Political Science Faculty of Law

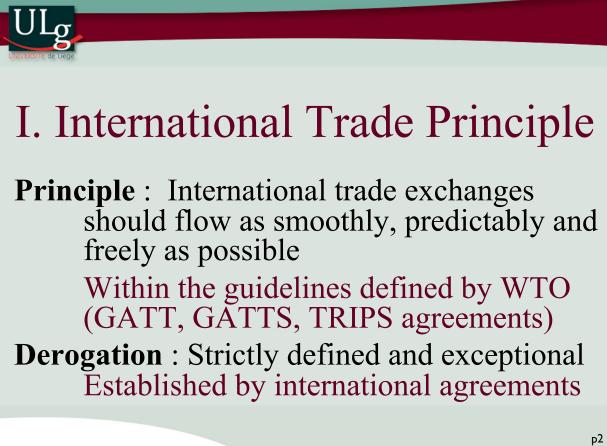


Nuclear Export Control in the **European** Union

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Derogations usually based on

- Quotas (steel, cereals, textiles)
- Health protection (food and mouth disease, influenza)
- Protection of cultural goods (national treasure)
- International Security (trade embargos)





Interpretation

- Minimum : exempts only "national security essential interests" related restrictions Nuclear trade could be restricted for "non-proliferation concerns"

- Maximum : exempts all nuclear trade restrictions

Nuclear trade could be limited to assurance/protection of national **energy** needs





II. International Nuclear Export Control Regime

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What do we have ?

- Treaty on the Non-Proliferation of Nuclear Weapons Cornerstone of the regime

- UNSC 1540 and 1887

Calls for the establishment of an efficient national export control regime

Faculté de Droit

- Nuclear Suppliers Group (NSG):

- Guidelines for Nuclear Transfers (INFCIRC/254/Rev.8/Part.1)
- Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software, and Related Technology (INFCIRC/254/Rev.7/Part.2)

- Zangger Committee

Guidelines for nuclear transfers (Trigger List: INFCIRC/209/Rev.2)

- Wassenaar Arrangement

- Guidelines and procedures
- List of Dual-Use Goods and Technologies
- Missile Technology Control Regime (MTCR) and International Code of Conduct against Ballistic Missile Proliferation



Export control commitments required by the NPT



Export of nuclear equipment and technology is essentially **concerned by one provision** (Article III.2):

NPT Parties take the commitment not to provide:

(a) source or special fissionable material, or

(b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material,

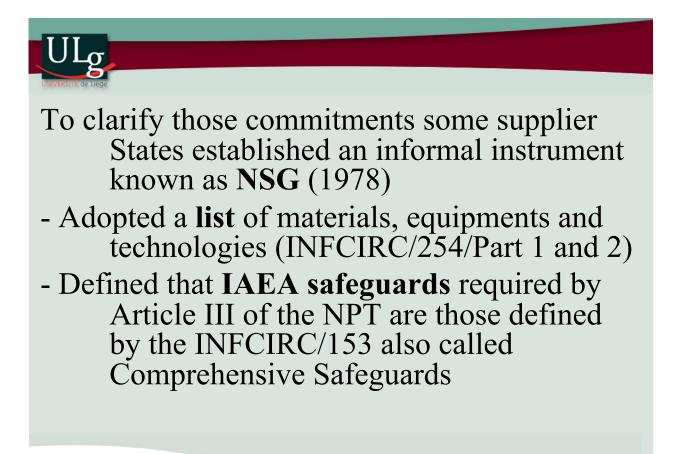
to any non-nuclear-weapon State (NNWS) for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article



What does it mean ?

