

## **Draft of proposed amended statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export licence**

This document is a draft of the proposed amended statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export licence, to be issued if the UK leaves the EU without an agreement in place. This draft may be subject to minor changes. The final version of the amended guidance will be published on the ACE website and become effective on or around exit day, in the event of a no deal exit. For the avoidance of doubt, this is a *draft* document, and the existing statutory guidance (dated March 2015) remains the relevant guidance pursuant to Section 9(6) of the Export Control Act 2002.

### **EXPORT CONTROLS ON OBJECTS OF CULTURAL INTEREST**

#### **STATUTORY GUIDANCE ON THE CRITERIA TO BE TAKEN INTO CONSIDERATION WHEN MAKING A DECISION ABOUT WHETHER OR NOT TO GRANT AN EXPORT LICENCE**

##### **INTRODUCTION**

1. Section 9 of the Export Control Act 2002 (the Act) requires the Secretary of State to provide guidance about the general principles to be followed when exercising licensing powers conferred by a control order made under the Act. The Export of Objects of Cultural Interest (Control) Order 2003 **S.I. 2003/2759** (the Control Order) prohibits, except under the authority of a licence granted by the Secretary of State, the export of:

“Any objects of cultural interest manufactured or produced more than 50 years before the date of exportation except:

- a) postage stamps and other articles of philatelic interest;
- b) birth, marriage or death certificates or other documents relating to the personal affairs of the exporter or the spouse of the exporter;
- c) letters or other writings written by or to the exporter or the spouse of the exporter; and
- d) goods exported by, and being the personal property of the manufacturer or producer thereof, or the spouse, widow or widower of that person.”

## **OPEN LICENCES**

2. In order to reduce the burden on would-be exporters, the Secretary of State has issued a number of open licences permitting the export of certain specified objects without the need to obtain an individual export licence. There are three types currently in operation, the first two under UK legislation and the third under EU legislation:

- a) the Open General Export Licence (Objects of Cultural Interest) (OGEL);
- b) the Open Individual Export Licence (OIEL); and
- c) the Specific Open Licence.

### **Open General Export Licence (Objects of Cultural Interest) (OGEL)**

3. The OGEL, which can be used by any exporter, may permit the permanent export of objects valued below specified financial thresholds, and also permits the export (for up to six months) of some common temporary exports and the re-export of some common temporary imports. The OGEL may also permit the export of an object of cultural interest (which would otherwise require an individual UK licence) where: (i) a licence was granted under Council Regulation (EC) No 116/2009 on the export of cultural goods (the "EU Regulation") before the day on which the UK left the European Union ("EU exit day"); (ii) it has not been released into free circulation in the UK; or (iii) the Secretary of State has approved its return following a recommendation to that effect by the Spoliation Advisory Panel.
4. The Secretary of State will normally undertake a full consultation with all interested parties, and will take their views into account, before suspending, amending or revoking an OGEL.
5. A copy of the current OGEL is on the Arts Council's website ([www.artscouncil.org.uk](http://www.artscouncil.org.uk)) or it can be obtained from:

The Export Licensing Unit  
Arts Council England  
21 Bloomsbury Street  
London  
WC1B 3HF  
Tel: 0161 934 4317  
e-mail: [elu@artscouncil.org.uk](mailto:elu@artscouncil.org.uk)

## **Open Individual Export Licence (OIEL)**

6. An OIEL may be granted to a named individual, company or institution, to permit either the permanent or temporary export of specified objects within a limited time frame (usually three years). An OIEL may be granted subject to conditions, including the requirement to keep records of all exports made under it.
7. In considering whether to grant an OIEL, the Secretary of State will consider factors such as membership of a professional trade association and the extent to which the granting of the OIEL would reduce the administrative burden on the holder of the OIEL. An applicant will also be expected to demonstrate a proven track record of individual export licence applications. An OIEL will not normally be granted without the agreement of the relevant Expert Adviser (usually a Director, Senior Keeper or Curator in one of the national museums and galleries).

