

Global Trade & Compliance

Classifying your product

Referent: Stephan Müller

Classification - topics

- General considerations
- Lists of items
- Finding your way through these lists
- Classification of components
- deviations between U.S. and EU lists
- Ways to classify
 - Supplier's classification
 - classification tools
 - Documentation
 - documentation
 - classification dossiers
 - best practices

General Considerations

the lists of controlled items are

- often inconsistent
- result of political compromises
- open to interpretation
- a combination of technologic/scientific and legal terminology

and

- key for the legally compliant handling of a transaction
- open for legal review (e.g. determination claim).

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listed items vs. not listed items

EU

listed items, e.g. 2B006 (certain measuring machines)

- controls apply (license requirement), irrespective of the use of the item

not listed items

- „only“ so called catch all controls apply

US

listed items

EAR 99 (US specific)

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Lists of items



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Lists of items to be considered

- Annex I (+ Annex IV) EU Dual Use Regulation (428/2009)
 - suggested substantial amendments in 2017 (delegated regulation 26/9/2017)
 - U.S. Commerce Control List
- National lists of Dual Use items (e.g. Germany Annex I B Foreign Trade Act)
- National lists of military items (Annex I A Foreign Trade Act)
 - *EU Common Military list*
 - *US Munitions List*
- Specific lists of items in *country specific* EU/UN Embargo Regulations
 - e.g. *Annex II of the Embargo on Russia 833/2014 („pumps and pipes“ – not listed dual use items)*
 - e.g. *Embargo on Iran 267/2012 (Viton seals – controlled only in relation to Iran)*
- Chemical Weapons Convention (CWC)
 - sometime double listings / however, some chemicals are listed exclusively on the CWC list
- Anti Torture Regulation

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Anti Torture Regulation

EC/1236/2005

consolidated version available

Annex II – prohibited items

Annex III – license requirements

can be of relevance for i.e. chemical/medical industry:

e.g. Oleoresin Capsicum (CAS Nr. 8023-77-6)

- mixtures exempted if in food or pharmaceuticals

e.g. certain barbiturates (if can be used for the execution of human beings)

e.g. electric shock devices

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Finding your way through the lists (1)

Categories give a first indication:

Category 0	Nuclear materials, facilities and equipment
Category 1	Special materials and related equipment
Category 2	Materials processing
Category 3	Electronics
Category 4	Computers
Category 5	Telecommunications and Information Security
Category 6	Sensors and lasers
Category 7	Navigation and avionics
Category 8	Marine
Category 9	Aerospace and propulsion

New Category 10 on Cyber Surveillance with the next reform of Dual Use Regulation

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Finding your way through the list (2)

Sub Categories

A - B - C - D - E

A, B and C is on hardware items

D is on Software

E is on Technology

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Finding your way through the lists (3)

The last 3 digits identify the source of the controls

e.g.

2 B 001

2 = materials processing

B = hardware; e.g. a machine tool for milling

001 = controlled under the Wassenaar Arrangement

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900er series

only by exception and on national level (= US has different 900er than Germany)
not all jurisdictions issue 900er controls (reads like 5 A 991)

14 ECCNs altogether in e.g. Germany

in Categories

2 – Materials Processing (3)

5 – Telecommunications and „Information Security“ (5)

6 – Sensors and Lasers (2)

9 – Aerospace and Propulsion (5)

Effect: License required for **intra EU** shipments if, at the point in time of the export takes place, the exporter knows that the destination is outside the EU.

Task: check whether your home jurisdiction provides for 900er controls

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600er Series

This is U.S. specific as a consequence of the Export Control Reform (ECR)

Some less sensitive controls have been moved from the Munitions List (ITAR) to the Commerce Control List (EAR)

There is no equivalent in the EU

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Classification exercise

Technical analysis of the item's features and characteristics

- Does the item meet the technical criteria?
- Note: the objective features are decisive
 - If the criteria are met, the item is controlled
 - The use of the item is irrelevant
- The subjective „intend of design“ is only a side aspect.

