

Export control of dual-use items – Key developments in Germany and Brussels

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Outline

- I. Introduction to the functioning of the German export control system**
- II. Dual-use export controls in the German practice**
- III. Recast of the Dual use-Regulation -the Commission's proposal**
- IV. Discussion / Q&A**

I. Introduction (1)

- (Traditional)Purpose of dual-use export controls: **non-proliferation**
= prevention of **misuse** for CBRN-risks (chemical, biological, radiological and nuclear) or conventional military use
- Therefore, control of items, software and technology that can be used for both civil and military (CBRN/conventional) purposes
- Focus on sensitive items!
 - crucial usability
 - technologically advanced
 - rare availability
 - capacity enhancement= **risk-based approach**

I. Introduction (2)

- Control through **item lists**
- Established in **international regimes**:
 - Nuclear Suppliers Group (NSG)
 - Missile technology Control Regime (MTCR)
 - Australia Group (AG)
 - Wassenaar Arrangement



Australia
Group



I. Introduction (3)

- Examples: special cameras, special valves, vacuum equipment



- Implementation and regulatory basis by each regime-MS
→ in EU by Dual-use-Regulation
- Different from other trade instruments:
 - ≠ arms exports
 - ≠ sanctions/embargoes

I. Introduction (4)

- **New: Human Rights Approach – The national debate**
- Items/technology with a legitimate civil use (IT security, law enforcement) that can be misused not for military purposes but for the commission of human rights violations = new dual-use-character (**triple use**)
 - Additions to Wassenaar in 2014, implemented by EU in 2015
 - New listed items: intrusion software, mobile interception equipment, internet surveillance equipment
 - Accompanying the EU unilateral approach within the Anti-Torture-Regulation
- **List-based approach** = control of specific critical items !
- DE went even further and introduced additional **national controls**
 - Monitoring Centers, data retention systems and **technical assistance** related to listed cyber-surveillance items
 - Ongoing task: keep up with technological developments, therefore **STEG (Surveillance Technology Technical Expert Group)**

II. Controls in practice (1)

- **BAFA's part in the licensing procedure**

The Federal Office for Economic Affairs and Export Control (BAFA), which is an executive agency operating under the jurisdiction of the Federal Ministry for Economic Affairs and Energy, is the competent authority for granting/denying export licenses for dual-use goods.

- **Criteria for decision:**

- Obligations and commitments of the international export control or non-proliferation regimes / treaties
- Obligations under sanctions imposed by the EU, OSCE or UN
- Considerations of national foreign and security policy, including the
- EU's common rules on controls of military equipment
- Considerations about intended end use and the risk of diversion

II. Controls in practice (2)

Objective of the Licensing Procedure

- Finding answers to the following questions
 - Who is the exporter?
 - Which items will be exported?
 - Who is involved and who are the consignees, end-users?
 - What will and could these items be used for?
- To take appropriate and justifiable decisions in a reasonable time

II. Controls in practice (3)

Challenges of Licensing Procedure:

- Authorities have to take forecasting decisions based on available (and in some cases obtainable) information
- **Political expectation in export control vs. legal standards: see recent developments on e.g. Russia, China, Arabic Spring, Turkey**
- Fact finding / legal assessment
- Technical parameters – a certain level of expertise is needed
- Interagency coordination vs. accelerated processing
- Scarce human resources
- Expectations of exporters to non-disruption of legitimate trade

II. Controls in practice (4)

Investigation

Result

Decision

Method of Licensing – Plausibility Check:

- “Is the stated end use plausible?”
- Information complete and conclusive?
- Verification: Evaluation of all information available
- Or further enquiries to other government authorities
- Comparison with information provided by applicant
- An application is plausible if the
“Information by applicant is substantiated
and conclusive
and no information casts doubt on its
correctness”
- Denial or Approval

II. Controls in practice (5)

Investigation – the three phases workflow:

Phase 1

Licensing Division

- First formal check and registration by central service unit
- If applicable: Request additional information from the exporter
- If applicable: Request information from other agencies

Phase 2

Technical Division

- Technical assessment of the case

Phase 3

Licensing Division

- Submittal for political decision or autonomous decision by BAFA
- License or Denial
- Final registration by central service unit



III. Recast Dual-use regulation (1)

- COM: export control system provides solid legal and institutional foundations
- Reform goals:
 - 1. Modernization:** exporter, regulation of technical assistance etc.
 - 2. Simplification:** general authorizations; intra-company transfers
 - 3. Protection of human rights:** stricter controls of cyber-surveillance items through:
 - amended dual-use definition
 - EU-autonomous list
 - explicit human rights criteria
 - catch-all provision (?)



