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: mkoebel@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
  - 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?