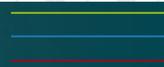


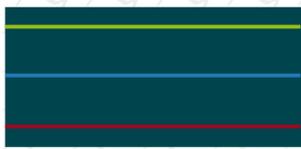


EU Dual-Use Trade Control and Green Paper

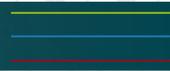
Pr. Dr. Quentin MICHEL

Karlsruhe, March 7th, 2012





Why trade control has become an essential instrument of EU external policy ?



Export control is an exception to international free trade principle established by the WTO

Organised by GATT, GATTS

Derogations to this principle are exceptional and strictly defined

- Founded on **economic** reasons : a step toward the achievement of the free movements
- Founded on **non-economic** reasons : national security interest

National security interest ?

Not defined by the GATT : left to the understanding of each State Party

Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

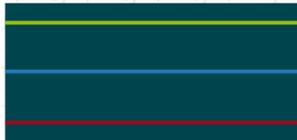
(i) relating to fissionable materials or the materials from which they are derived;

Two potential interpretations of the “security interest”

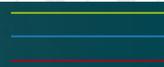
- **Minimum** : only to face non-proliferation State’s commitments
NPT, NSG

- **Maximum** : could be used for all nuclear trade derogations

Nuclear trade could be limited to assurance/protection of national energy needs



International Trade (Export) Control Regime(s)



A constellation of several dedicated regimes

Trade control regimes are organised according to **potential end-uses** :

- Nuclear : NPT, NSG and Wassenaar Arrangement
- Chemical : CWC and Australia Group
- Biological : BWC and Australia Group
- Missile : MTCR
- Conventional : Wassenaar Arrangement

Essential principle regulating International Trade of sensitive items

The general trade principle is overturned

- Principle : Prohibition
- Trade : Exception

All transfers shall be submitted to authorisation

- Might even lead to the prohibition of specific technologies : suppliers “should restrain themselves” from transferring some “sensitive technologies”

An ongoing process dating back from 1921

1925 -1944 : Prohibition of certain **means of war** : balancing the power of parties involved in the conflict :

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

1944 -1968 : Restraining or regulating **access** to certain **technologies**

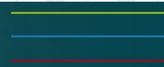
Mac Mahon Act, NPT

1944 -1978 : Avoiding **unfair** competition
Zangger Committee and NSG

- 1978 -1991 : Facing **new proliferation** concerns
Australia Group and MTCR
- 1991- 2001 : From *especially* designed to *dual-use*
items
NSG
- 2001- 2004 : Fight against **terrorism** as an
objective of export control regimes
NSG, MTCR, Australia Group
- Since 2004 : From export to **trade** control : a global
policy
UNSCR 1540



How International Export Control Regimes are implemented by the European Union ?



Implementation by the European Union
is a complex mechanism due to :

- **Institutional framework** of the European Union
- **Division of competencies** between the EU and its Member States

The institutional framework (1)

Trade control of dual-use items is an element of the **common commercial policy** and therefore should be ruled by EC (TFUE) and Euratom Treaties

EU law : regulations

Except for certain nuclear materials trade control is not governed by **Euratom**
Article 59 authorisation granted by the Commission

The institutional framework (2)

Understanding of the EU competency has been **challenged** by certain Member States

Presently includes in particular: lists of items, categories of authorisations, adoption and granting of General Authorisation, territorial validity, consultation mechanism, common market exceptions

The institutional framework (3)

Trade control is also an element of the EU **external policy** organised by the EU Treaty : the Common Foreign and Security Policy (CFSP)

- **EU WMD Strategy** adopted by the European Council in December 2003 and the new lines for action for combating the proliferation of WMD and their delivery systems (2008)

- **Implementation by the Council**

Non-proliferation clause in cooperation agreement with third countries

EU (EAS) participation to different international export control regimes

Adoption of political principle of restrictive measures against third countries (**embargoes**)

The institutional framework (4)

Consequently the implementation of UN embargoes by the EU requires two decisions:

1. External relations: non-proliferation concerns : EU Treaty (CFSP) provisions

Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran (as amended)