## **Specific Open Licence**

- 8a. These licences are no longer being issued in the UK with effect from EU exit day, but licences already issued by the UK remain valid for exports at the UK border until their stated expiry.
- 8b. This type of licence was issued under the EU Regulation to permit the temporary export outside the EU on repeated occasions of a specific category of cultural good by a person or organisation, for the purposes of use and/or exhibition in a third country<sup>1</sup>. This type of licence was only issued in the UK in respect of musical instruments and motor vehicles. It enables the repeated temporary exports of such objects for up to six months over a period of three years.

## **INDIVIDUAL EXPORT LICENCES**

9. Where neither the OGEL, the OIEL nor the Specific Open Licence permit the export of a particular object that exceeds certain age and monetary limits<sup>2</sup>, an individual export licence is required from the Secretary of State. These can be either for permanent or temporary export. In the latter case, it will be a condition of the licence that the object be returned by the date specified in it. Please see paragraphs 28-29 below for further information concerning applications for temporary export licences. The following sections apply to applications for permanent licences.

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<sup>1</sup> A country outside the EU.

<sup>2</sup> See Arts Council's *UK Export Licensing for Cultural Goods: Procedures and guidance for exporters of works of art and other cultural goods*

## **A. PERMANENT LICENCES**

### **Referral to an Expert Adviser**

10. Normally only those objects that are valued at or above the financial thresholds in the OGEL, and which have been in the UK for more than 50 years, are referred to an Expert Adviser for consideration as to whether the object is a national treasure.

### **The role of the Expert Adviser**

11. When an object is referred to an Expert Adviser, they may object to the granting of an export licence on the basis that the object satisfies one or more of the Waverley criteria.
12. The Waverley criteria are used to measure whether an object should be considered a national treasure on the basis that the object's departure from the UK would be a misfortune. The three Waverley criteria are as follows:

#### **Waverley One - Is it closely connected with our history and national life?**

This category can include objects which have been produced abroad, but which have acquired national importance by association with an important person, location or event. The first criterion was originally intended to catch such objects as the 'Alfred jewel' or the manuscript of Gray's *Elegy* but it is now interpreted in a somewhat wider context to include objects which are of major importance for local history, or which have been part of collections which are of great historical significance, or which are associated with significant historical events, people or places. Examples of 'Waverley History' objects have included: the archive of manuscripts relating to the editing of Newton's *Principia Mathematica*; a pair of paintings by Canaletto entitled

*'View of the Grand Walk, Vauxhall Gardens'* and *'the Rotunda of Ranelagh House'*; a 'jadeite' Neolithic axe-head; a collection of Thomas Hardy typescripts; Benjamin Britten's complete draft score of *'The Young Person's Guide to the Orchestra'*; and a copy of the warrant for the execution of Mary Queen of Scots.

#### **Waverley Two - Is it of outstanding aesthetic importance?**

The assessment of outstanding aesthetic importance involves a subjective judgment. It is not restricted to great works of painting or sculpture. It might, for instance, be concluded that an exquisite snuff box met this criterion as

well as a painting by Poussin. In the case of works by great artists it may be claimed that anything from the hand of Rembrandt is outstanding. However such arguments will not always be accepted, and the condition as well as the quality of the work in question and the extent of the damage or restoration to which it may have been subjected may also be taken into account. Examples of 'Waverley Aesthetics' objects have included: the painting '*Venus and Adonis*' by Titian; a watercolour painting, '*The Blue Rigi Sunrise*', by J M W Turner; the 'jadeite' Neolithic axe-head also listed above; Domenichino's '*Saint John the Evangelist*'; Van Dyck's last self-portrait; and a Pietro Lorenzetti altarpiece.

### **Waverley Three - Is it of outstanding significance for the study of some particular branch of art, learning or history?**

The object might be considered of outstanding significance for scholarship either on its own account or on account of its connection with a person, place, event, archive, collection or assemblage. Such objects serve as benchmarks for assessing other items since they can throw new light on the study of their type. It is considered that 'learning' in relation to culture should cover a wide number of disciplines e.g. art history, archaeology, ethnography, anthropology, palaeontology, science, engineering, architecture or literature, etc. However, this is an illustrative list and not necessarily a comprehensive one. Examples of 'Waverley Scholarship' objects include: Benjamin Britten's complete draft score of '*The Young Person's Guide to the Orchestra*' also listed above; a 17th-century lead merchant's ledger from the Peak District; a peridot and gold suite of jewellery given by the Prince of Wales to be worn at his daughter's wedding; and a bilingual Middle English-Latin dictionary dating from 1483.