Article III.2 establishes **two principles** to be implemented by the supplier State :

- 1. To control the transfer to **NNWS** (as defined by Article IX.3) of a **non-defined list** of items
- 2. To submit the export of nuclear items to the condition that fissile materials, being used in the facilities where the items are to be transferred, would be submitted to **safeguards**





Principles of the EU (Nuclear) Export Control Regime



Collection of different legally binding and/ or politically binding instruments:

1. Due to the EU treaties organisation

EC (TFUE) and Euratom Treaties Except for certain fissile materials, nuclear items export control is **not** governed by Euratom

EU Treaty

Foreign Affairs Council (CFSP)



2. Due to the division of competencies between EU Member States and EU/ EC Institutions

Principles and procedures are established by EU/EC Institutions

Authorisation : mostly decided and granted by Member States



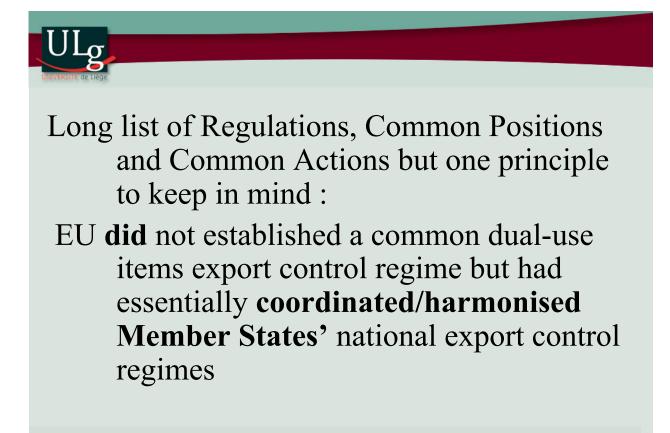
List of legally and politically binding instruments

Legally binding instruments

- Council Regulation 428/2009 of 5 May 2009 setting up a **Community regime** for the **control of exports, transfer, brokering and transit of dual-use items**
- List of Council Regulations adopting **restrictive measures** (embargos) against countries or non-state actors
- Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against **Iran**
- Euratom Treaty (Article 59)
- Council Regulation (EEC) 2913/92 establishing the **Community Custom Code** and in particular its new Section 1A on the **Authorised Economic Operator**
- Council and Parliament Regulation (EC) of March 31 2004 (No 725/2004) regarding the strengthening of ports safety measures (CSI) completed by the Directive 2005/65/CE

Politically binding instruments

- Council Joint Action of 22 June 2000 (2000/0401/CFSP) concerning the control of **technical assistance** related to certain military end-uses
- New lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems (Council decision)





The specificity of nuclear trade in the EU

Submitted to a dedicated Treaty : Euratom

- First objective was to organise the free movement of certain nuclear items within the EC (Chapter IX):

« g. ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialized materials and equipment, by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community; »



The Nuclear Common market

Member States shall **abolish** between themselves, one year after the entry into force of this Treaty, **all customs duties on imports and exports or charges** having equivalent effect, and all quantitative restrictions on imports and exports, in respect of: a. products in List A1 and A2 b. products in List B



List A.1

Uranium ores containing more than 5% by weight of natural uranium Pitchblende containing more than 5% by weight of natural uranium Uranium oxide

Inorganic compounds of natural uranium other than uranium oxide and uranium hexafluoride

Organic compounds of natural uranium

Crude or processed natural uranium

Alloys containing plutonium

Organic or inorganic compounds of uranium enriched in organic or inorganic compounds or uranium 235

Organic or inorganic compounds or uranium 233

Thorium enriched in uranium 233

Organic or inorganic compounds of plutonium

Uranium enriched in plutonium Uranium enriched in uranium 235 Alloys containing uranium enriched in uranium 235 or uranium 233 Plutonium Uranium 233 Uranium hexafluoride Monazite Thorium ores containing more than 20% by weight of thorium Urano thorianite containing more than 20% of thorium Crude or processed thorium Thorium oxide Inorganic compounds of thorium other than thorium oxide Organic compounds of thorium



List A.2

Deuterium and its compounds (including heavy water) in which the ratio of the number of deuterium atoms to normal hydrogen atoms exceeds 1 : 5 000

- Heavy paraffin in which the ratio of the number of deuterium atoms to normal hydrogen atoms exceeds 1 : 5 000
- Mixtures and solutions in which the ratio of the number of deuterium atoms to normal hydrogen atoms exceeds 1 : 5 000

Nuclear reactors

- Equipment for the **separation** of uranium isotopes by gaseous diffusion or other methods
- Equipment for the production of deuterium, its compounds (including heavy water) and derivates, and mixtures or solutions containing deuterium in which the ratio of the number of deuterium atoms to normal hydrogen atoms exceeds 1:5000
- Containers with lead radiation shielding for the transport or storage of radioactive material

