



The EU Dual-Use Export Control Regime: End-Use and End User Provisions

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Objective of the Contribution

- Essentials principles of the EU dual use export control regime

How GATT exceptions are implemented within the EU (general and security)

- Provision established by the EU regarding **End-use and End user**
Focus on legally binding provisions

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International Trade Principle

Principle : International trade exchanges should be flows as smoothly, predictably and freely as possible

Within the guidelines defined by WTO (GATT agreement)

Derogation : Strictly defined and exceptional

Based on

- Quota (steel, cereals, textiles)
- Health protection (food and mouth disease, influenza)
- Protection of cultural goods (national treasure)
- **International Security** (trade embargos)

Chapter VII of the UN Charter

Article XXI of the GATT Agreement

Security Exceptions : Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its **essential security** interests; or
- (c) to prevent any contracting party from taking any action in pursuance of its **obligations** under the United Nations Charter for the **maintenance of international peace and security**.

- (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;**
 - (ii) relating to the traffic in **arms**, ammunition and **implements** of war and to such traffic **in other goods and materials as is carried on directly or indirectly** for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other **emergency** in international relations; or

European Union Dual-use Export Control Regime

Collection of different legally binding and/or politically binding instruments:

Due to the EU treaties organisation:

- EC and Euratom Treaties
Except for some fissile materials, dual-use items export control is **not** ruled by Euratom
- EU Treaty
CFSP

Due to the division of competencies between EU Member States and EU/EC Institutions:

- Principles and procedure established by EU/EC Institutions
- Authorisation : mostly decided and granted by Member States

Presently we have :

Legally binding instruments

- Council Regulation 1334/2000 of 22 June 2000 setting up a **Community regime** for the **control of exports of dual-use items and technology**.
- List of Council Regulations adopting **restrictive measures** (embargos) against countries or non-states actors.
- Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against **Iran**
- Euratom Treaty (Article 59).
- Council Regulation (EEC) 2913/92 establishing the **Community Custom Code** and in particular its new Section 1A on the **Authorised Economic Operator**.
- Council and Parliament Regulation (EC) of March 31 2004 (No 725/2004) regarding the strengthening of **ports safety measures (CSI)** completed by the Directive 2005/65/CE.

Politically binding instruments

- Council Joint Action of 22 June 2000 (2000/0401/CFSP) concerning the control of **technical assistance** related to certain military end-uses.
- **New lines for action** by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems (Council decision 2003/438/CFSP)

Long list of Regulations, Common Positions and Common Actions but one principle to keep in mind :

EU **did not** established an common dual-use items export control regime but has essentially **harmonised Member States** export control regimes.

Origin of the EU Export Control Regime

Consequences of the implementation of the single market (January 1993)

- Open *de facto* (if not *de jure*) **free movement** of dual use items within the EC
- Necessity to **harmonise** national export control regimes or adopt of a **single** export control regime
- **No consensus** between Member States to consider that dual use items should be regulated under **133 EC (207TFUE)** (Common commercial policy)
Qualified majority
- Dual use items are even falling under the exception of **article 296 EC (346TFUE)** (conventional weapons)
Member States have an exclusive competence to define restricting export control principles.

Adoption of an dual export control regime

- Council Regulation 3381/94 defining the procedure and criteria
- Council Common Action 94/942/CFSP establishing the list of items and criteria
- Cross reference between the Council Regulation and Council Common Position

The dual system (regulation and common action) has been invalidated by two EU Court of Justice case law

In the **procedure of references for preliminary rulings** a German Court has submitted questions to the Court of Justice about the interpretation of article 133 and 296 regarding dual use items.

In its opinion, the Court stated:

- Dual use items should be ruled by article **133 (207)** (common commercial policy includes export control).
- Article **296 (346)** dedicated specifically to weapons as defined and listed by the 1958 Council decision.

Adoption of one single regulation organising the export control of dual use items (Council Regulation 1334/2000)

- Take almost two years of negotiation
- Main issues were
 - Establishing **lists** of items to be controlled (internal and external trade)
 - Accepting the **principle** that dual use export control should be regulated under article 133
 - Definition of authorisation **criteria**
 - License territorial **validity**
 - Principle of EU **authorisation**
 - **Catch all clause**

Recasting of the Council Regulation 1334/2000 proposed by Commission (COM(2006) 828 final)

- Initiated to implement the 1540 UNSCR and the WMD EU Strategy

Process is almost achieved, final text might be adopted by the Council under the Czech Presidency

- Main elements are :
 - Transit;
 - Brokering;
 - Exchange of information;
 - CGEA.