### **General Statement Applying to all Criteria**

13. The Expert Adviser may take into account the condition of the object as well as the extent of any damage or restoration to which it may have been subjected. In addition, they may take account of local interest, but only as part of their consideration as to whether one or more of the Waverley criteria apply.
14. In deciding whether to make an objection, the Expert Adviser should reach a decision solely on the basis of the Waverley criteria. No other factors should be allowed to influence that judgement. In particular, the following considerations should not be taken into account:
  - interest of an Expert Adviser in acquiring an object for his/her own institution;

- the knowledge that an Expert Adviser's own department is at present unable to afford a particular object which it would like to have acquired;
- the knowledge that a public institution is interested in acquiring an object for its collection;
- the possibility that, when several objects from one collection are being disposed of, one item may be made available to an institution in exchange for a licence being granted for another object;
- a statement or undertaking by the owner that, in due course, the object will be given or bequeathed to an institution in this country;
- judgements about the value shown on the application form, either extravagantly high or suspiciously low (although an expert adviser may expect to be asked his/her opinion on whether the value claimed represents a fair market price);
- the destination to which the applicant wishes to export the object, and the conditions under which it might be kept there; and
- press speculation in highly publicised cases.

### **The Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest**

15. If the Expert Adviser makes an objection, the case will be referred to the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (the "Reviewing Committee"), a non-statutory independent body which advises the Secretary of State for Digital, Culture, Media and Sport. In addition to the eight permanent members of the Reviewing Committee, each of whom has expertise in one or more types of object of cultural interest, the Reviewing Committee is assisted for each case, wherever possible, by three Independent Assessors. These are experts in the particular object under consideration and, for the cases which they attend, they are full members of the Reviewing Committee.
16. Both the Expert Adviser and the applicant for the licence are invited to submit evidence to the Reviewing Committee as to why one or more of the Waverley criteria might or might not be satisfied. They are also invited to attend the meeting of the Reviewing Committee at which the case is being considered. As with the Expert Advisers, the Reviewing Committee may take into account local interest, and the condition of the object, including the extent of any damage or restoration to which it may have been subjected.
17. The Reviewing Committee will advise Ministers about whether or not an object satisfies one or more of the Waverley criteria and should therefore be considered to be a national treasure. If the object is not considered to be a national treasure, the Reviewing Committee recommends that an export licence should be granted.

18. Where the Reviewing Committee advises that one or more of the criteria is satisfied, it will recommend that a decision on the licence application is deferred for a specified period (normally a total of four to nine months, although any length of deferral can be recommended) to provide an opportunity for a compensating offer to purchase to be made to the owner. The Reviewing Committee will recommend the fair market price at which an offer should be made.
19. Taking into account the advice provided by the Reviewing Committee, the Secretary of State will decide whether to grant an export licence or defer the decision on the licence application for a specified period. The Secretary of State will also decide the fair market price at which offers to purchase should be made to the owner.
20. If there is no offer to purchase during a deferral period, a licence will normally be granted. Where an offer to purchase is accepted, the application for the export licence lapses.

#### **Refusal of an export licence**

21. An owner is entirely free to reject an offer to purchase made during the deferral period. However, if the owner rejects such an offer, the Secretary of State will take the existence of that offer into account in reaching a decision about whether or not to grant a licence. Where an offer to purchase from a public source (a museum, gallery or other heritage body such as the National Trust) was refused, the Secretary of State will normally refuse to grant a licence.
22. However, where an offer to purchase from a private source was refused, in determining whether to grant a licence, the Secretary of State will take the existence of the offer into account only where the offeror has combined the offer with a signed undertaking with a public institution that he/she will guarantee public access to the object, provide satisfactory conservation conditions and not sell the object for a specified period (in order to secure the public access). In such circumstances, the Secretary of State will normally refuse to grant a licence.
23. The Secretary of State will also normally refuse to grant a licence where an owner indicates in advance that they are not prepared to accept an offer to purchase, if one is made.
24. In addition, if an application is withdrawn after an offer to purchase has been made from a public source or in circumstances where it was reasonably likely that an offer was imminent, the owner is likely to be considered as having refused a compensating offer to purchase, and any

subsequent application will normally be treated as if a licence had been refused. Paragraphs 25 to 27 below will apply in such cases.

