

Review

EU, Competition & Trade

The European Union introduces new export controls on brokering and transit for dual-use items

On 29 May 2009 the long awaited recast EU dual-use Regulation was published in the Official Journal of the European Union. The main changes to the current system are the introduction of brokering and transit controls. Member States will also be required to place a stronger emphasis on a company's internal compliance with export control rules when reviewing an application for a global export authorisation. The rules on export and intra-Community transfer of dual-use goods remain, however, virtually unchanged.

After over two years of consultations the EU adopted [Regulation 428/2009](#)¹ setting up the new Community regime for the control of exports, transfer, brokering and transit of dual-use items on 5 May 2009. It was published in the Official Journal of the European Union on 29 May 2009 and will enter into force on 27 August 2009. Regulation 428/2009 is a recast of the currently applicable [Regulation 1334/2000](#)².

Regulation 428/2009 leaves the rules on the export and intra-Community transfer of dual-use items virtually unchanged. Under the new regulation items listed in Annex I and IV will continue to require an authorisation for export and intra-Community transfer respectively. Note that Annex I has been updated in line with the EU's international obligations. The catch-all clause of Article 4 also remains unchanged so that an export of unlisted dual-use items is subject to an authorisation requirement if the exporter knows³ or is informed by the authorities that the dual-use goods are subject to certain end-uses. Most importantly an authorisation is required if:

Regulation 428/2009 brings stricter standards for global export authorisation approvals.

¹ 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.

² Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L 159/1.

³ While Article 4(4) requires awareness, exporters should de facto apply the more conservative standard "could have known". It will otherwise be very difficult for exporters to convince the authorities that they were not aware of a controlled end-use if the exporters failed to conduct prudent checks of clients or disregard obvious indications that an exported dual-use good shall be subject to a controlled use. Also note that some Member

- the items in question are or may be intended, in their entirety or in part, for use in connection with weapons of mass destruction (WMD) or missiles capable of delivering such weapons⁴; or
- the purchasing country or country of destination is subject to an arms embargo⁵ and the items in question are or may be intended, in their entirety or in part, for a military end-use⁶.

Regulation 428/2009 introduces among others two important changes for exporters. It introduces rules on brokering and transit, which shall bring the EU system into conformity with UN Council Resolution 1540 of 28 April 2004. Furthermore Regulation 428/2009 requires Member States to take company internal compliance programs into due account when deciding upon an application for a global export authorisation. This could generally lead to a stronger focus on and controls of companies compliance with export control laws.

BROKERING

Brokering services comprise the “negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country” or “the selling or buying of dual-use items that are located in third countries for their transfer to another third country”. Brokering does however not comprise mere ancillary services such as transportation, financial services, (re-)insurance, or general advertising or promotion (Article 2(5) of Regulation 428/2009).

A broker is any natural or legal person or partnership resident or established in a Member State engaging in the described services from the Community into the territory of a third country (Article 2(6) of Regulation 428/2009).

Article 5 of Regulation 428/2009 introduces an authorisation requirement for brokering services when they concern goods listed in Annex I and are subject to an end-use in relation to WMD or missiles capable of delivering such weapons. The authorisation requirement attaches if the broker is either aware or informed by the authorities of such use.

Member States may extend brokering controls to non-listed dual-use goods if they are subject to an end-use in connection with WMD or missiles capable of delivering such weapons, or to a military end-use in a country subject to a military embargo.⁷ With regard to WMD controls, Member States may also require a broker to contact the relevant authorities not only if he is *aware* of such end-use but also if he has mere *suspicion* thereof.

In addition, Regulation 428/2009 imposes certain information and documentation requirements on brokers. A new Annex IIIb provides a model for brokering services authorisation forms.

States such as the UK increased the standard for national controls by requiring merely “suspicion” rather than “awareness” as to trigger a licence requirement.

⁴ See Article 4(1) of Regulation 428/2009.

⁵ Based on a Common Position or Joint Action by the Council, a decision of the OSCE or an UN Security resolution.

⁶ See Article 4(2) of Regulation 428/2009.