Principles related to End-use, End-user of the Dual-use Regulation 1334/2000 in regards of the Proposal presented by the Commission (COM (2006) 828 final) to amend the Regulation

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End-User/End-Use Definition

- Terms are **not formally** defined by the Regulation.
Up to Member States to define it in conformity with their international commitments
- Terms **appears in several provisions** of the Regulation:
 - Authorisation
 - Conditions and criteria
 - Catch-all clause
 - Relevant information to be supply by the applicant
 - Exchange of information
 - Control Measures

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I. Individual and global authorisations :

Article 2 (new) end-user is **the key element** of the definition:

- (h) "**Individual export authorisation**" shall mean an authorisation granted to one specific exporter for **one end user** or consignee in a third country and covering one or more dual-use items
- (j) "**Global export authorisation**" shall mean an authorisation granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to **one or more specified end users** and/or in one or more specified third countries.

Available in all Members States **but not yet granted** by Bulgaria, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia

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General authorisations

Article 2 (new) did not refer to an end-use(r), only **country of end-use/destination (?)** is the key factor

- (i) "**Community General Export Authorisation**" shall mean an export authorisation for exports to **certain countries of destination** available to all exporters who respect its conditions of use as listed in Article 6(1) and Annex II.
- (k) "**National general export authorisation**" shall mean a national authorisation published in the official journal of a Member State which is **valid for all exporters** based in the Member State where it is published who meet the conditions set in the national law, covering one or **several specified countries** as well as a number of dual-use items defined in the national law and not subject to notifications under Article 9.

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End-user could be considered by Member States Legislation implementing the CGEA or the NGA

Poland

General licences and the Community General Export Licence may be used by any natural or legal person who is able to provide relevant documentation to confirm the **use of the internal system of trade control and management for the past three years**, and who submits a statement to the trade control authority defining the intention and starting date of intended trade.

Czech Republic

Access to global export authorisation is not restricted. There is only specific condition that the applicant must prove that he is capable of **respecting the regime applicable to the export control** (e.g. checking the end use of individual supplies). If this condition is not met the exporter is entitled to submit an application for an individual export authorisation.

Belgium

Access to global authorisation is not restricted. Dedicated condition might be required on case by case by Regional Authorities.

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II. Common conditions and criteria to issue or deny the authorisation

Article 8 (unchanged): *In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services under this Regulation, the Member States shall take into account all **relevant considerations** including: [...]*

*(d) considerations about intended **end-use and the risk of diversion**.*

Non-exhaustive list of **criteria** to be taken into consideration by Member States Authorities

The list is an “abstract” of conditions and criteria adopted by the **five international export control regime**.

Criteria : subjective elements to be considered by the supplier State, on a case-by-case analysis, to authorise or not the export authorisation.

No common understanding of the “end-use” criteria: up to Member States to implement and precise its content.

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III. Catch-all clause and End-user/use :

- End use and partly end user are core elements of the catch-all clause mechanism
- Regulation includes **three catch-all clauses**, two are compulsory and one is optional for Member States Authorities (article 4 unchanged)
- **Catch-all 1** : *An authorisation shall be required for the export of dual-use items not listed in Annex I if the **exporter has been informed** by the competent authorities of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part, **for use** in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear **weapons** or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.*

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Catch-all clause implementation by Members States authorities:

Two possibilities to notify the decision to the exporters

- Catch-all notification equivalent to a **prohibition** to export
- Catch-all notification require the submission of an **authorisation** for a non listed items

Authorities will issue an denial or an authorisation

Consequence

If notification consists in a **prohibition** : risk of undercut : no denial no obligation to consult as require by article 9.5

If notification consists in an obligation to require an **authorisation** : a catch-all denial issues by one Member State will induce indirectly the mutation of a national catch-all clause provision into an EU 27 catch-all provision.

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Article 9.5 (unchanged) :

*Before the competent authorities of a Member State, [...], grant an authorisation [...] they shall examine **all valid denials or decisions to prohibit a transit issued by another Member State or States***

*The Member State shall **first consult the competent authorities of the Member State or States which issued such denial(s) or decisions to prohibit the transit.**[...]*

*If following such consultation the competent authorities of the Member State decide to grant an authorisation or allow the transit, it shall **notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision.***

- Only consultation, **not a legally binding** prior consent mechanism
- **Might be politically binding** : no case of authorisation issued after a “negative” consultation of other Member State(s).

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Consultation only for an *essentially identical transaction*

Essentially identical transaction ?

Article 9.5 (new) defines such terms as *an item with essentially identical parameters or technical characteristics to the **same end user or consignee.***

Nevertheless it is up to Member States define what will be or not identical.

