

BIS | Department for Business
Innovation & Skills

**EXPORT CONTROL
ORGANISATION**

Guidance on Brokering
(Trade) of Dual-Use Items –
Council Regulation (EC) No
428/2009

MARCH 2010

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1. Introduction

On 27th August 2009 a new European Union (EU) Dual-Use Regulation came into force. Alongside the existing controls on exports from the EU of dual-use items the new Regulation includes, for the first time, a control on **brokering** of dual-use items. Brokering means buying or selling, or arranging or negotiating transactions for the purchase, sale, or supply, of dual-use items located in one third (i.e. non-EU) country for transfer to another.

From that date, any individual, partnership or legal entity resident or established in an EU Member State involved in the brokering of dual-use items listed in Annex I to the Regulation between two non-EU countries will require a licence where they have been **informed** that the items are or may be intended for a **WMD end-use**. If the broker is **aware** the items are intended for such an end-use he must contact the competent authorities in the Member State in which he is established (in the UK, the Export Control Organisation) who will decide whether to make the activity subject to control.

This Guidance sets out the scope of the dual-use brokering controls, how they will be applied, and what you need to do to be compliant with them.

You should note that controls on dual-use brokering are **in addition to**, and **completely separate from**, the UK's existing controls on trade (i.e., trafficking and brokering) in military goods.

An important distinction is that, unlike the latter, the new controls apply to trade in items of software and technology.

Separate guidance is available on the export control pages on the Businesslink site detailing Controls on the Trafficking and Brokering of Military Goods. These are accessible at:

<http://www.businesslink.gov.uk/exportcontrol>

2. The Legislation

Council Regulation (EC) No.428/2009 (the "Regulation"), which revokes and replaces Council Regulation (EC) No.1334/2000, was adopted on 5th May 2009 and published in the Official Journal of the European Communities (O.J. L134, 29.5.09, p1). The Regulation is directly applicable in all EU Member States and entered into force on 27th August 2009.

National legislation, The Export Control (Amendment)(No 3) Order 2009 (S.I. 2009 No. 2151), implementing certain provisions associated with licensing and enforcement came into force at the same time.

3. The new controls on brokering of Dual-use items (Trade Controls)

The controls on “brokering services” introduced under the Regulation are intended to meet EU Member States obligations set out under UNSCR 1540 in respect of Weapons of Mass Destruction (WMD), and apply to any items listed in Annex I to the Regulation where the broker has been informed that the listed items are or may be intended for a WMD end-use. There is also an obligation on the broker to advise the authorities if he is aware the items are intended for a WMD end-use.

- **What is meant by “Brokering services”?**

Article 2(5) of the Regulation defines “brokering services” as:

- the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country; or
- the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

In practice, brokering could include the following activities (this list is not exhaustive):

- arranging supply from overseas factories/warehouses;
- arranging intra-company transfers;
- drop shipping;
- acting as a ‘project manager’ for a project in one third country who sources supplies for that project in other third countries.

but **only** where the items to be supplied are listed in Annex I to the Regulation **and** the broker has been informed that a licence is required under the brokering control. In addition, if the broker is aware of a WMD end-use he must contact the competent authorities who will decide whether or not to make the transaction subject to control. If the broker is resident or established in the UK the competent authority is the Export Control Organisation.

For the purpose of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are “transportation, financial services, insurance or re-insurance, or general advertising or promotion.”

- **To whom do the brokering controls apply?**

Article 2(6) defines “Broker” as:

- any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under [the definition of “brokering services” point 5 from the Community into the territory of a third country.

Therefore, the controls apply to individuals (i.e., natural persons), companies and other legal entities (i.e., legal persons), and partnerships, who are resident or established in a Member State **and** who undertake a controlled brokering service from within the EU.

- **Additional measures in the Regulation**

The Regulation provides for Member States to impose additional controls on brokering of dual-use items not listed in Annex I, on dual-use items destined for a military end-use in a destination subject to sanctions or arms embargo, and to impose a licensing requirement where the broker suspects the items may be intended for a WMD end-use.

