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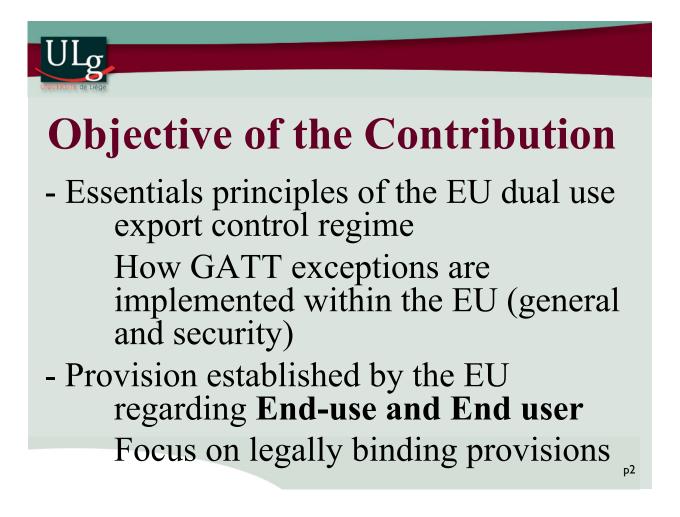


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The EU Dual-Use Export Control Regime: End-Use and End User Provisions Pr. Dr. Quentin MICHEL

Seminar on the Role of Technical Experts in the Assessment of Proliferation Risk Using End-Use End-User Analysis (20-21-22 January 2009) – JRC- Ispra







International Trade Principle

Principle : International trade exchanges should be flows as smoothly, predictably and freely as possible Within the guidelines defined by WTO (GATT agreement)

Derogation : Strictly defined and exceptional Based on

- Quota (steel, cereals, textiles)
- Health protection (food and mouth disease, influenza)
- Protection of cultural goods (national treasure)
- International Security (trade embargos) Chapter VII of the UN Charter





- (b) to prevent any contracting party from taking any action which it **considers necessary for the protection of its essential security interests**
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other **emergency** in international relations; or



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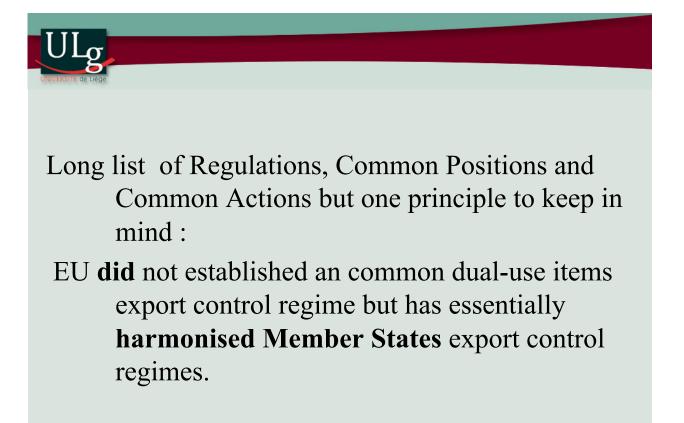
Presently we have :

Legally binding instruments

- Council Regulation 1334/2000 of 22 June 2000 setting up a **Community regime** for the **control of exports of dual-use items and technology.**
- List of Council Regulations adopting **restrictive measures** (embargos) against countries or non-states 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)





Origin of the EU Export Control Regime

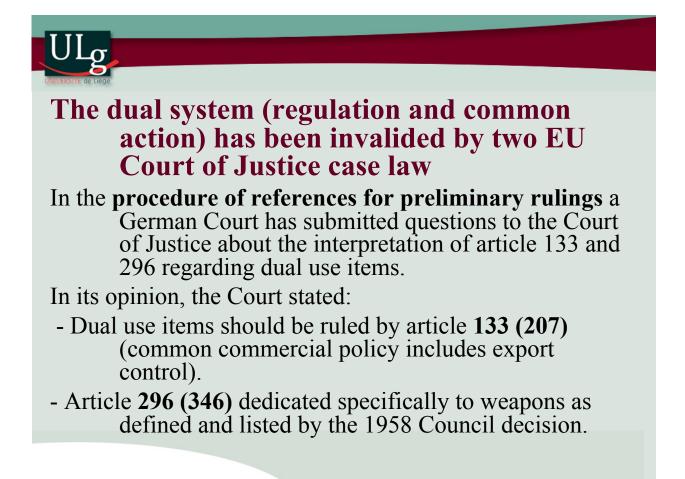
Consequences of the implementation of the single market (January 1993)