⁷ This provision corresponds to the catch-all clause of Articles 4(1), (2) and (4) of the (old and new) regulations (see above).

TRANSIT

Transit refers to “a transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community” (Article 2(7) of Regulation 428/2009).

Under a new Article 6, Member States may prohibit the transit of non-Community dual-use items listed in Annex I of the Regulation 428/2009 if the items are or may be intended for use in relation to WMD or missiles capable of delivering such weapons.

Note that the provision on transit does not establish an authorisation requirement but rather a right for the authorities to intervene in suspicious transactions.

As with brokering, Member States may apply stricter controls. Member States can impose authorisation requirements and extend the application of transit controls to unlisted dual-use goods subject to end-uses in relation to WMD or missiles capable of delivering such weapons, or to a military end-use in a country subject to a military embargo.

RELEVANCE OF INTERNAL COMPLIANCE PROGRAMMES FOR GLOBAL AUTHORISATION APPLICATIONS

When deciding on applications for global export authorisation⁸ Member States must, in the future, take into account whether a company has measures in place to ensure compliance with export control laws.

This will likely bring companies' internal compliance programs and their effectiveness under stronger scrutiny.

WEB-UP/DOWNLOADS CONSTITUTE AN EXPORT

Regulation 428/2009 also clarifies various definitions as to remove uncertainties regarding their interpretation. Most importantly Regulation 428/2009 clarifies the definition of export with regard to the transmission of software and technology.

Accordingly, the transmission of software and technology by all electronic means to a destination outside the European Union constitutes an export. In this respect the regulation clarifies that emails, websites, web up- and downloads, etc are also covered by the definition.

Regarding the oral transmission of technology over the telephone, Regulation 428/2009 omits the previous requirement that such technology must be laid down in a document to constitute an export.

As is currently the case, the supply of services or the transmission of technology will not fall under Regulation 428/2009 if they involve a cross-border movement of persons. If, for instance, a EU technician travels to a country outside of the EU where he performs maintenance services on a dual-use good, he would not require a licence under Regulation 428/2009 (but potentially under national laws). While Regulation 428/2009 does not extend to cross-border movement of persons, any tools, spare parts, or laptops which contain sensitive software that they wish to take with them might, however, attach a licence requirement.

⁸ A global export authorisation is granted to one specific exporter in respect of a type or category of dual-use items which may be valid for exports to one or more specified end users and/or in one or more specified third countries.

OUTLOOK

Regulation 458/2009 falls short of many of the initial proposals by the European Commission that were aimed at providing a friendlier regulatory environment for businesses. Despite a requirement for enhanced cooperation between Member States, it is doubtful whether the new regulation will provide a more consistent and homogenous application of export controls to dual-use items within the EU.

Member States have ample flexibility to impose stricter and additional export controls to those of Regulation 428/2009. Companies with seats in more than one Member States are therefore likely to face increasing differences in national rules and procedures in the future.

Regulation 428/2009 confronts authorities and exporters with significant challenges. Brokers and authorities in certain Member States such as, for example, Germany⁹ and the UK¹⁰ have applied brokering controls for several years already. In other Member States the authorities will only now have to establish respective controls and administrative systems. Likewise the stronger focus on companies' internal compliance in the review of global licence applications must not be underestimated.

Businesses will be well advised to carefully review and potentially update their internal systems and ensure that the relevant staffs have the knowledge and experience in handling exports of dual-use items.

The next step of the Council will be to discuss a proposal from the Commission of 16 December 2008¹¹ concerning the introduction of additional general Community export authorisations which shall facilitate exports of low value shipments, export after repair, export for exhibition, computers, telecom and information security and chemicals.

FURTHER INFORMATION

For questions concerning the new dual-use Regulation or information about compliance seminars and trainings, please contact a member of our Export Control Group.

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⁹ See Sections 40 to 42 of the Foreign Trade and Payment Regulation.

¹⁰ See Part 4 of Export Control Order 2008.

¹¹ Proposal for a Council Regulation amending Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use and technology, COM(2008)854 final, available at: http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142038.pdf

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