireland will continue, as I referred to a moment ago, to be derived from EU law, as required by the Northern Ireland protocol.

My Department will continue to be the licensing authority for strategic exports from the whole of the United Kingdom, but exports of such items from Northern Ireland will be done under a licence issued under EU regulations.

Gareth Thomas: On that point, will the Minister give way?

Mr Jayawardena: No, I will make progress.

To make that work, the draft regulations amend existing legislation. First, they amend the Export Control Order 2008, which has been the centrepiece of domestic export control legislation since April 2009. Secondly, they amend two instruments: the Export Control (Amendment) (EU Exit) Regulations 2019 and the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019, which were made last year in preparation for EU exit. In addition, they amend the draft Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations, which were debated here on 8 April last year and approved by both Houses, but have not yet been made. It is necessary to amend them to remove a dependency on the non-existent Customs Tariff (Establishment) (EU Exit) Regulations 2019.

Let me be clear that today’s regulations do no more than is necessary to ensure the continued functioning of export control law, and therefore the continued effective operation of our export control system in both Great Britain and Northern Ireland.

Gareth Thomas: Will the Minister give way?

Mr Jayawardena: No, I will make progress; the shadow Minister will be able to make his own remarks shortly.

Without the draft regulations, our ability to control the export of such goods would be undermined. The legislation will ensure that the Secretary of State continues to control exports from all parts of the United Kingdom

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of dual-use items, firearms and goods that could be used for capital punishment, torture or other cruel, inhumane or degrading treatment or punishment. Her Majesty's Government believe that the procedures for assessing licence applications and decision-making processes are robust, and will remain so following the end of the transition period.

The eight criteria used to assess export licence applications, as set out in the consolidated criteria, will remain the same. The Foreign, Commonwealth and Development Office and the Ministry of Defence will continue to provide my Department with advice and analysis. A licence, for the avoidance of doubt, would not be granted if to do so would be inconsistent with any of the criteria.

My Department will also continue to provide detailed advice and guidance about export controls, and, at the end of the transition period, to support legitimate exporters. I remind the Committee that these regulations are solely about preparing for the end of the transition and making sure that we have a functioning statute book after the end of the year. These amendments need to happen, and Parliament needs to make sure that the existing controls remain in place. Negotiations about the future relationship between the United Kingdom and the European Union—or, indeed, the wider world—are a separate matter, of course, and play no part in the debate today.

I am sure that the Committee will want to work in the interests of our national security and in support of retaining robust strategic export controls by making sure that the legislation passes; it is essential to the preparation for the end of the transition period. The legislation is necessary, and I commend the motion to the Committee.

9.40 am

Gareth Thomas: It is a pleasure to have what I think is my first opportunity to serve on a Committee under your chairmanship, Mrs Miller.

These regulations make amendments to legislation relating to the export and transfer of military and—more importantly, for the purposes of this debate—of dual-use goods. By their own estimate, the Government say that Britain is the second-largest global defence exporter and, in particular, a major exporter of arms. It is clearly important for us to have a robust export control regime now and after the end of the transition period—indeed, even more so as a series of concerns have been raised in recent months about the way the export control regime is working.

The regulations will make changes at the end of the transition period, when export control regulations in Britain will be covered by domestic law, while export control regulations in Northern Ireland will continue to follow EU law. Ministers have admitted that they and the Prime Minister do not fully understand the Northern Ireland protocol, which the Prime Minister signed to clinch a withdrawal agreement with the European Union; perhaps the need for this statutory instrument is one of the unfortunate consequences. Yesterday, the Chancellor of the Duchy of Lancaster headed to Brussels, apparently to thrash out a deal to

minimise checks on goods entering Northern Ireland from Great Britain. Will the Minister say whether he expects any changes to the regime for arms exports as a result of that discussion?

In an intervention earlier, I alluded to the fact that the German presidency appears to have agreed new rules with the rest of the European Union about dual-use exports; it would be good to hear a little more from the Minister about how he expects this regulation to affect Northern Ireland. I understand that there will be a further statutory instrument around export control rules. It would be good to hear whether that is purely to correct the error identified by the Joint Committee on Statutory Instruments, or whether it will include changes to reflect what has been agreed under the German presidency. It would also be good to know if there will be a public consultation on whether to adopt the new reforms adopted by the European Union and on whether, potentially, to go further.

The noble Lord Bassam asked a series of questions when speaking for my colleagues in the other place. The Minister's colleague in the Lords did not answer those questions. Will the Minister answer them? I repeat them for his benefit. The explanatory memorandum says that

“Regulation 7(4) provides for an exception to certain prohibitions to continue in relation to a certified person who is part of the armed forces, a police force, or public authority...who is a hunter or sport shooter, or who holds a Manx firearms certificate.”