III. Recast Dual use-Regulation

(2) What items are considered critical under human rights considerations?

- EU's Human Rights guidelines on the freedom of expression (12/5/14): "the EU will promote action at the international level to prevent the **sale of surveillance or censorship technology** to authoritarian regimes, including by presenting proposals in the context of key multilateral export control regimes such as the Wassenaar Arrangement."
- Trade for All" Communication (COM(2015)497): "an ambitious modernization of the EU's policy on export control of dual-use goods, including the prevention of misuse **of digital surveillance and intrusion systems** that results in human rights violations."
- Council's conclusions on the 2015-2019 Human Rights Action Plan (10897/15): "review of the dual-use regulation to mitigate the potential risks associated with the **uncontrolled export of ICT products** that could be used in a manner that leads to human rights violations."
- Joint Statement by European Parliament, Council and Commission 12 June 2014: "The European Parliament, the Council and the Commission acknowledge the issues regarding the export of certain **information and communication technologies (ICT) that can be used in connection with human rights violations** as well as to undermine the EU's security, particularly for technologies used for mass-surveillance, monitoring, tracking, tracing and censoring, as well as for software vulnerabilities."
- Council conclusions from 21 Nov 2014: „The Council recalls the joint statement of the European Parliament, the Council and the Commission of 16 April 2014⁶ acknowledging the issues regarding the **export of certain information and communication technologies (ICT)**."



Recast Dual-use regulation (3)

COM chose a combination of reform option 3 (upgrade) and reform option 4 (modernization) stating:

- memo p. 4: "It is recognised that option 4 could result in a higher administrative burden for operators and authorities, since a **new category** of goods and technology would be subject to control. It also involves a risk that distortions of competition be introduced at global level, as it cannot be assured that other key technology suppliers will introduce similar controls. However, **option 4 is expected to have a significant positive impact on security and human rights**: it appears as an indispensable condition to **prevent human rights violations resulting from the export of EU items to third countries and to address security risks, to the EU and its citizens, associated with new cyber-surveillance technologies**. In light of this assessment, the proposal sets out a two-fold approach, combining detailed controls of a few specific listed items with a "targeted catch-all clause" to act as an "emergency brake" in case where there is evidence of a risk of misuse. The **precise design of those new controls** would ensure that negative economic impact will be strictly limited and will only affect a very small trade volume."
- memo p. 6: "By subjecting exports of **specific cyber-surveillance technologies** to authorisation, the proposal provides for an **effective response to threats for human rights resulting from their uncontrolled export**, which was identified as a key issue in the impact assessment. While the measures will have some effects on the freedom to conduct a business for exporters, these measures will be appropriate to the overall objective of an **effective response to threats to human rights resulting from the export of these technologies**."



Recast Dual-use regulation (4)

1. Amended dual-use definition (art. 2 no. 1 and 21)

- no. 1: 'dual-use items' shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include:
 - (a) items which can be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery, including all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices;
 - **(b) cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States.**
- no. 21: '**cyber-surveillance technology**' shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, extracting, collecting and analysing data and/or incapacitating or damaging the targeted system. This **includes** items related to the following technology and equipment:
 - **(a) mobile telecommunication interception equipment;**
 - **(b) intrusion software;**
 - **(c) monitoring centers;**
 - **(d) lawful interception systems and data retention systems;**
 - **(e) digital forensics;**

Recast Dual-use regulation (5)

2. EU-autonomous list (Annex I Section B)

10A001 Surveillance systems, equipment and components for ICT (Information and Communication Technology) for public networks where the destination lies outside the customs territory of the European Union and outside of Part 2 of Section A of Annex II to this Regulation, as follows:

- a. Monitoring Centres** (Law Enforcement Monitoring Facilities) for Lawful Interception Systems (LI, for example according to ETSI ES 201 158, ETSI ES 201 671 or equivalent specifications or standards) and specially designed components therefor,
- b. Retention systems or devices for event data** (Intercept Related Information IRI, for example, according to ETSI TS 102 656 or equivalent specifications or standards) and specially designed components therefor.'