- Open de facto (if not de jure) free movement of dual use items within the EC
- Necessity to **harmonise** national export control regimes or adopt of a **single** export control regime
- No consensus between Member States to consider that dual use items should be regulated under 133 EC (207TFUE) (Common commercial policy)
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 - Qualified majority
- Dual use items are even falling under the exception of **article 296 EC (346TFUE)** (conventional weapons)

Member States have an exclusive competence to define restricting export control principles.

Adoption of an dual export control regime

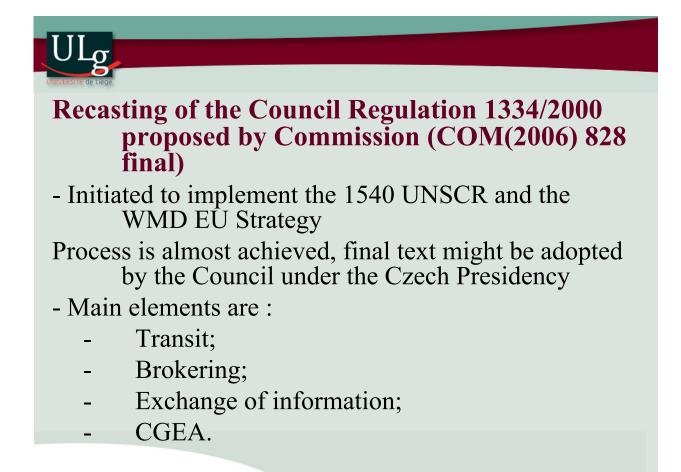
- Council Regulation 3381/94 defining the procedure and criteria
- Council Common Action 94/942/CFSP establishing the list of items and criteria
- Cross reference between the Council Regulation and Council Common Position





Adoption of one single regulation organising the export control of dual use items (Council Regulation 1334/2000)

- Take almost two years of negotiation
- Main issues were
 - Establishing **lists** of items to be controlled (internal and external trade)
 - Accepting the **principle** that dual use export control should be regulated under article 133
 - Definition of authorisation criteria
 - License territorial validity
 - Principle of EU authorisation
 - Catch all clause





Principles related to End-use, Enduser of the Dual-use Regulation 1334/2000 in regards of the Proposal presented by the Commission (COM (2006) 828 final) to amend the Regulation



End-User/End-Use Definition

- Terms are **not formally** defined by the Regulation.

Up to Member States to define it in conformity with their international commitments

- Terms appears in several provisions of the Regulation:

- Authorisation
- Conditions and criteria
- Catch-all clause
- Relevant information to be supply by the applicant
- Exchange of information
- Control Measures



I. Individual and global authorisations :

Article 2 (new) end-user is the key element of the definition:

- (h) "Individual export authorisation" shall mean an authorisation granted to one specific exporter for one end user or consignee in a third country and covering one or more dualuse items
- (j) "Global export authorisation" shall mean an authorisation granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users and/or in one or more specified third countries.

Available in all Members States **but not yet granted** by Bulgaria, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia



General authorisations

- Article 2 (new) did not refer to an end-use(r), only **country of end-use/destination (?)** is the key factor
- (i) "**Community General Export Authorisation**" shall mean an export authorisation for exports to certain countries of destination available to all exporters who respect its conditions of use as listed in Article 6(1) and Annex II.
- (k) "National general export authorisation" shall mean a national authorisation published in the official journal of a Member State which is valid for all exporters based in the Member State where it is published who meet the conditions set in the national law, covering one or several specified countries as well as a number of dual-use items defined in the national law and not subject to notifications under Article 9.



End-user could be considered by Member States Legislation implementing the CGEA or the NGA

Poland

General licences and the Community General Export Licence may be used by any natural or legal person who is able to provide relevant documentation to confirm the **use of the internal system of trade control and management for the past three years**, and who submits a statement to the trade control authority defining the intention and starting date of intended trade.