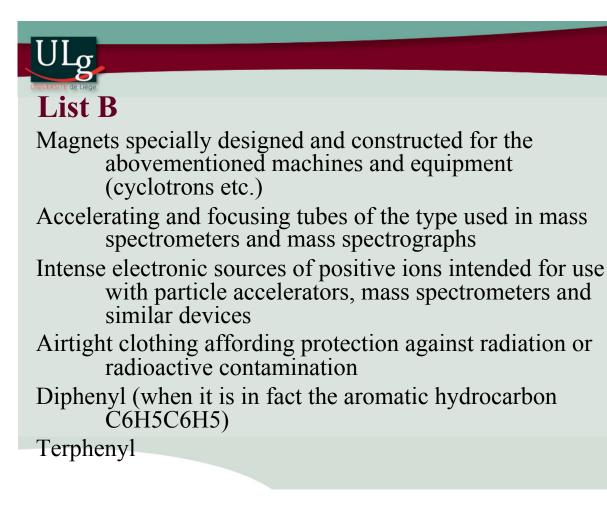
Artifical radioactive isotopes and their inorganic or organic compounds

Remote controlled mechanical manipulators specially designed for hand ling highly radioactive substances

List B Lithium ores and concentrates Nuclear grade metals Boron trifluoride Anhydrous hydrofluoric acid Chlorine trifluoride Bromine trifluoride Lithium hydroxide Lithium fluoride Lithium chloride Lithium hydride Lithium carbonate Nuclear grade beryllium oxide Refractory bricks of nuclear grade beryllium oxide Other refractory products of nuclear grade beryllium oxide Artificial graphite in the form of blocks or bars in which the boron content is less than or equal to one part per million and in which the total microscopic thermal neutron absorption cross section is less than or equal to 5 millibarns



Artificially separated stable isotopes Electromagnetic ion separators, including mass spectrographs and mass spectrometers Reactor simulators (special analog computers) Remote controlled mechanical manipulators Liquid metal pumps High vacuum pumps Heat exchangers specially designed for nuclear power stations Radiation detection instruments (and spare parts) of one of the following types, specially designed, or adaptable, for the detection of measurement of nuclear radiation, such as alpha and beta particles, gamma rays, neutrons and protons Cyclotrons, Van de Graaff or Cockcroft Walton electrostatic generators, linear accelerators and other machines capable of imparting an energy greater than 1 MeV to nuclear particles





Since 1957

Nuclear Common market has been informally diluted in the Common market established by the Single European Act (1986) and excluded indirectly by the first set of EC export control instruments (Regulation 3381/94 and Common Action 94/942)

Presently essentially (if not exclusively only) ruled by Regulation **428/2009**

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Nevertheless, certain exports of nuclear materials are still submitted to Chapter VI of the Euratom Treaty

Article 57

Every producer shall offer to the (Supply) Agency the ores, source materials or special fissile materials which he produces within the territories of Member States

Defined by Article 192:

1. 'Special fissile materials' means plutonium 239; uranium 233; uranium enriched in uranium 235 or uranium 233; and any substance containing one or more of the foregoing isotopes and such other fissile materials as may be specified by the Council, acting by a qualified majority on a proposal from the Commission; the expression special fissile materials' does not, however, include source materials



Article 59

If the Agency does not exercise its right of option on the whole or any part of the output of a producer, the latter: (...)

b. shall be authorized by a decision of the Commission to dispose of his available production outside the Community, provided that the terms he offers are not more favourable than those previously offered to the Agency. However, special fissile materials may be exported only through the Agency and in accordance with the provisions of Article 62