2. External trade: export policy TFUE (common commercial provisions 133/207)

Council Regulation (EU) No 961/2010 of 25 October 2010 concerning restrictive measures against Iran (as amended)

2. The division of competencies between EU Member States and EU/EC Institutions

- **Trade control principles and framework of the Regime** are established by EU/EC Institutions through the adoption of Decisions and Regulations
- **Authorisations, exceptions, restrictions and sanctions** : are adopted and decided essentially by Member States

EU Trade Control Regime is mostly organised by **Council Regulation 428/2009** of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

Even :

- if it is a Regulation, it is **drafted** more like a Directive
- it is called a Community regime, it **does not substitute national** export control regimes for an EU Trade Control Regime. It intends essentially to harmonise Member States' national practices.

From reactive to proactive (1)

- Up to 2001, the EU was essentially **responsive** to international export control regimes :
- 1957 Euratom to have **access** to technology and materials
 - 1968 NPT ratification and attempt to **exempt** the EU from IAEA **safeguards**
 - 1978 **EC statement** in the different export control regimes to exempt its common market from the guidelines adopted within those regimes
 - 1994 Facing challenges of achievement of the **common market**

From reactive to proactive (2)

Adoption of Regulation 1334/2001: the EU and its Member States became proactive by establishing **new principles** to face the new threats of proliferation

Several proposals tabled in different international trade control regimes enhancing efficiency of their guidelines, in particular catch-all controls

Adoption of Regulation 428/2009: establishment of a **model of trade control regime** to meet UNSCR 1540 State commitments

Regulation 428/2009 : a model of trade control regime ? (1)

Definition of common understandings or elements of a trade control regime:

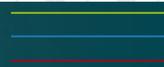
- **Dual-use items** : attempt to consolidate different definitions used by trade control regimes
- **Single list of controlled items** compiling in a coherent system the lists of five trade control regimes
- **Catch-all mechanism** “has been informed”, “knows”, “is aware”
- **Operations to be controlled** : export, transit, brokering

Regulation 428/2009 : a model of trade control regime ? (2)

- Harmonization of **documents** : model for Individual or Global Export Authorisation, End-User Certificates
- Harmonization of **categories** of authorisations : Individual, Global, National General Authorisation, EU General Export Authorisation (EUGEA)
- Definition of common **conditions** and **criteria** to be considered when granting or not an authorisation
- Establishment of **information exchange procedure** and **no-undercut** mechanism
- Controlling exports of **technical assistance**



The Green paper on the dual-use export control system of the European Union: ensuring security and competitiveness in a changing world : A step forward?



Background

- Issued by the Commission on June 30th, 2011
- Consultation was open until October 31st, 2011
- Over a hundred of responses coming from Member States, economic operators, industries associations, research groups, NGO
- **Objective:** launching a broad public consultation concerning the functioning of the EU dual-use export control system
- **Three parts** : setting out the overall context of export controls; specific issues under the current dual-use Regulation; mid-to long-term vision of export controls in the EU.

Responses to the Green Paper

Type	No. of responses	Type	No. of responses
Member States	20	Industry associations	21 (8 EU level associations)
Member States/national parliaments	2	Exporters	45
Member States/political parties	1	Individuals	5
NGOs	2	Law firms/consultancies	2
Academia	2	EU institutions	1

Main issues (1)

Extending the scope of authorisations

New EUGEA, phasing out NGA, license exception, reviewing the control lists

Common risk assessment and review procedures

- Identification of potential difficulties issue from different DUR implementation by Member States
- Level playing field for EU exporter
- Harmonisation of criteria
- Improvement of denials mechanisms

Main issues (2)

Intra-EU controls

- Post-shipment verification system
- EU end-user certification
- Notification system
- Reviewing Annex IV

Catch-all controls

- Evaluation of existing catch-all clauses, potential improvement
- Compulsory catch-all notifications
- EU-wide catch-all clauses

Main issues (3)

Transit and brokering controls

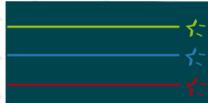
- Extending the scope

Information exchange

- Extending the scope, the contain, the level of constraint

A new export control model

- Rating the present regime compare to third countries
- Network of national licensing authorities operating under common rules



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