Czech Republic

Access to global export authorisation is not restricted. There is only specific condition that the applicant must prove that he is capable of **respecting the regime applicable to the export control** (e.g. checking the end use of individual supplies). If this condition is not met the exporter is entitled to submit an application for an individual export authorisation.

Belgium

Access to global authorisation is not restricted. Dedicated condition might be required on case by case by Regional Authorities.



II. Common conditions and criteria to issue or deny the authorisation

Article 8 (unchanged): In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services under this Regulation, the Member States shall take into account all relevant considerations including: [...]

(d) considerations about intended end-use and the risk of diversion.

Non-exhaustive list of **criteria** to be taken into consideration by Member States Authorities

The list is an "abstract" of conditions and criteria adopted by the **five international export control regime**.

Criteria : subjective elements to be considered by the supplier State, on a case-by-case analysis, to authorise or not the export authorisation.

No common understanding of the "end-use" criteria: up to Member States to implement and precise its content.



III. Catch-all clause and End-user/use :

- End use and partly end user are core elements of the catch-all clause mechanism
- Regulation includes **three catch-all clauses**, two are compulsory and one is optional for Member States Authorities (article 4 unchanged)
- Catch-all 1 : An authorisation shall be required for the export of dualuse items not listed in Annex I if the exporter has been informed by the competent authorities of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part, for use 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 or the development, production, maintenance or storage of missiles capable of delivering such weapons.



Catch-all clause implementation by Members States authorities:

Two possibilities to notify the decision to the exporters

- Catch-all notification equivalent to a **prohibition** to export
- Catch-all notification require the submission of an **authorisation** for a non listed items

Authorities will issue an denial or an authorisation

Consequence

If notification consists in a **prohibition** : risk of undercut : no denial no obligation to consult as require by article 9.5 If notification consists in an obligation to require an **authorisation** : a catch-all denial issues by one Member State will induce indirectly the mutation of a national catch-all clause provision into an EU 27 catch-all provision. ULg

Article 9.5 (unchanged) :

Before the competent authorities of a Member State, [...], grant an authorisation [...] they shall examine all valid denials or decisions to prohibit a transit issued by another Member State or States

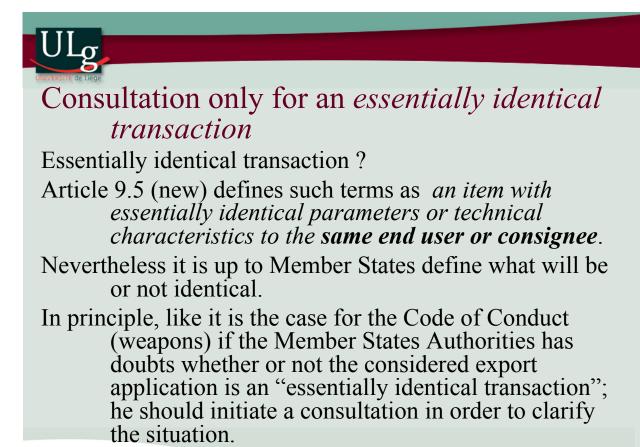
The Member State shall first consult the competent authorities of the Member State or States which issued such denial(s) or decisions to prohibit the transit.[...]

If following such consultation the competent authorities of the Member State decide to grant an authorisation or allow the transit, it shall **notify the competent authorities of the other Member States** and the Commission, providing all relevant information to explain the decision.

- Only consultation, **not a legally binding** prior consent mechanism

- **Might be politically binding** : no case of authorisation issued after a "negative" consultation of other Member State(s).

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Requirement to notify catch-all clause "prohibition":

Article 4.5 (unchanged) : A Member State which imposes an authorisation requirement, in application of paragraphs 1 to 5 [...], shall, where appropriate, inform the other Member States and the Commission. The other Member States shall give all due consideration to this information and shall inform their customs offices and other relevant national authorities

Consequence

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- Notification not done systematically only "where appropriate" Left to Member States to decide
- Information not necessarily transmitted to the concerned national authorities
- Difficult for Customs Authorities to implement : controlling only items coming from Member States who have issued such prohibition

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Catch	-all 2: If an exporter 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 paragraphs 1, 2 and 3, he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorisation within a period of time to be determined by national laws or practices.		
Responsibility to evaluate at the first stage the end use and the user lays			
	in the hand of the exporter.		
	After being informed the National Authorities might decide to submit such export to authorisation.		
''aware'	' should be understand as evidences based on information received directly or indirectly by the exporter that the items will not be used for its usual application but will contribute to the elaboration of a		
	weapons of mass destruction or military items listed in the Military		
	List. P24		



Catch-all 3: A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1.