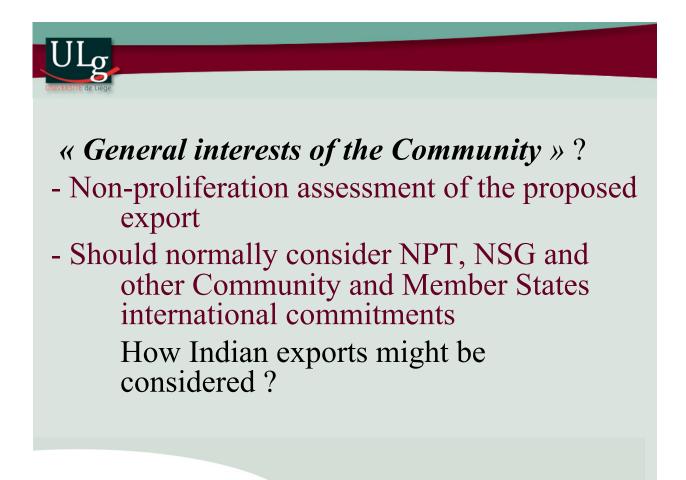
The Commission may not grant such authorization if the recipients of the supplies fail to satisfy it that the general interests of the Community will be safeguarded or if the terms and conditions of such contracts are contrary to the objectives of this Treaty



«available production» ?
Concerns only the Community production

Uranium mined or enriched in the Community and plutonium irradiated in a reactor in the Community

Operation of conversion, reprocessing in the Community, along with any other transit or storage of material in the Community **are in principle not considered as** Community production





But strictly speaking dual-use items export control is mostly organised by two following instruments

- 1. Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items
- 2. Council Joint Action of 22 June 2000 (2000/0401/CFSP) concerning the control of **technical assistance** related to certain military end-uses



1. Definition of dual-use items

Article 2(a) includes

- All goods which can be used for both **civil and military** purposes;

Not necessary limited to WMD

 All goods that can be employed for both non-explosive uses and assisting in any way in the manufacture of **nuclear weapons** or other nuclear explosive devices
 Element added in 2000 to conform with the definition of NSG dual-use items : items for which the transfer will not trigger the application of safeguards

- Concerns equipments, materials, tangible and intangible technologies



2. Items covered by the Regulation

- Establishment of **one** list of dual-use items requiring export **or** transfer authorisation

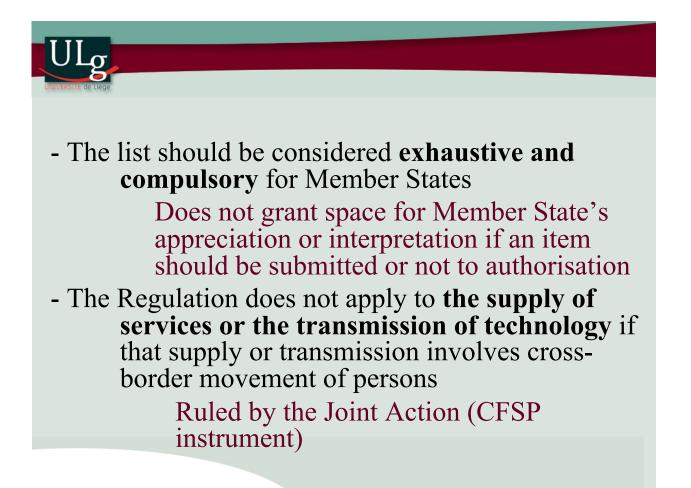
Specific system of references (9 categories)

- First international **compilation** of the various lists of 5 International Export Control Regimes

Wassenaar Arrangement, MTCR, NSG, Australia Group and CWC

Not all EU MS are members of all regimes (Wassenaar Arrangement: Cyprus

MTCR: Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia, Slovakia and Romania)