At this time the UK has decided NOT to impose these additional controls.

4. Trade Licences and How to Apply for Them

In view of the level of detail that will need to be provided with an application (see Article 10 of the Regulation) and the intended end-use that triggers the controls, the Export Control Organisation (ECO) will only consider issuing a Standard Individual Trade Control Licence (SITCL).

A SITCL is specific to a named trader (broker) and covers involvement in trading (brokering) a set quantity of specific goods (this will now extend to specific software or technology) between a specific source and destination country with a specified consignor, consignee and end-user. SITCLs will normally be valid for two years. Upon expiry either by time or because the activity has taken place the licence ceases to be valid. Should further similar activity take place, a further licence must be applied for.

There are no Open Individual Trade Control Licence (OITCL) or Open General Trade Control Licences (OGTCLs) that allow trade (brokering) where there is a WMD end-use.

- **How do I apply for a Licence?**

Applications for a SITCL should be made via SPIRE which is the ECO's fully electronic system for processing licence applications.

You can access SPIRE at <https://www.spire.bis.gov.uk>

Further details about how to register for SPIRE and about the different types of licences which might be available to exporters in applying for an export licence are available on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>.

- **Points to bear in mind when applying for a Licence**

Remember to give as much notice as possible prior to any licensable activity and to include as detailed a description as possible of the proposed activity, equipment and transaction details together with relevant technical specifications and information on the end-user.

When applying for licence coverage for controlled activities remember to ensure that your application covers all your potential requirements.

5. End-User Documentation

End user supporting documentation is required when applying for a SITCL. We recognise that the format of End-User Undertakings required for exports of goods from the UK will not always be appropriate for the licensable activity covered by the brokering (trade) controls.

However, some form of supporting documentation from the recipient will be required. It is not necessary for a new document to be drawn up; we can often accept documentation that has already been generated for commercial purposes, such as Government Purchase Orders, relevant extracts from Government contracts and copies of any End User Undertakings generated by the recipient to the authorities of the exporting nation, provided that it includes a full description of the goods, software or technology (quantity and values), details of the supplier, the recipient and the applicant.

In cases where the proposed brokering (trade) activity has yet to be fully scoped out, other forms of documentation may be acceptable and will be considered on a case-by-case basis. In these circumstances you should contact the [Special Casework Licensing Unit for further advice](#).

NB: The fact that you have been granted a UK Trade Licence does not remove the requirement for you to obtain the permission of the authorities of the appropriate countries to send or receive goods, software or technology from or to that territory as necessary.

Further information about End-User Undertakings is available on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>

6. Record Keeping and Compliance

For arrangements about Record Keeping and Compliance please refer to the terms of the licence or visit [the](#) guidance on export control compliance requirements which is available on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>

7. Frequently Asked Questions

i. What is the origin of these new rules?

The EU Commission tabled a proposal in December 2006 for a “re-cast” Regulation to replace the existing dual-use items Regulation (Council Regulation (EC) No.1334/2000). The Regulation proposed a range of changes which were drawn from different sources, i.e. recommendations from the outcome of EU Member States’ “Peer Review” and Member States’ obligations stemming from United Nations Security Council Resolution (UNSCR) 1540 on Weapons of Mass Destruction (WMD) (which includes obligations to combat illicit brokering of items with WMD uses). Following extensive discussions between EU Member States and the Commission, the final text of a proposal was agreed and adopted on 5th May 2009 to come into force on 27th August 2009.

ii. What activities fall under the heading of “brokering”?

In practical terms, as well as the ‘traditional’ brokering service of moving goods between two third countries, it could also include activities such as:

- Arranging supply from an overseas factory or warehouse in one third country to a destination in another third country;
 - For example, purchase orders for supply of goods to customers in Europe, the Middle East and Africa are processed or negotiated by your UK sales office who direct a regional warehouse in, say, Dubai, to ship the goods direct to the customer in another third country.
- Arranging intra-company transfers between locations in different third countries;
 - For example, as part of a manufacturing flow or for inventory control purposes you arrange for the transfer of components between sister companies located in different third countries.