The noble Lord Bassam asked how many people in total the Minister thought that would affect. Will this Minister provide the Committee with the answer to that question?

The noble Lord Bassam went on to ask a point about the statement in the explanatory memorandum that regulation 9 amends the Secretary of State's “regulation-making powers in the Export Control Act 2002”.

He asked whether the regulations would be made under the affirmative or negative procedure, and who the Secretary of State would consult before using the powers. That concern was specifically in relation to the SI that will come forward to correct the mistake identified by the Joint Committee. It would be good to hear clarity from the Minister on that.

My noble friend asked a third question, which was also not answered at that point. The explanatory memorandum states:

“Regulation 15 provides for certain authorisations granted by the Secretary of State under the Torture Regulation that have effect before the end of the transition period to continue to have effect after”

the end of the year. He asked specifically:

“How many authorisations does the Minister expect to be granted between now and 31 December?”—[*Official Report, House of Lords*, 2 December 2020; Vol. 808, c. 199.]

Again, it would be good to hear the answer to that question from the Minister.

When the Minister winds up the debate, perhaps he can use some real-life examples to explain the significance—or not—of the regulations and, if there continues to be divergence between the EU arms export control regime and the UK arms export control regime, to show how that is going to affect things in practice. Let us take a company that is exporting arms. It wants to send or export dual-use weapons, for example, to Northern Ireland to be part of an order to go off to

another country. Will it need a licence under UK domestic law to send those goods to Northern Ireland, and will the company then also need a licence to export those controls from Northern Ireland to the final destination? It would be good to hear some clarity from the Minister on that potentially real-life example.

As the Minister said, the Joint Committee on Statutory Instruments raised a series of concerns about the SI. Indeed, it specifically suggested that the regulations were “defectively drafted”. The Minister made much of the consolidated criteria, but I did not hear a specific answer as to why the regulations cannot just be left as they are. The Minister in the Lords said that they have strengthened the situation. Why, as a country, would we want to risk weakening the regime now for equipment, parts or software that might be used to make weapons of mass destruction? Again, it would be good to hear the Minister’s explanation on that.

I ask the Minister to say where he thinks the blame lies for the mistake. Is it his fault? Is it the noble Lord Grimstone’s fault? Is it officials in his Department, or is it the Treasury solicitors who drew up? How was the mistake made? He will understand that I ask this question in the context of the concerns that Campaign Against Arms Trade has raised about the increasing use of open licences and about not being able to track the final destination for some of the arms that are exported. There are concerns about the way in which arms exports have been restarted to Saudi Arabia, given the context of what has been happening in Yemen. Any further suggestion that mistakes are being made around arms export controls will raise a series of additional concerns.

The Joint Committee highlighted that part 5 of the draft regulations amends the trade in torture regulations, which have not yet been made. As I understand it, they currently do not take account of the Northern Ireland protocol and are therefore approved in draft only. Again, the Committee said that that was defective, and reported that part 5 of the regulations made for highly “unusual or unexpected use of enabling powers”.

It would be good to hear a full explanation for this use of the powers. Crucially, can the Minister explain when he expects the trade in torture regulations to be made?

It would also be helpful to hear from the Minister why he thinks it was not practical for the Department simply to amend the draft, if that is what he thinks is now required. Is it perhaps because the Department was focused on trying at the last minute to get the roll-over deals completed? Is it perhaps because the Secretary of State was too focused on trying to get a deal with the Trump Administration? Or is it because the Department’s efforts are focused on the Brexit negotiations? Either way, it would be helpful to understand why the Department does not feel that it can make the changes at this stage.

The Minister said that there will be new draft regulations. It would be good to know when they might be published. Can we expect them as an early Christmas present, or will it be in the new year? I ask that as a serious question, because the longer the time gap before the new changes are brought in, the longer the lacuna—the mistake, as the Minister describes it—is perpetuated. It would be good to hear what the process for consultation on that will be, if there is one. It was not clear from the Minister whether he and his officials will be consulting

with anybody other than each other. Although I recognise that the general trend in the current Government is just to consult with one’s chums, as opposed to the wider public, it would none the less be helpful to understand from the Minister what formal process, if any, will be undertaken.

I say gently to the Minister that the new draft regulations could be an opportunity to rebuild some confidence in the way the export control regime works. He will know of the concerns about the export to the US of riot control equipment, including anti-riot guns, tear gas and riot shields. There were concerns in the United States, as well as here in the UK, about the possible use of that riot equipment against peaceful, unarmed civilians taking part in Black Lives Matter protests. As I have alluded to, there have been even greater concerns about the sale of arms to the Saudi-led coalition for use in the war in Yemen.

