

U.S.-UK ITAR Exemption to Implement the Defense Trade and Cooperation Treaty Questions and Answers

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How does the UK exemption work?

The Defense Trade Cooperation Treaty between the U.S. and UK is implemented through the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR). Specifically, the Treaty is the basis for a new exemption to the ITAR (in §126.17- the UK Exemption). The Treaty, as implemented through the exemption, seeks to simplify the movement of equipment and information between and within the U.S. and the UK by creating an Approved Community of government and private sector entities and facilities. Approved

Community Members may receive certain defense articles (including technical data) and defense services solely for an end-use that is within the Treaty scope (combined operations identified on the DDTC website, <http://www.pmdtcc.state.gov>, cooperative government programs identified on the DDTC website, U.S. government contracts or solicitations that specifically identify Treaty eligibility, or HMG Projects listed on the DDTC website), without the need for ITAR export licenses or other written authorizations so long as all of the requirements outlined in the ITAR are followed. Similarly, the UK has created a corresponding Open General Export License (OGEL), so there is no need to receive an individual export license from the UK Government, if the transaction falls under the terms of the ITAR/OGEL.

The U.S. Community consists of departments and agencies of the U.S. Government and non-governmental U.S. persons registered with DDTC and not ineligible to export, according to the requirements and prohibitions of the Arms Export Control Act, the ITAR, and other provisions of U.S. law. This is the same as the community of U.S. exporters that can export pursuant to any ITAR exemption now.

The UK Community's (UKC) membership comprises certain U.K Government entities and facilities, as well as non-governmental facilities that have been vetted and approved by both Treaty partners. All UKC members will be assigned an Approved Community Identification Number (ACID) once in the community. Each private sector facility in the UK will have its own ACID; membership is granted a particular private sector entity at a specified address, not to a company writ large. U.K Governmental entities are provided one ACID for all facilities that fall within their purview and are in the territory of the United Kingdom. U.S. exporters will need to ask for the ACID from their UK trading partner (for both private sector and governmental entities). U.S. exporters will be able to confirm UKC membership prior to export by searching the ACID in the Treaty Reference System (TRS) currently available under the Treaty tab on DDTC's website. The Approved Community is subject to change; from the U.S. exporter's perspective, UKC members can be added or removed from the community at any time, therefore, we encourage you to check the status of an entity prior to making a shipment.

For UK industry, specific facilities, not companies, can join the UKC. This is a voluntary decision. The criteria against which a facility's application will be considered is outlined in the Treaty Implementing Arrangement (IA) and includes undergoing clearance to "List X" status; review of foreign ownership control or influence; review of previous convictions or indictments under UK or U.S. export laws and regulations; review of U.S. export licensing history of the entity or facility; and review of any potential national security issues (e.g., contact with proscribed countries). To qualify for UKC membership, UK facilities must have approval for inclusion from both the U.S. and UK governments.

Under the UK exemption, it will be possible for movement of defense articles within the Approved Community as long as the transactions are in support of pre-approved:

- combined military and counter-terrorism operations;
- cooperative security and defense research, development, production, and support programs;
- security and defense projects where the end-user is the Government of the United Kingdom; or

- U.S. Government end-use.

The U.S. and the UK governments will agree jointly on which projects, programs and operations qualify for processing under the terms of the UK exemption. A list of those programs is available on DDTC's website. The UK exemption is not for commercial sales or transfers to third parties not in the Approved Community.

UK retransfer or re-export of items originally exported under the UK exemption to a person or facility outside of the Approved Community will require U.S. approval and UK authorization.

The UK exemption does not apply to transfers, exports, re-transfers, and re-exports to Australia, which has a similar treaty with the United States. Movements of Defense Articles originally exported in accordance with the UK exemption from the UK to Australia (or any other third country) are bound by normal UK export rules and the standard re-export provisions under the ITAR.

U.S. entities will also still be subject to licensing requirements related to permanent exports and all other requirements not explicitly removed by the language of the UK exemption.

