

Recent Developments in EU Export Controls: *EU Green Paper on Dual-use Exports*

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Exporters have less than four weeks to submit comments on the European Commission's Green Paper on European Union ("EU") export controls ("Green Paper").

The Green Paper is the first step in the Commission's review of the EU's export control regime. Specifically, the Green Paper launches a public consultation on the functioning of the regime, and on the Commission's proposals for its improvement. This is a key opportunity for those stakeholders with concerns to offer input to the Commission.

The Green Paper consultation closes on October 31, 2011. Based on the input it receives, the Commission will publish (i) an overview of the received comments (due January 2012) and (ii) a formal report on the subject to the European Parliament and Council (expected in September 2012). The Commission plans to propose amendments to the existing dual-use export control regime during 2013 or 2014.

EU Dual-use Export Control System

The general framework for dual-use export controls in the EU is set out in Regulation (EC) No 428/2009 ("the Dual-use Regulation"). The Dual-use Regulation lists (i) the items subject to controls, (ii) the types of authorizations that can be issued by the national authorities, (iii) the conditions under which controls on "non-listed" items can be imposed ("catch-all" controls), (iv) consultation and information exchange procedures, and (v) requirements for intra-EU transfers of certain controlled items.

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Importantly, enforcement of these rules is left to the Member States. This decentralized approach often results in divergent applications of the Dual-use Regulation throughout the EU. In some cases, for example, the export of a specific item from one Member State may be significantly delayed or even prohibited, while the export of that same item from another Member State can be undertaken without any limitations.

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The differences in the application of the EU Dual-use Regulation are particularly striking with respect to:

- registration and reporting requirements applicable to exporters,
- use of the export authorizations,
- interpretations of control list entries,
- use of the catch-all controls, and
- use of the transit and brokering controls.

Potential Changes to the EU Dual-use Export Control Regime

Through the Green Paper, the Commission has proposed several possible changes to the EU dual-use export control regime, among them:

- a common approach to risk assessment,
- a common approach to catch-all controls,
- the systematic exchange of information on suspicious transactions and licenses issued by different Member States,
- the phasing out of National General Export Authorizations ("NGEAs") in favor of EU General Export Authorizations ("EU GEAs"),

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- the abolition of controls on intra-EU transfers, and
- more coordinated enforcement of export control rules.

Common Risk Assessment

The Dual-use Regulation establishes criteria under which export license applications are to be assessed. These criteria are fairly general, and national authorities tend to interpret the criteria differently. The Commission proposes a common risk assessment approach that would better guide national authorities and lead to more consistency in licensing decisions.

Better Exchange of Information

At present, the information exchanged among national regulators relates primarily to license denials. This is aimed at avoiding “undercutting,” where one Member State authorizes an export while a different Member State refuses to issue an export license. In the Green Paper, the Commission proposes expanding this information exchange to cover (at a minimum) details regarding:

- licenses issued by national authorities;
- exporters engaged in the export of dual-use items,
- exporters registered to use general export authorizations, and
- suspicious entities seeking to procure dual-use items.

Extending the Scope of EU General Export Authorizations

The Dual-use Regulation sets out four types of export authorizations. Three types of licenses (individual, global and National General Export licenses (“NGAs”)) are issued at national level, while one (EU GEA) is issued by the EU. The processing times and/or requirements for the various licenses differ across the Member States, and NGAs are only available to exporters in 7 of the 27 Member States. The Green Paper reiterates the Commission’s plan to adopt further EU GEAs in order to even the playing field among EU exporters. Separately, the Commission announced that it plans to adopt five new EU GEAs by the end of 2011 in order to even the playing field among EU exporters (specifically addressing exports to certain destinations; exports after repair and replacement; temporary exports after an exhibition or fair; telecommunications; and chemicals).

A Common Approach to Catch-all Controls

The Dual-use Regulation allows Member States to introduce additional “catch-all” controls – i.e., controls

governing exports of items not specifically listed on the EU control list where those items could be used for (i) WMD proliferation, or (ii) military purposes.

Not surprisingly, there is no common approach to the application of catch-all controls among Member States. In order to introduce greater coherence, the Commission proposes:

- mandatory exchanges of information about catch-all controls applied by the national authorities and the reasons behind their decisions or
- creation of an EU-wide catch-all control under which a Member State or group of Member States could ask the Commission to issue an authorization requirement applicable across all 27 EU Member States, valid for a certain period of time, or
- adoption of temporary lists of controlled items which would be based on denial decisions issued by national authorities.

At a minimum, the Green Paper recommends minimizing record-keeping requirements and the adoption of general licenses for certain intra-EU transfers.

Abolition of Intra-EU Controls

The Commission proposes eliminating the license requirement on intra-EU exports and instead using post-shipment verification mechanisms and lists of certified end-users in the EU to prevent diversion of highly sensitive items. At a minimum, the Green Paper recommends minimizing record-keeping requirements and the adoption of general licenses for certain intra-EU transfers.

Improved Enforcement of Export Controls

Finally, the Commission concludes that – as a result of better information exchange among national regulators – Member State authorities will be better able to identify high-risk transactions and concentrate their enforcement efforts on these transactions. The Commission also contemplates the use of the Authorized Economic Operator (AEO) certification to alleviate the burden of export control obligations on “reliable” exporters.

Exporters have until October 31, 2011 to express their views on these and other issues relating to the EU’s export control regime. □