The suspicion clause is **optional** and the following Member States have introduced such catch-all clause in their national export control regime:

> Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Luxembourg, Malta, Netherlands, Poland, Slovakia, Spain and United Kingdom.

In case of violation, authorities might face difficulties to prove the evidences



Consequence in case an authority of a Member State did not answer within a certain deadline to the exporter in the case of catch-all II and III

Germany : The exporter is obliged to await the decision of the authorities and that it would be an offence according to German Law if he fails to do so.

Exporter may be punished by a fine up to \in 500,000 if he "...intentionally or negligently ... contrary to Article 4 para. 4 second half-sentence, **exports** dual-use items without a decision by the responsible authority on the required authorisation or **without obtaining an authorisation** from the responsible authority".

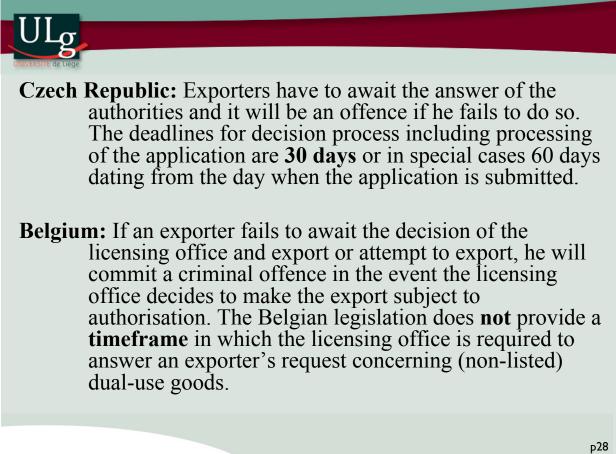


Moreover, this action also constitutes a criminal offence under certain circumstances. According to section 34 para 2 AWG

> "A prison sentence of up to five years or a fine shall be imposed on anyone who perpetrates with intent an act, which is likely to threaten

- 1. the external security of the Federal Republic of Germany,
- 2. the peaceful coexistence between nations or
- 3. the foreign relations of the Federal Republic of Germany".

Finland: Answer shall be given without *undue delay*. Upon request, the authority shall supply the exporter with an estimated time to issue a decision. (Finnish Administrative Procedure Act (434/2003, section 23).





IV. Information regarding end-use(r) to be submit when applying for an authorisation

Article 6 (unchange) : Exporters shall supply the competent authorities with all relevant information required for their applications for individual and global export authorisation so as to provide complete information to the national competent authorities in particular on the end-user, the country of destination, the end-uses of the items exported. The authorisation may be subject, if appropriate to an end-use statement.



Relevant information ?

All Member States required an End-User Certificate

- Best practice recommendations for elements of Community End-Use Certificates have been adopted by the Dual-use Council Working Group in November 2008.
- Such **non legally binding** recommendations will be published in the C series of the Official Journal of the European Union
- Contains information on parties, on items, on commitments to be certified by the foreign consignee who might act as end-user or as trader, whole or re-seller.
- The document is published as an End-user Certification "form" which could be implemented directly by Member States Authorities.

End-Use Certificate for (if issued by the government authority, a unique	
A. Parties	
1. Exporter (Name, Address and Contact Details)	4. Country of Final Destination
2. Consignee (Name, Address and Contact Details)	
3. End-User (if different from consignee)	