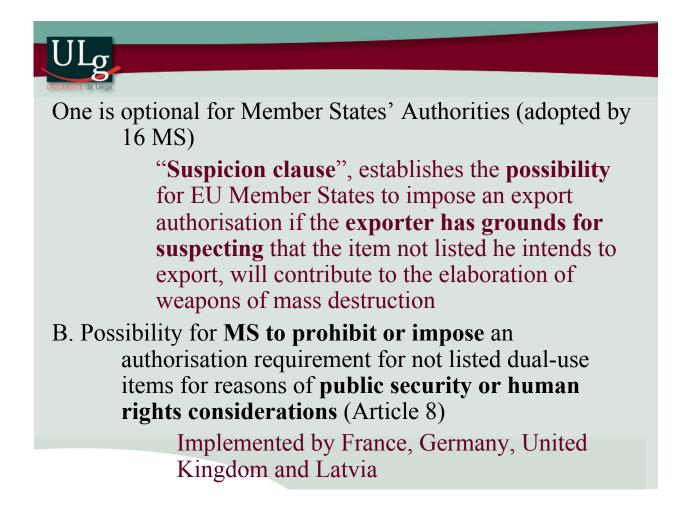


3. Items not listed potentially covered by the EU Regulation

A. Not listed items can be controlled by Member States on the basis of **catch-all clause** implementation

Two of them are compulsory for Member States' Authorities

- 1. Member States' Authorities require, through a **notification to exporters**, an export authorisation for an item not listed if there is risk that this item might be used in weapons of mass destruction program
- 2. Obligation for the exporter to notify to his National Authorities if he is aware that an item he intends to export will contribute to the elaboration of weapons of mass destruction





4. Transfers concerned by the EU Export Control Regime

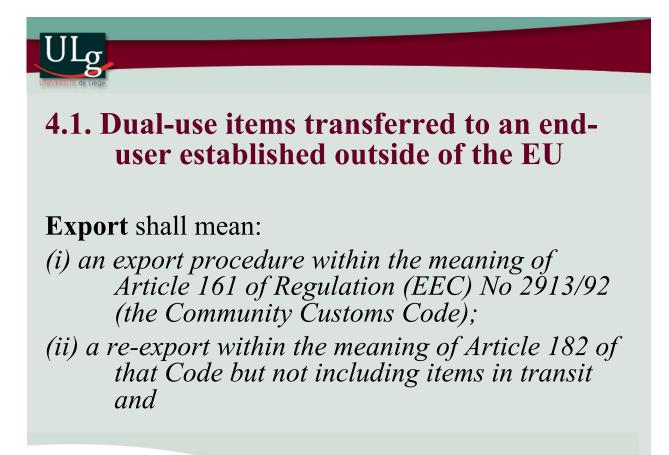
The Regulation considers two different operations :

1. Dual-use items transferred to an end-user established outside of the EU

Export, external transit and brokering activities

2. Dual-use items transferred to an end-user established in another MS

Intra-community trade





(iii) transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to a destination outside the European Community; it includes making available in an electronic form such software and technology to legal and natural persons and partnerships outside the Community. Export also applies to oral transmission of technology when the technology is described over the telephone;



Who is the exporter ?

Defined the MS who will analyse the export application and who might issued the authorisation

"exporter" shall mean any natural or legal person or partnership:



- On whose behalf an export declaration is made
- Holds the contract with the consignee
- If no export contract the person who has the power for determining the sending of the item out of the customs territory of the Community;
- Decides to transmit or make available software or technology by any other electronic means to a destination outside the Community.





- Could be **extended** to non-listed items and to listed dual-use items intended for military end-use or for countries under embargoes

- Territorial validity limited

The authorisation/prohibition is valid only for the Member State who has decided or issued it

- No coordination of Member States' policies, except if a denial has been issued

Consultation mechanism



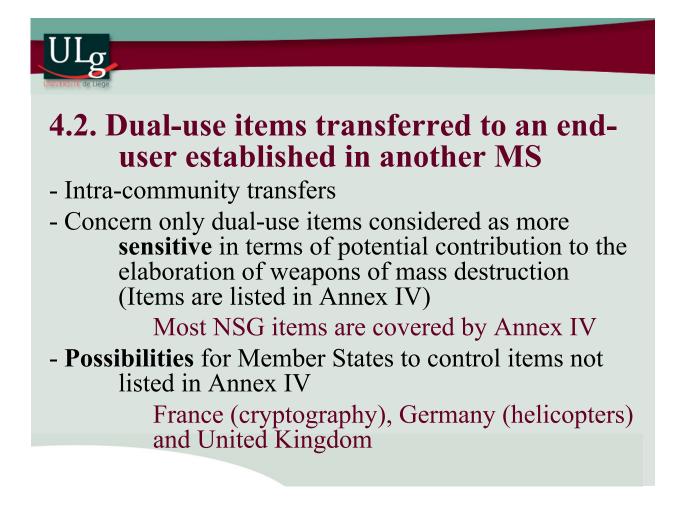
Brokering: possibility to submit to authorisation