- Drop shipping;
 - That is, you arrange for goods to be supplied directly from your supplier or stock holder in one third country to your customer in another third country.
- Acting as a 'project manager' for a project in one third country who sources supplies for that project in other third countries.

iii. Do the controls apply to the supply of software and technology?

Because the controls refer to "brokering services of dual-use items listed in Annex I", and as dual-use items are defined as including software and technology, then Yes, the controls apply to brokering of software and technology.

iv. Even if that supply is by electronic means?

Yes, if being transferred between third Countries.

v. What about transfers of software and technology by non-electronic (e.g. oral) means?

As with exports oral transfers between third countries would be controlled where the technology is described over the telephone.

vi. What destinations do these controls apply to?

The controls on brokering services are not country specific but are instead based on end-use. Therefore, where we have informed you that the items in question are or may be intended for WMD end-use such brokering services would be subject to control. Remember also that if you are aware the items are intended for a WMD end-use you must contact us and we will decide whether or not to invoke the brokering control..

The Government's Annual Reports on Strategic Export Controls give details of refusals, by destination, on end-use grounds and will give an indication of some of the countries where there are WMD concerns. Details of the Annual Reports can be found on the Strategic Export Controls: Reports and Statistics website: <https://www.exportcontroldb.berr.gov.uk>

Further Guidance on WMD End-Use Controls can be found on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>

vii. What does WMD end-use mean?

See existing WMD guidance (see above website address)

viii. When will you invoke the Brokering controls?

We will invoke the control when we become aware that brokering is or is about to be taking place in respect of Annex I items that are or may be intended for a WMD end-use. This could be in response to an enquiry by the broker e.g., a rating request, or because we have become aware through our own information sources.

ix. What does “being informed” mean?

Being informed means that you have received a formal notice from us that items that are the subject of a proposed transaction are or may be intended for WMD or Military End-Use (and therefore that export and, in the case of WMD End-Use, trade controls apply). If you then decide you still want to continue with that transaction you must apply for a licence.

Further guidance on End-Use Controls is available on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>

x. How will you inform me?

If we invoke the control we will advise you in writing by letter or email or, if you submitted a rating enquiry, through SPIRE.

NB: Also remember that if you are aware that items to which your activities relate are for a WMD end-use you must contact us and we will decide whether or not to invoke the brokering controls.

xi. So if I am not informed that I need a licence I do not have to worry?

Although a licence will only be required if you have been informed that the items are or may be intended for a WMD end-use, if you are aware that the dual-use items are intended for a WMD end-use you must notify us and we will then decide whether to “inform” you and so make that activity subject to control. Furthermore, if you have any concerns about a proposed transaction you may of course contact us for advice or submit a rating enquiry.

xii. How might I be aware that the items are for a WMD end-use?

There is guidance available intended to help you judge where there are WMD end-use concerns (see above for website address) so that you can factor this into your business planning and make better informed decisions on whether to contact the competent authorities.

xiii. Why might you choose not to inform me that a licence is required even though I know the items are for a WMD end-use?

Because after full consideration of the facts of the case we may satisfy ourselves that there is not an unacceptable risk of use in, or diversion to, a WMD programme, or we may decide that it is not expedient in the circumstances to invoke the control.

xiv. What if I am suspicious about the end-use of the items?

The brokering controls do not apply if you are suspicious about the proposed end-use but if you do have concerns you may of course contact us for advice or submit a rating enquiry.

xv. Should I submit a rating enquiry if I am suspicious about the end-use?

There is no requirement on you to submit a rating enquiry but of course you are free to do so or to contact us for advice.

xvi. How do I know whether or not the items are listed in Annex I to the Regulation?

You should look at Annex I which forms part of the Strategic Export Control Lists on our website or use the Goods Checker online tool. If having done so you are still uncertain whether the items are listed you can submit a rating enquiry. Applications for rating advice are made via SPIRE. To find out more see the guidance on the Rating Enquiry Service on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>

xvii. If the items are not listed in Annex I to the Regulation then I won't need a brokering licence even if I know they are for a WMD related end-use?