Legal analysis

- Some criteria are open for interpretation, for example:
 - Principal element
 - Specially designed
- Inconsistent technical features (e.g. accuracy depends on the environment)

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Example

2B001b

b. Machine tools for milling having any of the following:

1 Having all of the following:

- a. Positioning accuracy with "all compensations available" equal to or less (better) than 6 µm according to ISO 230/2 (1988) or national equivalents along any linear axis; and*
- b. Three linear axes plus one rotary axis which can be coordinated simultaneously for "contouring control";*

2 Five or more axes which can be coordinated simultaneously for "contouring control";

3 ...

⇒ **Client incorporated a software that can coordinate only 4 axes.**

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Classification of components



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Components

Components/accessories

Components and accessories can be controlled items as well.

This can be of importance in two different scenarios:

Scenario 1

The component itself is a listed item and incorporated in a not listed product

Question: Does this affect the status of my product in which the component is used?

Scenario 2

The component itself is a not listed item, but it is used in a listed item

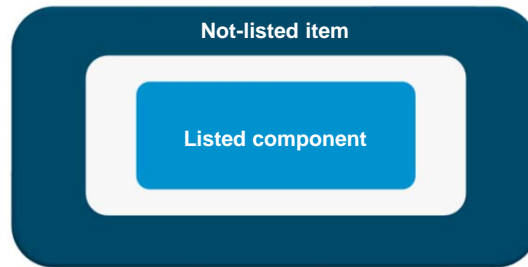
Question: Does this affect the export control status of the component?

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Scenario 1

Question: Is the listed component „swallowed up“ by the end product or does it „infect“ the end product?



Case: Valve in fruit juice filling device

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Components

Scenario 1: General Note

The object of the controls should not be defeated by the export of

- any non-controlled goods
- containing one or more controlled components
- when the controlled component or components are the principal element of the goods and
- can feasibly be removed or used for other purposes.

N.B.: In judging whether the controlled component or components are to be considered the principal element, it is necessary to weigh the factors of quantity, value and technological know-how involved and other special circumstances which might establish the controlled component or components as the principal element of the goods being procured.

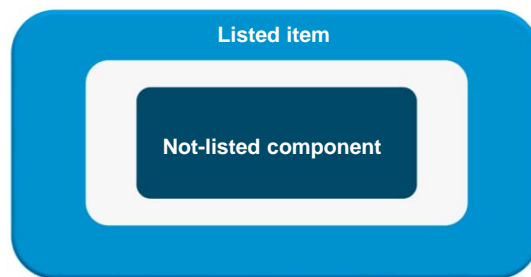
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Scenario 2

Not listed component is incorporated in a controlled item

General rule: If the not listed item is „specially designed“ for the controlled item, it will be controlled itself.



Case: Oxygen mask for military aircraft / window seals for military / civil aircrafts

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Components

Scenario 2: Specially designed

Please note:

Already relatively minor changes to the standard product can constitute a „special design“ in the meaning of export controls

A high technical/engineering effort is not necessary

Case: Aluminum sheets for fighter jet.

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Deviations US lists vs. EU lists

There are deviations:

- in the wording
- in the interpretation

however, only a few deviations

- generally, EU classification and US classification run in parallel

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Differences EU/US

The main differences is in the concept of the lists:

- Annex I EU – Regulation is (almost) exclusively looking at the technical characteristics of an item. It is only about the question, whether or not a license is required. (this may change with the introduction of the human resources criterion).
- Commerce Control List (CCL) – contains a lot of additional information (Reason for Control; License exceptions) which already refers to the question, whether a license can be obtained.