Art. 16

2. The Commission shall be empowered to adopt delegated acts in order to amend the lists of dual-use items set out in Annex I and Section B of Annex IV, as follows:

(b) The list of dual-use items set out in Section B of Annex I may be amended if this is necessary due to risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States.

Recast Dual-use regulation (6)

3. Explicit human rights criteria (art. 14)

In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services or technical assistance under this Regulation, or to prohibit a transit, the competent authorities of the Member States **shall take into account** all relevant **considerations** including the following criteria:

- a) Union and Member States' international obligations and commitments, in particular the obligations and commitments they have each accepted as members of the relevant international non-proliferation regimes and export control arrangements, [...] and their obligations under sanctions imposed by a decision or a common position adopted by the Council or by a decision of the OSCE or [...] the United Nations;
- b) **respect for human rights** in the country of final destination as well as **respect by that country of international humanitarian law**;
- c) the **internal situation** in the country of final destination – competent authorities **will not authorise exports** that would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination;
- d) preservation of regional peace, security and stability;
- e) considerations of national foreign and security policy, including security of Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
- f) considerations about intended end use and the risk of diversion, including existence of a risk that the **dual-use** items will be diverted or re-exported under undesirable conditions.



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Recast Dual-use regulation (7)

4. Human rights catch-all (art. 4) - a surprise?

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 authority that the items in question **are or may be intended**, in their entirety or in part;

- (d) for use by persons **complicit in or responsible** for **directing or committing serious violations of human rights** or international humanitarian law **in situations of armed conflict or internal repression** in the country of final destination, **as identified by** relevant public international institutions, or European or national competent authorities, and where there is **evidence** of the use of this or similar items for directing or implementing such serious violations by the proposed end-user;

2. If an exporter, **under his obligation to exercise due diligence, 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 paragraph 1, he **must notify** the competent authority, **which will decide** whether or not it is expedient to make the export concerned subject to authorisation.



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Recast Dual-use regulation (8)

Issues:

- Vague legal terms: in the definition and the catch-all → „serious violations of HR“, „complicit“, „internal repression“
- Broad scope of human rights assessment: not only for cyber-surveillance items, but any non-listed item
- Unclear causality: direct/indirect use or any contribution?
- Unclear evidence standard: what and by whom?
- Blurring of responsibilities: exporter and/or authorities to make assessment?
- Lack of legal certainty?
- Massive bureaucratic concerns - How to get and to provide information?
- How to challenge information? (see legal challenges of terror listings)
- How to separate a legitimate use from illegitimate? (already problematic with listed items)
- Coherence with reference documents which call for cyber-surveillance control?
- Coherence with COM's own option assessment?
- Change in the systematic fabric of dual-use nature of export control as a trade instrument? (regimes, list based approach, limited „technical“ catch-alls)?
- Coherence w/ other EU-instruments: Anti-Torture-Regulation has list approach and no



Recast Dual-use regulation (9)

4. Other main reform issues

- Terrorism catch-all (art. 4 para. 1 lit. e)
- Transit and brokering controls for all non-listed items (art. 5, 6)
- Control of technical assistance for all non-listed items (art. 7)
- Extraterritoriality/ Certain controls for non-EU-companies controlled by EU-companies (art. 2 nos. 7, 9)
- Maximum validity period for authorizations of 1 year (art. 4, 10)
- Consultation procedures (art. 4)
- Intra-company transfers (Annex II.H)
- General circumvention clause (art. 23): *„It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 3, 4, 5, 6, and 7.“*



Thank you!

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