- Brokering services : the selling, buying, negotiation or arrangement of transactions for supply of dual-use items from a third country to any other third country
- Authorisation granted by MS authorities
- Authorisations shall be valid throughout the Community.
- Authorisation requirement for brokering services and **not to exercise** brokering activities



Authorisation will be required if

- the broker has been informed by his authorities that **listed** items must be submitted to authorisation
- the broker is aware that the **listed** items...
- Possibilities for Member States **to extend an authorisation requirement** for brokering services
 - to **non-listed** items
 - in case the broker has grounds for suspecting that listed and non listed items...





5. Transfers not ruled by the Regulation

Import

Import authorisation could be required unilaterally by a Member State

Counterproductive measure which could be easily countered by importing the item through another Member State





Three types of authorisations

Individual authorisation is granted to one specific exporter for one end-user covering a number of items (one or several);

Global authorisation, also called open individual licence, 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 countries;

National **general** authorisation is valid for all national exporters to one or several specified countries covering a number of determined items.



One authorisation granted directly by the EU Export Control Regime

- Community General Export Authorisation (CGEA)
- No complementary MS authorisation is necessary Not fully respected by MS
- Valid for a defined list of items to the following destinations:

Australia, Canada, United States of America, Japan, Norway, New-Zealand, Switzerland

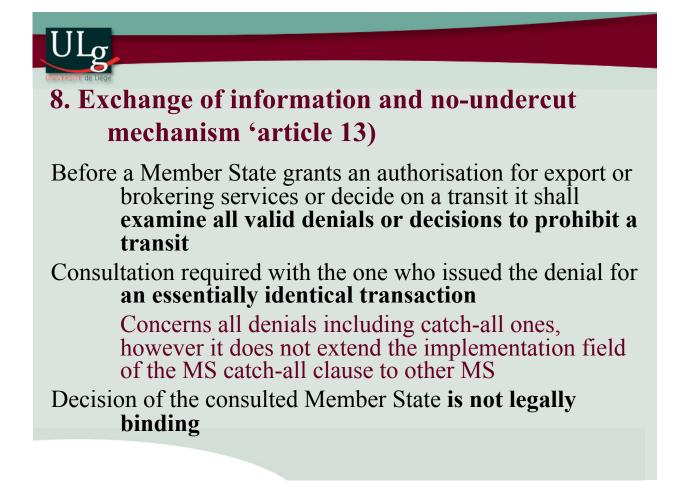
- Discussion has been initiated to **increase** the number of CGEA

Low value shipments, export after repair, temporary export for exhibition, certain categories of items (chemicals, computers, telecommunication and information)



7. Conditions and Criteria

- No conditions defined
- Establishment of common **criteria** to be considered by MS when granting or not the authorisation (Article 12):
 - 1. Commitments and obligations taken in the relevant international non-proliferation regimes
 - 2. Obligations under **sanctions imposed** by the CFSP, OSCE or a binding resolution of UN Security Council
 - 3. Consideration of **national foreign and security policies**, including those covered by the European Union Code of Conduct on Arms Exports
 - 4. Consideration of intended end-use and risk of diversion

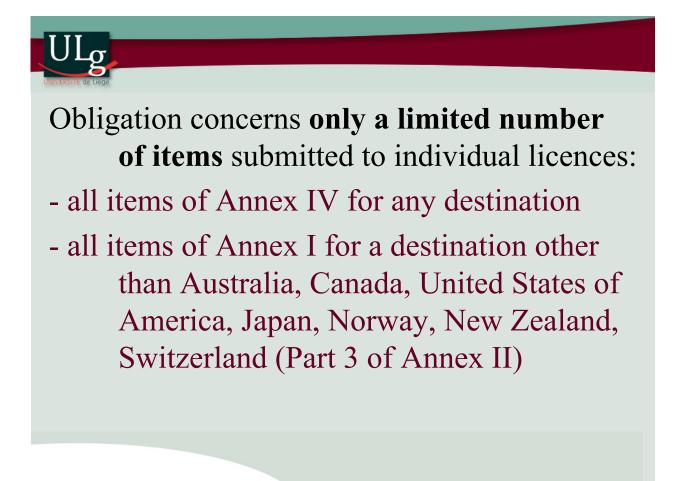




Not to be mixed up with the consultation requirement established by Article 11

Concerns authorisation when the dual-use items are or will be located in one or more Member States other than the one where the application has been made.