The ECCNs have identical sources in international agreements (e.g. Wassenaar or Nuclear Suppliers Group); therefore, there should not be too many deviations.

exemption 900er series (and for the US: 600er series)

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Examples for deviations

Item	Description	EU	US
TRIETHANOLAMINE	Triethanolamine, often abbreviated as TEA, is a Chemical that may be used as precursors for toxic chemical agents. It is also listed in the CWC List 3, Pos. 17	1 C 350 No. 46	1 C 350 c 9
Oracle Database	Oracle Database 11g Enterprise Edition, Standard Edition, Standard Edition One	No control	5 D992 c
Tank - cryovessel	Chemical API container	2 B350 c 4	2 B 350 c 2

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Ways to classify



General Principle

The exporter is obligated to do the classification

Therefore, it is the exporter's sole responsibility to get the classification right.

Consequently, classification is a crucial task for the exporter

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Supplier's classification

Supplier's obligation

- Art. 22 para 10 EU Dual Use Regulation - provides for the supplier's (exporter's) obligation to indicate the classification in case of intra EU shipments.
- If you source domestically or outside the EU there is no such obligation.
- You may want to introduce such an obligation in the supply contract (combined with a liability in case of incorrect classification).

Reliability

- However, you cannot legally rely on the supplier's classification. Each exporter is responsible for its exports and therefore for its classification.
- Although the supplier's classification is an important indication
- If you suffer damages due to incorrect classification there may be a possibility to claim for compensation.
- However, the criminal liability remains with exporter and its employees.
 - Supplier's (wrong) classification may be a mitigating factor

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classification tools

- some software companies offer classification tools
- these often use the customs code/tariff classification as a basis
- Problem: you need to get the customs code right!
- Further: classification tools offer typically a „selection“ of dual use list positions
- consequently:
 - risk of incorrect customs code is transferred to the export control classification as well
 - the tool offers „only“ an indication for the correct classification

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What clients do

Most of our clients do not rely on classification tools. Best practice is a classification team/task force combining technical and legal expertise.

Those who use a classification tool, apply the following routine:

- customs classification (without the help of a tool)
- plausibility check
- co-ordination with export control department
- final classification through a „classifier“

In other words:

- classification tools help to navigate the lists and narrow down the potentially applicable items' positions
- helpful, if (i) lots of items or (ii) constantly changing items need to be classified

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Documentation

- There is no explicit legal requirement to document classification
- If you export from the EU you are required to indicate the classification vis a vis your customer
- Documentation is however a substantial aspect of an internal compliance program
- In case of an incorrect classification it is more than helpful, if you can demonstrate (i) that you did a classification and (ii) what the reasoning for a particular classification was.

⇒ classification dossier or „official“ classification statement issued by the authorities

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Classification dossiers

„Private dossier“

- in case of doubt, best practice is to draft a „classification dossier“
 - description of the item
 - reasoning for the classification as „not controlled“

Authority's dossier

- some Export Control Agencies provide for official classification statements (e.g. BAFA)
- can take several weeks, sometimes months
- conservative approach
- not easy to move away from such a statement

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Components of a best practice

- Classification should follow a „scheme“
- capture new developments both change of law as well as change of product
- include production devices (e.g. filters, cutting or grinding devices, measuring devices) in the classification process
- make sure that technology is embedded as well
- establish classification team, comprising technical and legal expertise
- classify at an early point in time, include R&D
- have documentation ready available
 - including „classification dossier“, explaining the reasons why you decided a particular item is not listed

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Where do companies make mistakes

The most frequent sources for mistakes are:

Spare parts

Based on the component rules a particular component may not be controlled when exported incorporated in the product.

However, when exported separately as a spare part, it is fully controlled

Components

Companies often do not analyse whether components in their product qualify as „principal element“ with the effect that the entire product (although not listed) is treated as a listed item.

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What happens in cases of wrong classification?

You use the wrong ECCN

- This does not really do harm; it may have some impact on the customs side, because you may also use the wrong customs code.

You treat an item as classified although it is not

- This does not really harm as well, because you apply stricter standards than required. However, again potential customs issues and unnecessary administrative burdens

You treat an item as not classified although it is

- That is a breach of law! Investigations and proceedings will be the consequence, sanctions are typically fines (against the company and/or the responsible employees)