B. Items	
1. Items (detailed description of items)	2. Quantity (Units) / Weight
3. End-Use (Specific purpose for which the items will be used)	
4. Specification of the end-use location of the items	

e	
с. с	Certification of foreign consignee
	C.1. Consignee acts as end-user (for traders, whole- or re-sellers see section C.2. below)
Art.	6.2. of the Regulation EC 1334/2000 states that the granting of an export licence may be subject to
oblig	gation to provide an end-use statement.
We ((I) certify that the items described in Section B supplied by the exporter named in Section A 1:
1.	will only be used for the purposes described in Section B 3 and that the items or any replica there are intended for final use in the country named in Section A 4;
2.	that the items or any replica thereof will not be used in any nuclear explosive activity unsafeguarded nuclear fuel-cycle activity;
3.	that the items will not be used for any purpose connected with chemical or biological or nucle weapons, or missiles capable of delivering such weapons;
4.	that the items will only be used for civil end-uses (delete if not applicable);
5.	as far as technology is concerned, we (I) certify) that we (I) treat the technology strictly confident and neither pass the technology on to other companies nor shall we (I) make knowledge available third parties. In case of goods produced by the help of transferred technology, these goods will or be delivered to a third person/company on condition that this third person/company accepts t commitments of the above declaration as binding for itself and on condition that this this person/company is known to be trustworthy and reliable in the observance of such commitments.
6.	If required: We (I) further certify that we (I) will not re-export the items to third countries with

listed in Annex II of EC dual-use REG N° 1334/2000 do not require any consent of

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	C.2. Consignee acts as trader, whole- or re-seller (only to be completed if Section C.1. is not applicable / end-user cannot be determined yet)	
	Art. 6.2. of the Regulation EC 1334/2000 states that the granting of an export licence may be subject to an	
	obligation to provide an end-use statement.	
	We (I) certify that the items supplied by the exporter named in Section A 1, will only be delivered to	
	customers considered absolutely reliable by this company.	
	1. The customers shall declare unequivocally that the items described in Section B or any replica thereof	
	will not be used in any nuclear explosive activity or unsafeguarded nuclear fuel-cycle activity; that the	
	items will not be used for any purpose connected with chemical or biological or nuclear weapons, or	
	missiles capable of delivering such weapons.	
	2. The goods will only be delivered to a third person/company on condition that this third	
	2. The goods will only be derivered to a third person/company on condition that this third person/company accepts the commitments of the above declaration as binding for itself and on	
	condition that this third person/company is known to be trustworthy and reliable in the observance of	
	such commitments.	
	If required: The customer shall not re-export the goods to third countries without the consent of	
	the Re-exportations to EU-countries or countries listed in Annex II of EC Dual Use Reg	
	Nr. 1334/2000 do not require any consent of ".	
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Other Relevant documents

Request for additional documents varies tremendously among Member States

- Common understandings of the additional documents to be provided by the applicant have not be adopted but the overwhelming majority of Member States require:
- Submission of an export contract
- Technical specifications of the goods to be exported.
- Excerpt from the commercial register
- Delivery Verification Certificate or other official certification submitted by the exporter to its authorities, which confirms that the items have arrived in the country of destination.



V. Exchange of information

No formal constraint to exchange information between Member States Authorities excepted on denials

Article 15.2. has been **reviewed** to reinforce cooperation:

Member States shall take all appropriate measures to **establish direct cooperation and exchange of information** between competent authorities with a view to enhance the efficiency of the Community export control regime. Such information may include:

(a) Details of exporters deprived, by national sanctions, of the right to use the National General Export Authorisations or Community General Export Authorisations

(b) Data on sensitive end users, actors involved in suspicious procurement activities, where available, routes taken P36



Few instruments has been established to reinforce cooperation between members in particular to identify potential enduses:

- A **Pool of Experts** to assist Member States in identifying items under Annex I

List of national experts by categories (nuclear, biological, chemical) or by non proliferation regimes (Wassenaar Arrangement, MTCR) has been established available to support Member States Authorities without qualified expertise

- A secure and encrypted system for the exchange of information among Member States and the Commission should be set up

> Presently denials database is compiled by the Commission services and a new CD is regularly issued and distribute to Member States



VI. Control Measures

- 16.2 Exporters of dual-use items shall keep detailed registers or records of their exports, in accordance with the practice in force in the respective Member States. Such registers or records shall include in particular commercial documents such as invoices, manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified: [...]
 (d) where known, the end-use and end-user of the dual-use items.
- **Registers have to be kept for a minimum of three years** but some Members States have laid down a longer period
- The registers or records and the documents shall be kept for:
- Five years in Denmark, Finland, Poland, Slovenia, Spain and Sweden;
- Seven years, in the Netherlands and Austria;
- Ten years in Estonia.