

What you need to know about EU export controls for dual use items: The new EU Regulation 428/2009

Dr. Michael Koebele, LL.M.
Crowell & Moring
71 Rue Royale
Brussels, Belgium
Tel.: +32-2-214-28-93
E-Mail: mkoebele@crowell.com

Overall Multilevel Framework for Export Controls in EU

- Dual use goods, technology & software
 - New Regulation 428/2009 provides for common rules directly applicable in all EU Member States
 - National additions
 - General application and implementation by EU Member States (not the EU!)
- Military goods & technology
 - Sovereignty concerns – still within competence of EU Member States
 - National Legislation and Practice
 - Coordination among EU Member States through Common EU Policy (Military List, Code of Conduct)
- EU Sanction Regulations may provide for additional restrictions
 - Prominent example: Iran
 - Currently no overall trade embargo

Historic Overview of EU Export Control Regulation of Dual Use Items

- Regulation 3381/1994
 - Entered into force in January 1995
 - First EU-wide common rules on export of dual use items
 - Two core principles
 - Free circulation of dual use items and technologies within the EU
 - Prohibition on exports of those items without authorization
- Regulation 1334/2000
 - Further harmonization
 - Incorporation of common lists of dual use items in Regulation
- Regulation 428/2009 (“Recast”)
 - Entered into force in August 2009
 - Consolidation of previous amendments to Regulation 1334/2000
 - Implementation of United Nations Security Council Resolution 1540/2004
 - Amendments to list of items
 - New rules on brokering, transit and procedure

Open Issues

- Proposals by business community that were not included in Regulation 428/2009
 - Exemption of multinational companies from export controls of intangible transfers between its EU base and its foreign subsidiaries
 - Change of the current system based on ex ante and case-by-case export control decisions to a system of certified exporters through regular audits of their internal compliance programs and intensive government-to-industry dialogue
 - Introduction of a pre-established maximum deadline for the process by national authorities applications
 - Elimination or radical simplification of the control on non-listed items that EU Member States are enabled to conduct
- But possibility to take practical considerations or problems into account when implementing the provisions of Regulation 428/2009

Future Amendments

- Review Clause in Regulation 428/2009
 - Every three years update report by the European Commission
 - Can include proposals for amendment
- Future updates of dual items list
- General Background
 - Level playing field
 - Practice of different EU Member States
 - General drive of European Commission for harmonization and centralization

Key Parameters

- Change of location
 - Export
 - Sending items from within the EU customs territory to outside destination
 - Includes sending intangible items (e-mail!)
 - Transfer
 - Sending items from one EU Member State to another
 - Example: from Germany to Hungary
 - Transit
 - Items are in the EU
 - Neither of EU origin
 - Nor set free for free circulation
- Type of items
 - Listed in Annex I
 - Non-listed items
- Depending on parameter(s), different rules apply!

Items Subject to Export License (1)

- Items listed in Annex I to Regulation 428/2009
- Implementing international regimes and documents
 - Wassenaar Arrangement
 - Missile Technology Control Regime
 - Nuclear Suppliers Group
 - Australia Group (non-proliferation of chemical & biological weapons)
 - Chemical Weapons Convention

Items Subject to Export License (2)

- ECCN Categories 0 to 9
 - Nuclear materials, facilities and equipment
 - Special materials and related equipment
 - Materials processing
 - Electronics
 - Computers
 - Telecommunications and “information security”
 - Sensors and lasers
 - Navigation and avionics
 - Marine
 - Aerospace and propulsion
- General Notes on interpretation and application, definitions, acronyms and abbreviations

Items Subject to Export License (3)

- Assumption of insufficiency of formal approach with listed items
- Consequence: National “catch all” provisions for non-Annex I items in case of
 - Possible WMD use
 - Biological weapons
 - Chemical weapons
 - Nuclear weapons
 - Related missile technology
 - Possible military use in country of destination that is subject to UN, EU or OSCE arms embargo or for goods listed on national military lists
 - Connection to prior exports without export license or in contravention of export license

Items Subject to Export License (4)

- Obligation of exporter to notify national authority of factual circumstances
- National authority may then grant or refuse license
- Additional possibility for EU Member States to add national lists to Annex I based on public security and human rights concerns

Items Subject to Intra-EU Transfer License

- Highly “sensitive” goods and technology
 - Listed in Annex IV to Regulation 428/2009
 - Excerpts from product descriptions in Annex I
- EU Member States can subject other dual use items to license requirement if
 - It is known that final destination is outside EU
 - No processing or working is to be performed in the EU Member State in which they are to be transferred to
 - The items would be subject to export license in the EU Member State in which they are to be transferred to and there is no general or global export authorization
 - Example: UK

Items Subject to Transit License or Prohibition

- Introduction of new transit control regime in Regulation 428/2009
- For non-EU dual-use items which only pass through the territory of the EU
 - Neither of EU origin
 - Nor in free circulation
- EU customs laws provide for re-export declaration for any good in transit = 'export'
- EU Member States may impose prohibitions or licensing requirements for Annex I items if
 - Possible use as WMD item
 - Possible military use in embargoed country
- EU Member States may impose prohibitions or licensing requirements for non-Annex I items if
 - Possible use as WMD item

Intermediation Services (1)

- New rules on brokering; brokering for dual use items previously not covered at EU level
- Broker is any
 - Legal or natural person
 - Resident or established in EU Member State
- Brokering is
 - Buying
 - Selling
 - Negotiation or
 - Arrangement of transfer of Annex I items from one third country to another third country

Intermediation Services (2)

- Ancillary services not covered

- Transportation
- Financial services
- Insurance
- Re-insurance
- General advertising or promotion

⇒ This may be different under EU Sanction Regulations!

- License is required if

- Broker is informed by national authorities
- Broker has grounds to suspect illicit use

Intangible Exports (1)

- Transmission of software, technology or by electronic media to a destination outside the EU, including by
 - Fax
 - Telephone
 - E-mail
- Making available in electronic form software and technology to legal and natural persons and partnerships outside the EU
- Oral transmission of technology when described over the telephone
- Exporter is natural or legal person or partnership which decides to transmit or to make information available
- Regulation 428/2009 does not apply to services rendered by EU persons outside the EU => but: EU Member States

Intangible Exports (2)

- Exceptions:
 - “In the public domain”: Technology or software which has been made available without restrictions upon its further dissemination; copyright restrictions do not remove technology or software from being in the public domain
 - “Basic scientific research”: Experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective
 - Technology or software to the minimum necessary information for patent applications
- Technology transfer export control is declared enforcement priority for national authorities
- Rules on intangible exports may also apply to new transit rules

Export Licenses (1)

- Licenses issued by EU Member State Authority
- Exception: Community General Export Authorization (CGEA)
 - Issued by EU
 - For exports to destinations that are considered “safe”: Australia, Canada, Japan, New Zealand, Norway, Switzerland, USA
 - Some products are excluded (ECCNs: certain nuclear goods/software, pathogenes, GMOs, missile technology & parts)
- Exporter must register with EU Member State Authority to use CGEA
- CGEA cannot be used by exporter if
 - Exporter is notified or aware of possible WMD or military end use in arms embargoed country
 - Items are delivered to customs free zone or free warehouse in country of destination

Export Licenses (2)

- National law fills gap of Regulation 428/2009 as to details of administrative proceedings – different legal traditions among EU Member States
 - Individual export license is granted to one specific exporter for one end-user or consignee in a third country and covering one or more dual use items
 - Global export license is 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
 - National general export license in Austria, France, Germany, Greece, Italy, Netherlands, Sweden and UK
- “Denials Database” for coordination among national authorities

Questions?