Correct, the controls only apply to items listed in Annex I to the Regulation.

xviii. You informed me under the WMD end-use control that I needed a licence to export goods from the UK; do I need a brokering licence to arrange for my overseas parent/sister/subsidiary company to supply the same goods to the same end-user instead?

No. We could only have 'informed' you under the WMD end-use control if the goods were not listed in Annex I to the Regulation. Only items listed in Annex I to the Regulation are subject to the control on brokering.

xix. I applied for a licence to export Annex I goods but this was refused on WMD end-use grounds. Do I need a licence to arrange for my overseas parent/sister/subsidiary company to supply those goods to that end-user instead?

If we refused an export licence on WMD end-use grounds then you must be aware that the goods are or may be destined for a WMD end-use. In this case you must notify us and we will decide whether to make the brokering activity licensable.

xx. Does it matter where the activities take place?

Yes. For the Regulation to apply the Broker must be resident or established in a Member State of the Community and the brokering activity must take place within the Community. Note, however, that some software and technology transfers are controlled under UK legislation even where they take place entirely outside the Community (see article 11 of the Export Control Order 2008 and the guidance at <http://www.berr.gov.uk/files/file50853.pdf>).

xxi. I am arranging for the goods to be supplied from another EU MS; do I need to apply for a brokering licence?

No – supply must be between third (i.e. non-EU) countries. Annex I dual-use items require an export licence to be exported from the EU.

xxii. I am arranging for the goods to be supplied to another EU MS; do I need to apply for a brokering licence?

No – supply must be between third (i.e. non-EU) countries.

xxiii. Do the brokering controls apply if the goods transit the Community en route from source to destination?

Where a UK broker is involved a UK Brokering Licence will be required and this will cover any subsequent transit through the UK. If no UK Broker is involved and the goods are in transit through the UK a transit licence will be required. This is likely to be the same in other Member States.

xxiv. But I (or my supplier) already have an export licence from the source country. Do I still need to worry about the brokering controls?

Yes. Third country approvals are irrelevant in determining whether a brokering licence is required.

xxv. How do the controls apply if I am arranging the supply of items from one place to another within a country?

They don't – supply must be from one third country to another.

xxvi. Although I am a UK national I reside outside the Community; do I still need a licence?

No. The Regulation only applies to Brokers who are resident or established in the Community, and where the Brokering service takes place from within the Community. Note, however, that some software and technology transfers are controlled under UK legislation even where they take place entirely outside the Community (see article 11 of the Export Control Order 2008). If you are involved in actual transfers you may need a licence.

Further guidance is available on the Provision of Technical Transfers and Export of Technology on the export control pages on the Businesslink website at <http://www.businesslink.gov.uk/exportcontrol>

xxvii. I am normally resident within the Community but travel outside it to conduct the brokering activity. Do I still need a licence?

No, the activity must take place within an EU Country. Note, however, that some software and technology transfers are controlled under UK legislation even where they take place entirely outside the Community (see article 11 of the Export Control Order 2008 and the further guidance on the export control pages on the Businesslink website at

<http://www.businesslink.gov.uk/exportcontrol>

If you are involved in actual transfers you may need a licence.

xxviii. How am I affected if my only involvement is to provide transport, finance, insurance/re-insurance, or general advertising or promotion?

These are defined in the Regulation as “ancillary services”. The control on “Brokering services” does not include ancillary services therefore if your sole involvement is the provision of ancillary services you will not be subject to the controls.

xxix. How am I affected if I am a freight forwarder who arranges transportation of Annex I goods between overseas countries?

If you are involved in the 'arrangement of transactions for the...supply of dual use items' between third countries then a licence is required if they are Annex I items and you have been informed that the items are for a WMD end-use. If you are aware that there a WMD end-use case then you should

contact us.. However, if you are simply providing transport (i.e. an ancillary service), then no licence is required.

xxx. Does it matter whether I get paid for an activity that is linked to a trading (brokering) activity?