Can a company decide unilaterally to use the UK exemption for a particular project or component?

A company may self-determine whether a particular transaction is UK exemption-eligible. To do so, a company must determine whether:

- the transaction is in support of a UK exemption eligible end-use (combined operations identified on the DDTC website, cooperative government programs identified on the DDTC website, U.S. government contracts or solicitations that specifically identify Treaty eligibility, or HMG Projects listed on the DDTC website);
- the defense article (including technical data) or defense service to be exported is eligible for export under the UK exemption (i.e., review of Supplement No. 1 to Part 126); and
- the facility to which the company is shipping is a member of the Approved Community.

I have a key supplier outside the UK and U.S. May I use the UK exemption?

Transactions with suppliers outside the UK and U.S. Approved Communities are not covered by the UK exemption. Transactions involving non-Approved Community members will require an ITAR license or other approval.

I am in a cooperative program with UK/U.S. and a third party; can I use the UK exemption?

Transactions with partners outside the UK and U.S. Approved Communities are not covered by the UK exemption. However, the UK exemption may be utilized in the context of a multilateral program when the Treaty eligible elements are defined and managed separately, and are covered by a separate U.S.-UK agreement, MoU or other arrangement. Section 2(2)(c) of the Implementing Arrangement sets out the criteria for Treaty eligible programs.

How will UK exemption articles be protected when in the UK?

All U.S. defense articles, including technical data, and defense services provided under the UK exemption are required to have protective markings and be managed in accordance with the terms of the UK exemption, Implementing Arrangement, UK security regulations, and the UK Official Secrets Act.

What are the marking requirements under the UK exemption?

For defense articles, including technical data, and defense services classified for reasons other than solely the UK exemption (e.g., items unclassified in the U.S.), the standard marking or identification will read CLASSIFICATION LEVEL USML//REL USA and GBR Treaty Community//. For all other defense articles, including technical data, and defense services, the standard marking or identification will read RESTRICTED USML //REL USA and GBR Treaty Community// and will be handled while in the UK as “ UK RESTRICTED” items.

Defense articles (other than technical data) shall be individually labeled with the appropriate identification detailed above; or, where such labeling is impracticable (e.g., propellants or chemicals), shall be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings.

Technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (physical, oral, or electronic), shall be individually labeled with the appropriate identification detailed above; or, where such labeling is impracticable shall be accompanied by documentation (such as contracts or invoices) or verbal notification clearly associating the technical data with the appropriate markings.

Defense services shall be accompanied by documentation (contracts, invoices, shipping bills, or bills of lading) clearly labeled with the appropriate identification detailed above.

Marking requirements are further outlined in §126.17(j) of the ITAR.

Will there be less paperwork associated with the UK exemption than existing ITAR licenses?

The UK exemption removes the requirement for submission of an export authorization request to the U.S. Department of State. You will not have to prepare, submit and wait for your authorization; however, the exemption does not remove requirements for maintaining records on the movement of defense articles. In most cases, record-keeping is the same as under the other parts of the ITAR. The UK exemption requires entities using the UK exemption to export, transfer, re-transfer, re-export, or receive defense articles maintain detailed records of all such movements. The detailed record keeping requirements are in ITAR §126.17(l).

Why don't we wait for export control reform to go into effect instead of using the UK exemption?

The UK Treaty predates President Obama's reform initiative, but the UK exemption is consistent with it while reflecting the close and enduring relationship the U.S. shares with one of its closest allies. The UK exemption streamlines trade exclusively with the UK, while the President's proposed export control reform effort will make broader changes across the entire system. The

UK exemption is available for use today and will be available in the future for eligible items that are on the USML. The UK exemption simplifies export controls for the movement of defense articles and services in support of coalition operations, cooperative defense programs, and U.S. and partner defense procurements from each other.

Given the improvements in export licensing timelines, how will the UK exemption make any difference?