In principle, like it is the case for the Code of Conduct (weapons) if the Member States Authorities has doubts whether or not the considered export application is an “essentially identical transaction”; he should initiate a consultation in order to clarify the situation.

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Requirement to notify catch-all clause “prohibition”:

Article 4.5 (unchanged) : *A Member State which imposes an authorisation requirement, in application of paragraphs 1 to 5 [...], shall, where appropriate, inform the other Member States and the Commission. The other Member States shall give all due consideration to this information and shall inform their customs offices and other relevant national authorities*

Consequence

- Notification not done systematically only “where appropriate”
Left to Member States to decide
- Information not necessarily transmitted to the concerned national authorities
- Difficult for Customs Authorities to implement : controlling only items coming from Member States who have issued such prohibition

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Catch-all 2: *If an exporter is **aware** that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1, 2 and 3, he must notify the authorities referred to in paragraph 1, **which will decide whether or not it is expedient** to make the export concerned subject to authorisation within a period of time to be determined by national laws or practices.*

Responsibility to evaluate at the first stage the end use and the user lays in the hand of the exporter.

After being informed the National Authorities might decide to submit such export to authorisation.

“**aware**” should be understood as evidences based on information received directly or indirectly by the exporter that the items will **not be used for its usual application** but will contribute to the elaboration of a weapons of mass destruction or military items listed in the Military List.

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Catch-all 3: *A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter **has grounds for suspecting** that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1.*

The suspicion clause is **optional** and the following Member States have introduced such catch-all clause in their national export control regime:

Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Luxembourg, Malta, Netherlands, Poland, Slovakia, Spain and United Kingdom.

In case of violation, authorities might face difficulties to prove the evidences

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Consequence in case an authority of a Member State did not answer within a certain deadline to the exporter in the case of catch-all II and III

Germany : The exporter is obliged to await the decision of the authorities and that it would be an offence according to German Law if he fails to do so.

Exporter may be punished by a fine up to € 500,000 if he “...*intentionally or negligently ... contrary to Article 4 para. 4 second half-sentence, **exports** dual-use items without a decision by the responsible authority on the required authorisation or **without obtaining an authorisation** from the responsible authority*”.

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Moreover, this action also constitutes a criminal offence under certain circumstances. According to section 34 para 2 AWG

“A prison sentence of up to five years or a fine shall be imposed on anyone who perpetrates with intent an act, which is likely to threaten

- 1. the external security of the Federal Republic of Germany,*
- 2. the peaceful coexistence between nations or*
- 3. the foreign relations of the Federal Republic of Germany“.*

Finland: Answer shall be given without *undue delay*. Upon request, the authority shall supply the exporter with an estimated time to issue a decision. (Finnish Administrative Procedure Act (434/2003, section 23).

Czech Republic: Exporters have to await the answer of the authorities and it will be an offence if he fails to do so. The deadlines for decision process including processing of the application are **30 days** or in special cases 60 days dating from the day when the application is submitted.

Belgium: If an exporter fails to await the decision of the licensing office and export or attempt to export, he will commit a criminal offence in the event the licensing office decides to make the export subject to authorisation. The Belgian legislation does **not** provide a **timeframe** in which the licensing office is required to answer an exporter's request concerning (non-listed) dual-use goods.

IV. Information regarding end-use(r) to be submit when applying for an authorisation

Article 6 (unchange) : *Exporters shall supply the competent authorities with **all relevant information** required for their applications for individual and global export authorisation so as to provide complete information to the national competent authorities in particular on the end-user, the country of destination, the end-uses of the items exported. The authorisation may be subject, if appropriate to an **end-use statement**.*

Relevant information ?

All Member States required an **End-User Certificate**

- Best practice recommendations for elements of Community End-Use Certificates have been adopted by the Dual-use Council Working Group in November 2008.
- Such **non legally binding** recommendations will be published in the C series of the Official Journal of the European Union
- Contains information on parties, on items, on commitments to be certified by the foreign consignee who might act as end-user or as trader, whole or re-seller.
- The document is published as an End-user Certification “form” which could be implemented directly by Member States Authorities.

End-Use Certificate for Dual-Use Items

(if issued by the government authority, a unique identifying Certificate number N° ...)