If you undertake a brokering service and this results in the removal of items from one third country to another third country then the activity is licensable irrespective of payment.

xxxi. Does an agreement have to be a formal or written one?

No. It can be oral and informal.

xxxii. What is the difference between general and active or targeted advertising in relation to promotional activities?

For the purpose of the trade (brokering) controls:

- **General advertising** is where the advertising is not directed at one individual/company and is not intended to close a deal i.e. its main objective is to gain people's interest. An example of general advertising may include a stand at a trade fair with promotional materials such as posters or brochures; or an advert in a periodical or magazine.
- **Active/Targeted advertising** is typically where the advertising is specifically aimed at an individual/s or company/ies with the intention of closing a deal. An example of active or targeted advertising may include a specific visit to a customer's premises to establish the terms of a potential future supply, or an application as part of a tendering exercise.

xxxiii. What if the items in the third country are transferred before I get a licence, in circumstances beyond my control?

You may not engage in any controlled activities without a licence. It is, therefore, vital to ensure that all staff likely to be engaged in such activities are made aware of the controls. If you subsequently discover that you are involved in a brokering service for which you should have applied for a licence, you should notify the ECO as soon as possible for advice.

xxxiv. How long will applications take to process?

Licence applications will be processed in the usual way with the aim currently of completing the process within 20 working days on 70% of Standard Individual Trade Control Licences (SITCLs). You should also bear in mind that this target applies only when we are in receipt of all documentation necessary to be able to process.

xxxv. Can applications be refused?

Yes. Applications are considered on a case-by-case basis by our various advisers against the Consolidated EU and National Arms Export Licensing Criteria and other announced policy, and taking into account the Government's commitments and international obligations. Among the factors taken into account in assessing applications will be the destinations and parties involved, the nature of the items concerned, and the uses to which they could be put, as well as any other relevant information. There have been and will continue to be occasions when applications will be refused following the assessment process.

xxxvi. If an application is refused, is there a right of appeal?

If a SITCL is refused, a reason for the refusal will be provided, and the right to appeal will be offered.

xxxvii. Can licences be granted for embargoed destinations?

Licences are considered on a case by case basis and the reason for the embargo will need to be taken into account when deciding whether or not to issue a brokering licence.

xxxviii. What happens if I trade without a licence?

To undertake a brokering service (trading) described above without a valid licence is a criminal offence. Offenders can be fined and/or imprisoned. In addition, making false statements in connection with a licence application is also a criminal offence. The maximum penalty for the most serious offences is set at 10 years.

If you find that you have inadvertently brokered (traded) without appropriate licence cover you should let the ECO know as soon as possible. The ECO will normally advise that you make a voluntary declaration about the mistake to HMRC. It is, therefore, important that companies and individuals take advantage of the various training opportunities that the ECO provide and ensure that they themselves have adequate training, awareness, procedural and security strategies in place.

xxxix. Can existing licences for physical exports from the UK be extended to cover trade?

No. Separate applications will have to be made for trade licences, specifying the source and destination countries to be included on the licence.

8. Contacts for Further Advice

Further information and help on export and trade controls can be obtained from:

Special Casework Licensing Unit
3rd Floor
1 Victoria Street
London SW1H 0ET
Fax: 020 7215 4539
Email: lu3.eca@bis.gsi.gov.uk

or;

Export Control Organisation Helpline
3rd Floor
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 4594
Fax: 020 7215 0531
Email: eco.help@bis.gsi.gov.uk

(The general enquiry telephone helpline service is usually available between 9:30am and 5:30pm Monday to Friday but a voicemail will be available outside those times. We will ring you back if you leave your details.)

For queries on using SPIRE contact:
Tel: 020 7215 4594
email: spire@bis.gsi.gov.uk

Information on export controls is published on:
<http://www.businesslink.gov.uk/exportcontrol> and
<http://www.bis.gov.uk/exportcontrol>