Companies choosing to utilize the UK exemption will see a decrease in the time burden of preparing a license application, submitting it and waiting for its adjudication. Through procedural mechanisms such as an “Approved Community” of exporters and importers and identified projects and programs the UK exemption removes the need for individual licenses and the associated administrative burden of preparing them, as well as the uncertainty of when a license may be issued.

Will there be changes to UK laws?

Amendments to UK laws are not required to implement the Treaty although changes have been made to UK security and export regulations to reflect the Treaty’s requirements.

What criteria will be used as the basis for U.S. decisions on what Defense Articles to exempt from the scope of the UK exemption?

If a specific technology meets any one of the following criteria, it is included on the Exempted Technologies List and identified in Supplement No. 1 to part 126 of the ITAR. The technologies are those that:

- Are controlled according to U.S. Presidential Directive;
- Are controlled subject to applicable international agreements or arrangements (e.g., the MTCR, or Chemical or Biological Warfare regimes);
- Are not controlled for export as defense articles by the UK; and/or,
- Are targeted, sensitive technologies that should not be freely Transferred within an “Approved Community,” but only to specifically identified recipients pursuant to an export license.

No defense articles controlled for compliance with the Nuclear Suppliers Group (NSG), or the Missile Technology Control Regime may be exported under the UK exemption, and are included in Supplement No. 1 to part 126 of the ITAR, which supplement also includes “Defense Articles listed in the Missile Technology Control Regime (MTCR) Annex, the Chemical Weapons Convention (CWC) Annex on Chemicals, the Convention on Biological and Toxin Weapons, and the Australia Group (AG) Common Control Lists (CCL).”

These items are identified in Supplement No. 1 to Part 126 of the ITAR.

How do I export or obtain U.S. classified defense articles under the UK exemption?

You must obtain a written request, directive or contract from the U.S. Department of Defense prior to the initial export from the United States. After that, U.S. classified materiel (Confidential and above) eligible for transfer under the Treaty will be moved in accordance with the Treaty’s detailed arrangements and other applicable security requirements.

How do I submit a request for authorization to retransfer, reexport, change end-use, or transition of an item exported under the UK exemption?

You must submit a General Correspondence (GC) request to DDTC and request such authorization. Requests for authorization to retransfer, reexport, or change the end-use of an item exported under the UK exemption to one outside the scope of the exemption should be made pursuant to current practices under §123.9 (See §126.17(h)). Requests to transition from a current export license or other authorization following the initial export to UK exemption coverage should also be made via a GC to DDTC. The requirements for making such a request are outlined in §126.17(i).

I am unclear about the meaning, and the impact, of “marketing purposes” in §126.17(g)(1) and A1 of the List of Defense Articles Exempted from Treaty Coverage.

Item A1 of the List of Defense Articles Exempted from Treaty Coverage (reference Article 3(2) of the U.S./UK Defense Trade Cooperation Treaty) was developed to preclude marketing of items for which no prior USG determination has been made regarding export policy. Section 126.17(g)(1) reiterates the requirements of A1. The impact should be rather limited, because articles (including responses to solicitations) exported based strictly on compliance with the documented requirements, specifications and descriptions associated with the approved operation, joint program, or project would not be considered marketing.

What is the impact of C1 of the List of Defense Articles Exempted from Treaty Coverage exempting developmental systems which have not obtained written Milestone B approval from the Department of Defense?

C1 of the List of Defense Articles Exempted from Treaty Coverage requires an export license for the export of developmental U.S. technologies that have not previously been approved for an export license or have not received Milestone B approval from the Department of Defense. Section 126.17(g)(4) of the ITAR reiterates the requirements of C1. However, an export will be permitted under the UK exemption if that export is made pursuant to a written solicitation or contract issued by the DoD and if the developmental system export is consistent with parts A and B of the U.S. exempted technologies list (i.e., not otherwise exempted from UK exemption coverage by the exempted technologies list (Supplement No. 1 to part 126)). It is U.S. policy that export of systems prior to Milestone B requires case-by-case review and the UK exemption does not reverse this policy.

