
Report from Europe

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EU EXPORT CONTROLS IN LIGHT OF EU SANCTIONS AND EMBARGOES IMPOSED IN THE MIDDLE EAST AND AFRICA

In response to the latest political and social developments in Africa and the Middle East, the United Nations (UN) and its Members recently imposed and reinforced severe embargoes against various countries. In the first months of 2011 alone, the European Union (EU) imposed sanctions against Congo, the Ivory Coast, Iraq, Libya, Tunisia and Zimbabwe. Earlier, in 2010, the EU reinforced sanctions against Iran beyond those measures agreed upon by the UN.¹ Restrictive measures were not only targeted against countries but also against those individuals, including members of (former) governments deemed responsible for having committed inhuman acts.² The increased use of embargoes and sanctions merits a closer look at the export controls of the EU and its Member States and what business entrepreneurs have to do to comply with these rules.

OVERVIEW

The export controls of the EU and the Member States stem from international agreements, most importantly UN Security Council Resolutions and the four export control regimes, the Missile Technology Control Regime, the Nuclear Suppliers' Group, the Australia Group, and the Wassenaar Agreement. The EU and Member States have also implemented additional unilateral controls.

Export controls apply to transactions involving countries subject to embargoes and controlled individuals as well as the export and intra-EU transfer of military and dual-use items.³ Additionally, certain transits, brokering activities and technical assistances (trainings, repairs, etc) can be subject to export controls.

Complying with these controls has become an increasingly important consideration for all exporters, since violations can result in heavy financial penalties and severe reputational damage for their businesses, coupled with the risk of criminal sanctions being imposed against management and executives.

TYPES OF CONTROLS

One can roughly distinguish three types of controls: (1) item controls, (2) end-use controls, and (3) end-user/destination controls.

Item controls

Concerning item controls, the EU and Member States control the export and intra-EU transfer of military and dual-use items.

Due to the distribution of competences in the EU the control of military items lies within the competence of the Member States. On a political level, EU Member States have, however, agreed to a minimum of unification of the applicable rules. Generally, both exports and intra-EU transfers of military items require a prior authorisation by the transferring Member State. Applicable laws and procedures as well as public policy consideration can vary significantly among different Member States.

¹ For the current status of EU sanctions see: http://www.ec.europa.eu/external_relations/cfsp/sanctions/docs/measure_en.pdf viewed 9 May 2011.

² For the EU consolidated list of persons, groups and entities subject to EU financial sanctions, see: http://www.ecas.europa.eu/cfsp/sanctions/consol-list_en.htm viewed 9 May 2011.

³ Dual-use items are civil items that can also have a military use, such as night vision goggles, certain chemicals or aviation technology. The term item generally comprises goods software and technology. Consequently, export controls regulate not only the physical export of goods, but also, for example, data transfer, including sending software and technology abroad by email or server up/download.

Member States acknowledged that these disparities may impede the movement of defence-related items and distort competition within the internal market. The EU consequently adopted the so-called transfer Directive⁴ in 2009. This Directive obligates EU Member States to introduce facilitations of intra-EU transfers of military items via national laws that become effective by July 2012.

By contrast, the export and intra-EU transfer of dual-use items is primarily controlled at EU level by Regulation 428/2009.⁵ Generally, dual-use items listed in Annex I to Regulation 428/2009 require a licence when exported from a Member State to third countries. The intra-EU transfer of dual-use items is generally not subject to a licensing requirement, except for highly sensitive items listed in Annex IV to Regulation 428/2009, such as nuclear and stealth technology.⁶ A number of EU Member States have adopted further item controls in addition to Annex I.

End-use controls

End-use controls impose a licensing requirement on exports of dual-use items, if they are subject to certain end-uses. These controls can exist on their own merit or, for example, can apply only for exports to certain destinations. The most important end-use controls at EU level are set out in Art 4(1) and (2) of Regulation 428/2009. According to Art 4(1), dual-use items used in their entirety or in part, 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 (commonly referred to as weapons of mass destruction or WMD) or the development, production, maintenance or storage of missiles capable of delivering such weapons, require a licence if the exporter knows or is informed by the authorities of such use. Article 4(2) imposes a licensing requirement on the export of dual-use items if the exporter knows or has been informed by the authorities that the items have a military end-use and the country of destination or the purchasing country is subject to an arms embargo decided by a decision of the Council or a decision of the Organization for Security and Co-operation in Europe (OSCE) or by a binding resolution of the Security Council of the UN. Germany and the United Kingdom especially have adopted additional national end-use controls that need to be observed for exports and intra-EU transfers from these countries.

Embargoes and sanctions

Embargoes and sanctions are politically motivated and express a government's disapproval of another government's action or behaviour. With the growing threat from non-governmental organisations and individuals such as Al Qaida, the UN and its Members have increasingly made use of sanctions targeting not states and governments but legal and natural persons.

The embargoes in force in the EU can generally be divided into arms and economic embargoes. Embargoes are first agreed on by the Member States in a Council Decision. Based on this decision, the EU will implement a Regulation with regard to the economic sanctions agreed upon which is binding and directly applicable in all EU Member States. Arms embargoes are implemented by the Member States' authorities directly due to the division of competences within the EU.

Due to their political nature, embargoes can be much further reaching than item and end-use controls. For instance, under Art 2(1) of the Iran embargo,⁷ the EU is not only prohibited to export but also to "sell, supply, transfer or export, directly or indirectly, the goods and technology listed in Annexes I and II to the Iran Embargo, whether or not originating in the Union, to any Iranian person,

⁴ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (Text with EEA relevance), OJ 2009 L146/1.