A. Parties

1. Exporter (Name, Address and Contact Details)	4. Country of Final Destination
2. Consignee (Name, Address and Contact Details)	
3. End-User (if different from consignee)	

B. Items

1. Items (detailed description of items)	2. Quantity (Units) / Weight
3. End-Use (Specific purpose for which the items will be used)	
4. Specification of the end-use location of the items	

C. Certification of foreign consignee

C.1. Consignee acts as end-user

(for traders, whole- or re-sellers see section C.2. below)

Art. 6.2. of the Regulation EC 1334/2000 states that the granting of an export licence may be subject to an obligation to provide an end-use statement.

We (I) certify that the items described in Section B supplied by the exporter named in Section A 1:

1. will only be used for the purposes described in Section B 3 and that the items or any replica thereof are intended for final use in the country named in Section A 4;
2. that the items or any replica thereof will not be used in any nuclear explosive activity or unsafeguarded nuclear fuel-cycle activity;
3. that the items will not be used for any purpose connected with chemical or biological or nuclear weapons, or missiles capable of delivering such weapons;
4. that the items will only be used for civil end-uses (delete if not applicable);
5. as far as technology is concerned, we (I) certify) that we (I) treat the technology strictly confidential and neither pass the technology on to other companies nor shall we (I) make knowledge available to third parties. In case of goods produced by the help of transferred technology, these goods will only be delivered to a third person/company on condition that this third person/company accepts the commitments of the above declaration as binding for itself and on condition that this third person/company is known to be trustworthy and reliable in the observance of such commitments.
6. If required: We (I) further certify that we (I) will not re-export the items to third countries without the consent of the _____. Re-exportations to EU countries or Countries listed in Annex II of EC dual-use REG N° 1334/2000 do not require any consent of _____.

C.2. Consignee acts as trader, whole- or re-seller

(only to be completed if Section C.1. is not applicable / end-user cannot be determined yet)

Art. 6.2. of the Regulation EC 1334/2000 states that the granting of an export licence may be subject to an obligation to provide an end-use statement.

We (I) certify that the items supplied by the exporter named in Section A 1, will only be delivered to customers considered absolutely reliable by this company.

1. The customers shall declare unequivocally that the items described in Section B or any replica thereof will not be used in any nuclear explosive activity or unsafeguarded nuclear fuel-cycle activity; that the items will not be used for any purpose connected with chemical or biological or nuclear weapons, or missiles capable of delivering such weapons.
2. The goods will only be delivered to a third person/company on condition that this third person/company accepts the commitments of the above declaration as binding for itself and on condition that this third person/company is known to be trustworthy and reliable in the observance of such commitments.

If required: The customer shall not re-export the goods to third countries without the consent of the _____. Re-exportations to EU-countries or countries listed in Annex II of EC Dual Use Reg Nr. 1334/2000 do not require any consent of _____".

Other Relevant documents

Request for additional documents varies tremendously among Member States

Common understandings of the additional documents to be provided by the applicant have not been adopted but the overwhelming majority of Member States require:

- Submission of an export contract
- Technical specifications of the goods to be exported.
- Excerpt from the commercial register
- Delivery Verification Certificate or other official certification submitted by the exporter to its authorities, which confirms that the items have arrived in the country of destination.

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V. Exchange of information

No formal constraint to exchange information between Member States Authorities excepted on denials

Article 15.2. has been **reviewed** to reinforce cooperation:

*Member States shall take all appropriate measures to **establish direct cooperation and exchange of information** between competent authorities with a view to enhance the efficiency of the Community export control regime. **Such information may include:***

(a) Details of exporters deprived, by national sanctions, of the right to use the National General Export Authorisations or Community General Export Authorisations

(b) Data on sensitive end users, actors involved in suspicious procurement activities, where available, routes taken

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Few instruments has been established to reinforce cooperation between members in particular to identify potential end-uses:

- A **Pool of Experts** to assist Member States in identifying items under Annex I

List of national experts by categories (nuclear, biological, chemical) or by non proliferation regimes (Wassenaar Arrangement, MTCR) has been established available to support Member States Authorities without qualified expertise

- A **secure and encrypted system** for the exchange of information among Member States and the Commission should be set up
Presently denials database is compiled by the Commission services and a new CD is regularly issued and distribute to Member States

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VI. Control Measures

16.2 *Exporters of dual-use items shall keep detailed **registers** or records of their **exports**, in accordance with the practice in force in the respective Member States. Such registers or records shall include in particular commercial documents such as invoices, manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified: [...]*

*(d) where known, the **end-use and end-user** of the dual-use items.*

Registers have to be kept for a minimum of three years but some Members States have laid down a longer period

The registers or records and the documents shall be kept for:

- Five years in Denmark, Finland, Poland, Slovenia, Spain and Sweden;
- Seven years, in the Netherlands and Austria;
- Ten years in Estonia.

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