What criteria were used by the UK to decide which technologies would be exempt from the scope of the UK exemption?

The exempt technologies are drawn from the UK’s Strategic Exports Control List which includes items controlled by both the UK Government and the European Union. Technologies will be generally exempt if they:

- Are controlled subject to applicable international agreements or arrangements (e.g., the MTCR, or Chemical or Biological Warfare regimes);
- Are items which could be used for internal repression or violations of human rights;
- Are targeted, sensitive technologies that should not be freely transferred within an “Approved Community,” but only to specifically identified recipients pursuant to an export license;
- Are EU dual use items (as the EU has competence over this area of UK export control); or

- Certain categories of goods covered by the U.S. Munitions List but which the UK does not control (as there is no mechanism to control re-export).

These items are identified in Supplement No. 1 to Part 126 of the ITAR.

How will the exempted technologies lists be maintained?

The U.S. and UK exempted technologies lists will be updated on an as-needed basis. The U.S. and the UK will work together on any future additions or removals to the exempted technologies lists. Any resulting updates to Supplement No. 1 to Part 126 of the ITAR will be made and published in a Federal Register Notice.

What is the intent of Section 2(2)(e) of the Implementing Arrangements?

The intent of this paragraph is to provide the U.S. and UK flexibility in designating a cooperative program as UK exemption eligible. For example, if a cooperative program involves a system consisting of components that are both exempt and non-exempt, this paragraph allows the U.S. and UK to agree to use the UK exemption for transactions involving the non-exempt technologies. This paragraph is supported by the U.S. Senate's Resolution of Advice and Consent to Ratification of the Treaty, which provides in Section 3(3) "Cooperative programs with exempt and non-exempt defense articles. It is the understanding of the United States that if a cooperative program is mutually determined, consistent with Section 2(2)(e) of the Implementing Arrangements, to be within the Scope of the Treaty pursuant to Article 3(1)(b) of the Treaty despite involving Defense Articles that are exempt from the Scope of the Treaty pursuant to Article 3(2) of the Treaty, the exempt Defense Articles shall remain exempt from the Scope of the Treaty and the Treaty shall apply only to non-exempt Defense Articles required for the program."

If I incorporate UK exemption defense articles into a non-UK exemption article, will the "conjoined" item be subject to two regimes?

Determining UK exemption eligibility is done on a transaction-by-transaction basis. If an article exported under the UK exemption is incorporated into an article that is not UK exemption eligible (e.g., is identified in Supplement No. 1 to part 126 or is for an end-use not approved under the UK exemption), this would be considered a change in end-use of the article and would require authorization from DDTC. Upon receiving authorization for such change in end-use, the new "conjoined" item would be subject to the authorization under which the non-UK exemption article was received.

If I incorporate items not eligible for the UK exemption into a UK exemption eligible item, does that incorporated article become subject to the UK exemption?

No. Pursuant to §126.17(g), the exporter must obtain a license or other authorization from DDTC for the export of such embedded defense articles (for example, USML Category XI (a)(3) includes that electronically scanned array radar systems that are exempt from this section that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from the Directorate of Defense Trade Controls for their export, transfer, reexport, or retransfer).

How will the authorized end-uses be identified?

DDTC will post on its website lists of eligible combined military operations and exercises, combined counter-terrorism operations, cooperative programs, and HMG projects. These lists will be mutually determined by the UK MOD and the U.S. DOD, subject to mutual approval by the Department of State and the UK MOD. The U.S. and UK will work together to keep these lists current.

Eligible U.S. government end-uses will be identified in the solicitation or contract. The DFARS describes the conditions under which the contracting officer should include provisions in solicitations to offerors and include clauses in contracts requiring contractors to comply with the provisions of the treaty as implemented in the ITAR and DFARS. The DFARS also requires contractors to flow down these requirements in their contracts with sub-contractors at any tier. The DFARS also requires the offeror to sign a representation that export(s) or transfer(s) of qualifying defense complied with the requirements of this provision.