⁵ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L134/1.

⁶ Regulation 428/2009 sets out the rules for the export of dual-use items, including goods, technologies and software, from the EU to third countries. It also regulates the intra-EU transfer of certain highly sensitive dual-use items and controls certain brokering activities and goods in transit.

⁷ Council Regulation (EC) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007, OJ 2010 L281/1.

entity or body or for use in Iran". The Iran embargo also prohibits inter alia imports of certain products, imposes authorisation requirements for payments above a certain threshold to and from Iranian persons and requires pre arrival and departure notification for shipments.⁸ The embargo against North Korea also prohibits the export of certain luxurious products.⁹

Sanctions against natural or legal persons usually take the form of admission bans, freezing of funds, and prohibition to provide finances or economic resources¹⁰ to such persons. They severely impact the affected natural and legal persons and have been repeatedly subject to review by the European courts.¹¹

While item and end-uses controls result from the sensitivity of an item or an end use, embargoes and sanctions reflect public policies agreed upon by the UN or the EU. Both types of controls will however also have common and overlapping goals, such as preventing nuclear proliferation in countries that impose a security threat to the international society.

LICENSING

Member States authorities are generally in charge of the licensing process.

At EU level, the Community General Export Authorisation (CGEA) permits the export of specified dual-use items to certain destinations by any exporter, providing the terms and conditions of the authorisation have been met.¹² The CGEA is currently valid throughout the EU for export of the majority of dual-use items listed in Annex I of Regulation 428/2009 to Australia, Canada, Japan, New Zealand, Norway, Switzerland and the United States.

A number of Member States have created national general export authorisations (NGAs) which permit the export of a variety of military and dual-use controlled items to specified destinations subject to an exporter first registering to use the authorisation and demonstrating full compliance with any applicable terms and conditions of use. By example, in the United Kingdom these NGAs are known as Open General Export Licences (OGEL);¹³ in Germany, they are referred to as Allgemeine Genehmigung (AGG).¹⁴

In addition to the CGEA and NGAs, where more sensitive items are involved and there are concerns about the possible end-use/users of the items in question, Member States issue tailored global or individual licences which permit individual exporters to export specified items to specified customers and/or destination(s).

COMPLIANCE AND ENFORCEMENT

All the above described controls apply cumulatively. It is therefore understandable that economic operators often struggle to comply with this complex web of controls, especially if operating in various Member States at the same time.

Member States oversee the compliance with export controls within their territory and take enforcement measures. Export control offences are subject to civil and potentially criminal penalties,

⁸ See Arts 4, 21 and 27.

⁹ Council Regulation (EC) No 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea, OJ 2007 L 88/1.

¹⁰ The term "economic resources" is usually widely defined and means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but which may be used to obtain funds, goods or services.

¹¹ See in particular *Kadi v Commission*, ECR 2010, Case T-85/09, Judgment of the General Court of 30 September 2010 (not yet published).

¹² The CGEA is published as Annex II of Regulation 428/2009.

¹³ For a full list of the OGELs currently available, see: <http://www.berr.ecgroup.net/Publications/EuropeTradeExportControl/ExportControlLicences.aspx> viewed 9 May 2011.

¹⁴ For a full list of the AGGs currently available, see: <http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/verfahrenserleichterungen/allgemeingenehmigungen/index.html> viewed 9 May 2011.

including fines and imprisonment for a company and in certain circumstances, individuals such as company directors. In addition, if export control violations are made public, this can result in serious reputational damage.

It is therefore advisable that exporters have proper compliance programs in place and consult the authorities in advance when in doubt whether a specific transaction attaches a licensing requirement. In general, Member States authorities tend to be helpful in these circumstances and will work together with companies to find a solution, where possible.

An example of an effort to assist exporters with regards to export licence applications, is the United Kingdom's Export Control Organisation's (ECO) "Iran List – WMD End-Use Control" guidance. The "Iran List" provides information about entities in Iran which might potentially be of concern due to their involvement in the country's nuclear development programs. An exporter considering a transaction which involves an entity on the list should contact the ECO for further guidance before proceeding with the transaction.

Member States' authorities also conduct training and seminars for businesses and publish guidelines on the application of item and end-use related export controls as well as sanctions and embargoes.¹⁵

LOOKING AHEAD

In the recent past, the UN and the EU have shown that they do not shy away from implementing far reaching embargoes and sanctions against governments and non-governmental groups that are perceived as imposing a significant threat to international peace and security. The media coverage of the recent events in the Middle East and Africa and the actions taken by the UN and the EU have clearly increased awareness of export controls among business entrepreneurs. EU businesses can no longer afford non-compliance with EU and national export controls.

Prudent business entrepreneurs will increasingly focus to implement compliance programs to ensure a proper understanding and application of export controls by their employees. Companies that tackle export controls proactively and educate their staff to consider these issues as an integral part of every business transaction will have a competitive advantage in a business environment that is ever-increasingly concerned with the control of exports.

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¹⁵ See for instance the United Kingdom's country-by-country list published by the Foreign and Commonwealth Office: <http://www.fco.gov.uk/en/about-us/what-we-do/services-we-deliver/export-controls-sanctions/country-listing> viewed 9 May 2011. For Germany's BAFA export control guidelines (Merkblätter) see: <http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/arbeitshilfen/merkblaetter/index.html> viewed 9 May 2011.