

# Opening Statement

## Control of Exports Bill 2021

*Joint Committee on Enterprise, Trade and Employment*

*29<sup>th</sup> September 2021*

### **Context**

Good morning Chairperson and Members of the Committee, thank you for your invitation to discuss pre-legislative scrutiny for the Control of Exports Bill.

I am joined by my colleagues from the Trade Licensing and Control Unit in the Department, Ms Carol Toolan and Mr Matthew Geoghegan.

I will briefly summarise the nature and purpose of Export Controls to provide some context, followed by the rationale for upgrading the current Act and then briefly outline the main provisions in the new Bill.

Export Controls are a multi-lateral, global mechanism designed to prevent the proliferation of weapons of mass destruction, to preserve regional stability, to prevent terrorism and to protect human rights.

Export Controls are rooted in the work of a number of multi-lateral non-proliferation regimes such as the Missile Technology Control Regime, the Chemical Weapons Convention and the most significant from Ireland's perspective due to its focus on technology, the Wassenaar Arrangement. Technical experts in the regimes maintain, and update on an on-going basis, lists of items within their remit that should be subject to Export Control by the participating states.

Export Controls generally take the form of a legal obligation on exporters to obtain *prior authorisation* i.e., an Export Licence, from the national competent authority in a State for the export to third countries of certain, designated goods i.e., the listed items.

The success of Export Controls is predicated on uniform and consistent implementation on a *multilateral* basis. A published list of controlled items is a prerequisite for achieving this

objective; a list-based approach also provides regulatory transparency and certainty for exporters.

However, achieving the multi-lateral consensus required to update a list, and then giving legal effect to that update, inevitably entails a time lag between the need for a new control becoming apparent and the implementation of that control. Therefore, the regulations also make provision for controlling the export of items not currently on the list, under specific and exceptional circumstances. These are so called “catch-all” controls and are intended as a temporary, bridging measure until an item can be included on the list.

One further important consideration in relation to regulatory regimes is that they should be targeted and proportionate and endeavour to mitigate the risk of unintended consequences. This is particularly important when the regulations apply to SMEs who can be disproportionately impacted by the regulatory burden due to their limited resources and inability to benefit from economies of scale in ameliorating setup and ongoing operational costs. To this end, Export Controls are designed to minimise the burden on reputable exporters engaged in legitimate, low-risk trade.

### **Legal Framework**

The legislative framework for Export Controls in Ireland is established in a number of linked national and EU instruments. There are two key EU instruments in the context of today’s discussion. The first is,

*REGULATION (EU) 2021/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items*

Trade in Dual-use items is an EU competence, and this Regulation has direct, legal effect in all Member States. However, Member States are obliged to establish in national legislation effective, proportionate and dissuasive penalties applicable in the event of infringements of

the provisions of the Regulation. The EU Regulation also provides Member States with discretion to adopt certain additional measures in their national legislation.

“Dual-use” items are defined as products and components, including software and technology, that can be used for both civilian and military applications. The Regulation explicitly identifies 1,850 types of Dual-use items, spanning 10 categories:

0. Nuclear materials and equipment
1. Special materials and related equipment
2. Materials processing
3. Electronics
4. Computers
5. Telecommunications and "information security"
6. Sensors and lasers
7. Navigation and avionics
8. Marine
9. Aerospace and propulsion

Of particular note in the Irish context is that many mainstream, business ICT products are classified as Category 5 Dual-use items by virtue of the fact that they incorporate strong encryption for data protection. These items include data storage, networking and IT security products, both hardware and software.

The second key EU instrument is the

*COUNCIL COMMON POSITION 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (as amended by Council Decision (CFSP) 2019/1560).*

The categories of military technology and equipment to which these rules should apply are set out in the Common Military List of the EU. The Common Position sets out the eight criteria against which licence applications should be assessed.

Control over the export of “Military” equipment is a national competence and the Common Position does not have direct effect in Member States. Therefore, its provisions must be given

effect by national, primary legislation. The national legislation comprises the Control of Exports Act 2008 and a number of Statutory Instruments.

### **Rationale for New Legislation**

The Department, as the national competent authority for Export Controls, is committed to providing a robust, transparent export control system and is proposing to bring forward new legislation to update the Control of Exports Act 2008. The Department's overarching goal in bringing forward this legislation is to mitigate the risk that controlled items could be exported from Ireland and used to cause injury in regional conflicts or to violate human rights in third countries. Therefore, the Bill is designed to ensure that Ireland has a comprehensive and robust legal framework for regulating the exports of controlled goods and in particular, to ensure that the Minister (currently, An Tánaiste) has comprehensive and effective powers of enforcement.

The current Act must be updated to reflect the significant advances in technology, new developments in business practices, updates to EU instruments, and the evolved geo-political risk landscape.

### **Main Provisions of the Bill**

The Bill will update (repeal and replace) the Control of Exports Act 2008.

The Bill will establish the National Strategic Export Control List, i.e., a list of goods, services and "technology" subject to export controls. The National List will include all items on the EU Common Military List. However, the National List may also include other items of equipment or technology that are to be brought under control nationally, in advance of their inclusion on an EU list.

The Bill will provide a solid legal basis for regulating the export of *services*, as well the export of goods.

The Bill will ensure that the Minister has an effective enforcement capability. It will provide Authorised Officers with more effective powers for investigating potential infringements of

controls, and it will ensure that the penalties for infringements of the regulations are proportionate, graduated and dissuasive.

The Bill will provide for the use of administrative sanctions for non-compliance with Export Controls.

The Bill will ensure that the Minister has a robust legal basis for administering export controls. For example, setting terms and conditions and reporting obligations associated with export licences.

The Bill will include a provision to exempt from licensing requirements the *temporary* transfer out of the State of “Military” equipment (including firearms) by the Defence Forces or An Garda Síochána when necessitated by operational requirements, for example: training; maintenance and repair; UN missions. However, such items being sent abroad for disposal, whether for sale or for destruction, will be subject to a licensing requirement.

### **Current Status**

The Department has been engaging with the Office of the Attorney General including the Office of the Parliamentary Council on the drafting of the Bill. Important legal questions have arisen and are being systematically addressed: for example, the unique interplay between national and EU competence in Export Controls and the mechanism for handling appeals.

The Department is also consulting with other Government Departments and State entities, as appropriate.

As a result of these engagements, considerable progress has been made, both in terms of refining the Department’s policy objectives, as well as drafting the body of the full Bill. It is the Department’s desire to have a full draft of the Bill available for publication during the Autumn session.

Thank you, Chairperson and Members of the Committee, for your attention this morning. My colleagues and I look forward to answering your questions on this important piece of legislation.

**ENDS**