What about FMS? Will Defense Articles exported under the FMS Program be eligible for license-free Transfers to Approved Community members pursuant to the UK exemption?

Under the Arms Export Control Act, sales of defense articles and defense services to foreign countries under the Foreign Military Sales (FMS) program are made by the U.S. Government and executed by the Department of Defense. All FMS sales require the approval of the U.S. Secretary of State but do not otherwise require licenses that the AECA requires for exports for direct commercial sales where U.S. companies export defense articles or defense services to foreign countries.

Generally, the FMS process will remain unchanged. However, transfers following the initial sale, that is when the items have been delivered, may come within the UK exemption's scope if all the exemption requirements are met for eligibility. The intent is to allow the transfer of defense articles and defense services, without the need for individual approvals from the Department of State, or from the Armed Forces of the UK to Approved Community members to achieve certain purposes, such as for maintenance, overhaul, or repair.

Terms of the FMS LOA unrelated to the provisions of the UK exemption will continue to apply.

The UK government will maintain a register of items that are transitioned to UK exemption eligibility. This will create a documented record that is available to the U.S. government for review or tracking of any FMS item transitioned to UK exemption coverage that is transferred within the Approved Community. The United States does not require a notification of each movement; however, records must to be kept and made available for review upon request.

What are the “cooperative program legislative authorities” referenced in Section 2(2)(a) of the Implementing Arrangements?

The legislative authorities referenced in Section 2(2)(a) are the following: 10 USC 2350a, 10 USC 2350b, 10 USC 2350f, 10 USC 2350i, 10 USC 2350l, 10 USC 2358, 22 USC 2767 (Section 27 of the AECA), and 22 USC 2796d (Section 65 of the AECA). A “valid cooperative program international agreement or arrangement” is an agreement or arrangement which is based on the legal authorities cited in the answer to the question above, where the agreement or arrangement (1) has entered into force or effect; and (2) has not expired or been terminated.

What are the criteria for UK Community (UKC) membership? How does a facility join the UKC?

To be in the UKC, a nongovernmental facility must be within UK territory, must undergo clearance to “List X” status and will be considered against the following criteria: foreign ownership control or influence, previous convictions or indictments under UK or US export laws and regulations, the U.S. export licensing history of the entity or facility and national security issues such as contact with proscribed countries. Application should be made through the UK. The UK element will be managed by DE&S Infrastructure Security which runs the “List X” process. Following the UK review and approval, U.S. Government approval is required for the facility to join the UKC.

Once a facility is granted membership into the UKC, it will be assigned an Approved Community Identification Number (ACID). Each facility that is a member of the UKC will have its own unique ACID. Both UK governmental entities with facilities and non-governmental facilities will be assigned an ACID. U.S. exporters will need to request the ACID from their UK trading partners. U.S. exporters will be able to confirm UKC membership through a search function available in the DDTC Treaty Reference System (TRS), which will be available on the Treaty Tab on DDTC’s website.

Articles 4 and 5 of the Treaty use the phrase “security accreditation and a need-to-know” in reference to personnel and employees. Does “security accreditation” mean the same thing as “security clearance”?

Typically, the UK uses the term, “security accreditation” to refer to the facility security and information technology system vetting process, and the term “security clearance” when referring to the personnel security vetting process. For the purposes of the Treaty, the term “security accreditation” may be used interchangeably when discussing the vetting process for both personnel and Approved Community facilities. As with current security practices, the “need to know” requirement will generally be managed by Approved Community members rather than centrally managed or controlled by the respective government.

How will the U.S. Government vet all eligible UK facilities for inclusion in the UK Community (UKC)? Which U.S. agencies will participate in such vetting?

The UK government will review and vet requests by entities seeking membership in the UK Community, and then submit them to DDTC for review and vetting. In making its determination, DDTC will consult with the Department of Defense and evaluate each non-governmental entity proposed for the UKC on an individual basis, assessing for national security and foreign policy concerns.