The Minister will also be aware of concerns raised by the right hon. Member for Bournemouth East (Mr Ellwood), who currently chairs the Defence Committee, about reports of UK-made sniper weapons, made by a Portsmouth company, finding their way into Russian hands and being trained on British soldiers taking part in NATO operations in support of the Baltic countries. Apparently there was due to be an investigation. Perhaps the Minister can tell us whether it has been completed and whether it has thrown up any problems with the current export control regulations that the new draft regulations might be able to counteract.

I look forward to the Minister’s response. The Opposition want to ensure that there are strong, robust export control regulations and procedures. As long as the Minister can give useful answers to us, we do not intend to divide the Committee.

9.53 am

Mr Jayawardena: I thank the hon. Gentleman for his questions. I must confess that they seemed to stray a bit further than the regulations in front of us. I am sure he will table questions to me in due course in respect of a number of those issues, as he has done to date.

Gareth Thomas: On a point of order, Mrs Miller. I would be grateful if you could clarify whether I was at any point out of order in asking those questions of the Minister and expecting a reply from him.

The Chair: Sitting in the Chair, I would say that you were pushing at the boundaries at points, but I was certainly satisfied that you were within the realms of talking about issues to do with exports. If I had felt that it was necessary to draw to the attention of the Committee that you were straying, I would have done so.

Gareth Thomas: I look forward to the Minister’s answers then.

Mr Jayawardena: At no point did I say that the hon. Gentleman was out of order; I simply said that he was straying.

I am not going to apportion any blame for the drafting. That is not my job, nor is it my style. Rather, I believe that we should focus on fixing any drafting errors that might have been made. To that end, I welcome the fact that, in order to secure the licensing controls on

[Mr Jayawardena]

strategic exports, the Labour party will be supporting the regulations. If these measures were not in place, we would not have the correct controls across the United Kingdom.

The hon. Gentleman asked, why not leave it? Why not leave the wrong conjunction between sub-paragraphs (a) and (b)? I thought I had made this point clear, but let me restate for the record that it would not be consistent with EU law and it would be a breach of the Northern Ireland protocol. That is why we cannot leave it. That is why we wish to bring forward a statutory instrument using the negative procedure. I hope to bring that forward this month, but certainly we will bring it forward as soon as possible.

In terms of any future changes to the regime, we will always consider how we can further improve our system, but we are confident that we have one of the most robust systems in the world, and we do think very hard before licensing any goods so that all licences are always consistent with the consolidated criteria.

I will write to the hon. Gentleman in respect of the number of people who might benefit from an exception, or the number of licences that might be granted before 31 December.

The hon. Gentleman rightly wanted the flavour of a real-life scenario to draw reference to how things might be different between Northern Ireland and Great Britain. Let me provide the House with such a scenario. Take Neil and Eleanor, who are both mechanical engineers designing a component typically used in horticultural spraying equipment. They intend to courier their respective printed technical drawings—on paper, non-electronic—to their customer in the European Union, and they know that their customer intends to incorporate those technical drawings into their design schematics for use by a manufacturing plant outside the European Union. The Secretary of State has informed Neil and Eleanor that the type of technology they are working

on may be intended for use in connection with the dissemination of a chemical weapon—that is, a WMD purpose.

Neil works in Belfast; Eleanor works in Coventry. The current exception would mean that no export licence is required if the export is from the United Kingdom to the European Union, and the exporter knows that the final destination of the software or technology is the European Union or that processing or working is to be performed on the software or technology in the European Union. The issue that we have identified through the scrutiny of the JCSI is that no export licence is required if the export is from Northern Ireland to the European Union, and the exporter knows that the final destination of the software or technology is the European Union and processing or working is to be performed on the software or technology in the European Union.

That would mean that Neil in Belfast requires an export licence, because the export is from Northern Ireland, the export is to the European Union, the technology will be worked on in the European Union, but the final destination of the technology is not the European Union. Eleanor requires an export licence full stop: the export is from Great Britain, and the exception only applies to exports from Northern Ireland.

The correct exception, once we have brought forward the amending statutory instrument using the negative procedure, will mean that Neil does not require an export licence because the export is from Northern Ireland, the export is to the European Union, and although the final destination is not the EU, the technology will be worked on in there. However, Eleanor would still require an export licence because she is based in Great Britain. I hope that clarifies the matter.

Question put and agreed to.

Resolved,

That the Committee has considered the draft Export Control (Amendment) (EU Exit) Regulations 2020.

9.59 am

Committee rose.