### **Subsequent application for an export licence**

25. Where a subsequent application is made for a licence to export an object that was considered to be a national treasure belonging to a person who, at the time of the first application, refused (or declined to consider) an offer to purchase, or withdrew their application in circumstances where it was reasonably likely that they had knowledge of an offer being imminent, it will be subject to the normal licensing procedures. If the Expert Adviser objects to the granting of the licence under the Waverley criteria, the application will be referred to the Reviewing Committee for consideration as to whether or not the object still satisfies one or more of the Waverley criteria.
26. If the application is made within 10 years or so of a licence being refused (or where the owner declined to consider an offer to purchase), the applicant for the fresh licence should include, in their written statement to the Reviewing Committee, details of any change of circumstances since the earlier application, or other arguments in support of the new application. In particular, the applicant should set out any arguments they wish to advance as to why the Reviewing Committee should not recommend a further licence refusal, without a deferral period, given the history of the previous application (assuming the object is still found to be a national treasure). If the Reviewing Committee concludes that the object still satisfies one or more of the Waverley criteria, and there has been no change in circumstance since the previous application, the Secretary of State will normally refuse an export licence without a deferral period.
27. If the applicant submits evidence that, since the previous application, the object has been made available for sale to a public body (or a private owner in the circumstances described in paragraph 22), the Secretary of State will take into account the absence of an offer to purchase in making a decision about the licence, but this factor will not necessarily be decisive. In reaching a decision, the Secretary of State will take into account all relevant factors, such as whether the price was reasonable, the identity of the prospective purchaser, the time since the offer and the time since the previous licence refusal.

### **B. TEMPORARY LICENCES**

28. The same considerations apply to applications for temporary licences as to those for permanent ones as set out in paragraph 10 above except that they are not scrutinised with regards to national importance. Instead, the Expert Adviser is asked to comment on the object's fitness to travel and on whether



there are sufficient assurances provided as to its return in good condition at the end of the temporary licence period. For objects that have not previously been found to be national treasures by the Reviewing Committee, a temporary licence may be issued for a period of up to three years, unless exceptional circumstances apply. It is possible to apply for one extension of an existing temporary licence, which again will not normally exceed three years.

29. If an application is made for the temporary export of an object found by the Reviewing Committee to be a national treasure, different considerations apply. A temporary licence for such an object will only be issued for a maximum period of three years and normally only for the purposes of display in a public institution. No extension will be available and the object will have to be returned to the UK when the licence expires and will then have to remain in the UK for a period of three years before a further application for a temporary licence can be made on the same terms.

### **IMPORTED OBJECTS**

30. Where there is proof that an object has been imported within the last 50 years, an export licence will normally be granted unless it is subject to the special considerations applicable to objects from the European Union (see paragraph 31 below), or if it is subject to a sanction.

### **Objects from the European Union**

- 31a. Where an object is intended for export to a country outside the EU, and the object was dispatched from an EU Member State on or after 1 January 1993, an export licence will only normally be granted if that dispatch was lawful and definitive. If that dispatch was not lawful and definitive, an application for a licence will normally be refused.
- 31b. To assist in the assessment of the application, export licence applications for objects from EU Member States which are intended for export to countries outside the EU, should be accompanied by:
- (a) documentation providing all relevant information on the cultural object and its legal status at the time when the application is made, in order to allow the Export Licensing Unit to assess whether a previous export of the object was lawful and definitive;
  - (b) a photograph of the cultural goods in question (this requirement may be replaced, where appropriate and at the discretion of the Export Licensing Unit, by a detailed list of the cultural goods).

## **EMBARGOED DESTINATIONS**

32. A licence cannot be issued for export to an embargoed destination. This means a destination to which an export ban applies by virtue of a prohibition contained in legislation implementing sanctions.

## **FURTHER INFORMATION**

The Export Licensing Unit  
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WC1B 3HF  
Tel: 0161 934 4317  
email: [elu@artscouncil.org.uk](mailto:elu@artscouncil.org.uk)