Is access to Defense Articles exported pursuant to the UK exemption limited to nationals of the United States and the UK? Will some third-country nationals also have such access, by virtue of having a UK security clearances and a need to know?

A limited number of third country nationals may have access to Defense Articles exported pursuant to the UK exemption. Serving members of Her Majesty’s Armed Forces may have access to Defense Articles Exported under the Treaty, and some of those individuals may be third country nationals. The provisions of §126.18 may apply, provided all elements of the exemption are met.

Will the UK Community (UKC) include any distributors of parts and components, or only end-users of parts and components?

The UK exemption does not preclude distributors from being members of the UKC. However, it is unlikely that this would happen as such distributors would have to be cleared to handle classified information or material by the UK government.

What are the criteria for eligibility for the U.S. Community?

Eligibility is a key element of the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR). As with other ITAR exemptions, registration with DDTC is the first step, but an exporter must also not be ineligible as outlined in § 120.1(c) of the ITAR, or they cannot utilize the UK exemption.

What are the security accreditation requirements for employees in the U.S. Community?

Security accreditation will not be required of employees in the U.S. Community who do not handle classified exports or transfers. For the UK exemption, only those U.S. persons having access to exports or transfers classified at the CONFIDENTIAL level or higher will be required to obtain “security accreditation and a need-to-know.” The basis on which accreditation and need-to-know decisions are made are based on E.O. 13526, “Classified National Security Information;” E.O. 12968, “Access to Classified Information;” and E.O. 12829, “National Industrial Security Program.” U.S. Community members are responsible for determining access based on a favorable adjudication of an appropriate investigation of the employee and resulting security clearance, and a determination of a need-to-know based on a lawful government purpose. Within the Department of Defense, the Defense Office of Hearings and Appeals handles hearings and appeals on negative security accreditation decisions. E.O. 12968 sets forth similar hearings and appeals proceedings for all other departments and agencies in the Executive Branch.

What Congressional notifications will occur?

Notifications will be made on exports that meet or exceed the notification thresholds of AECA Sec. 36(c) and (d). This information must be provided to DDTC 15 days prior to export. Congress will also be notified of any request to re-transfer or re-export to a person or entity outside of the UK Community a defense article or defense service where the value of such transaction meets or exceeds the thresholds identified in Section 3(d) of the AECA.

What impact, if any, will the UK exemption have on the operations and actions of various U.S. companies that are operating under consent agreements from past arms export cases?

U.S. companies or persons under Consent Agreements that have not been statutorily or administratively debarred by the Department may be members of the U.S. Community so long as they are otherwise eligible.

Does the UK exemption have any impact on the permanent import licensing requirements promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE)?

No. The UK exemption has no effect on permanent import license requirements. Importers must continue to seek a permanent import license from BATFE if the article being permanently imported is on the U.S. Munitions Import List and requires an import license.

Will §123.4 be amended for repair/return?

No. There is no need to update or amend §123.4. The UK exemption provides for the movement of qualifying defense articles between the U.S. and the UK. Therefore, §126.17 can be used for items exported under the section that are shipped back to the U.S. for repair/return.

Will §121.16 Missile Technology Control Regime Annex (MTCR) be updated?

Section 121.16 will not be updated at this time. However, the MTCR Annex exclusions in the exemption are intended to reference the current MTCR. The current MTCR Annex is available at: <http://www.mtc.info/english/annex.html>.

How do you use the UK exemption in the Automated Export System (AES)?

As outlined in §126.17(l)(2), all exporters of defense articles under the UK exemption must electronically file Electronic Export Information (EEI) using the AES citing one of the four referenced codes (126.17(e)(1); 126.17(e)(2); 126.17(e)(3); or 126.17(e)(4)) in the appropriate field in the EEI for each shipment. These codes refer to each of the approved end-uses under the UK exemption. These new codes will be added to the existing AES drop-down menu. Exporters will also be requested to enter the ACID of the intended end-user.