- **Obligation of consultation** between the Member State responsible for issuing the licence (the one where the exporter is established) and the Member State where the item is or will be located
- Alters the principle of EU validity of a licence granted by another Member State

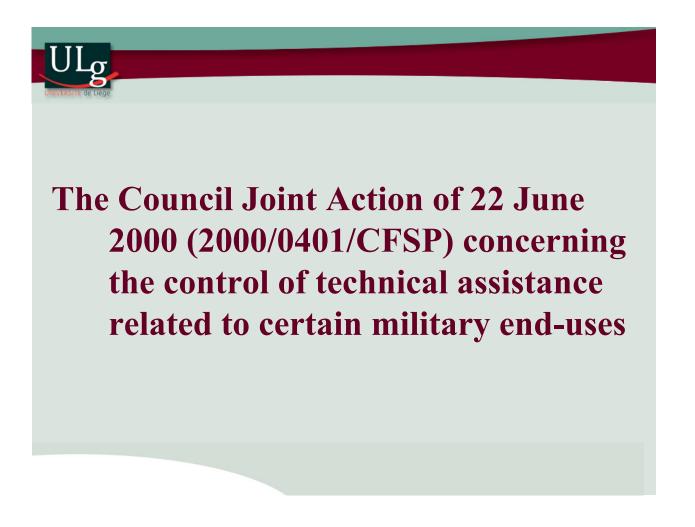




Obligation is limited to individual authorisations (not global or national general)

Decision of the consulted Member State delineates the decision of the Member State where the application has been made

A negative answer imposes the denial of the authorisation





Principles

- Not a Regulation : a Council Joint Action
- Intergovernmental cooperation instrument set up by the Treaty on European Union (EU Treaty) Not EU legislation

Role of the Court of Justice is limited

- To enter into force, it has to be **transposed by** Member States into their national legislations
- No **formal link** with the Dual-Use Regulation Negotiated and adopted at the same time Considered as "package deal"



Controlling exports of Technical Assistance

(a) "technical assistance" means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, training, transmission of working knowledge or skills or consulting services;

Controlling the movement of persons

(b) "technical assistance" includes oral forms of assistance; Other forms than these mentioned above ?



Related to export control regimes

Technical Assistance related to the "international export control regimes, bodies and treaties" has to be understood as the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group, Wassenaar Arrangement, Zangger Committee and the Chemical Weapons Convention.

WMD **and** certain military items (Munition list of the WA)



Transactions to be controlled

Two kinds of transactions:

where it is provided **outside** the European Community by a natural or legal person established in the European Community and is **intended**, or the **provider is aware** that it is intended, for use in connection with WMD

Drafted like a catch-all clause but it is not a catch all clause

Where it is related to *military end-uses* and is *provided* in countries of destination subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the OSCE or an arms embargo imposed by a binding resolution of the Security Council of the United Nations.



Exceptions

Article 2 does not apply to the "technical assistance":
(a) where it is provided in a country listed in Part 3 of Annex II to Regulation (EC) No 1334/2000: Australia, Canada, United States of America, Japan, Norway, New-Zealand, Switzerland
(b) where it takes the form of transfer of information that is "in the public domain" or "basic scientific research" as these terms are respectively defined in international export control regimes, bodies and

treaties; or



(c) where it is in **oral form** and **not related to items** required to be controlled by one or more of the international export control regimes, bodies and treaties.

> Not related to Annex I of the Dual-Use Regulation, direct reference to the lists established by international export control regimes



To conclude...

"Who wants to be consistent? The dullards and the doctrinaire, the tedious people who carry out their principles to the bitter end of action, to the reductio ad absurdum of practice. Not I" (Oscar Wilde)