The EU's New Dual-Use Regulation: Export Controls for a New Era

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With its revised Dual-Use Regulation, the European Union brings its export control regime for dual-use items up to date with recent political, economic and technological trends. It also makes important steps forward in encouraging harmonisation of national systems and cross-border cooperation on implementation and enforcement, while increasing the compliance and reporting obligations of businesses. The clear focus on cyber-surveillance technologies signals the EU's enduring concern for human rights as well as a greater willingness to use export controls as a tool of economic statecraft against a background of intensifying geopoliticisation of trade and technology.

Introduction

The EU's exports of military goods and dual-use goods are regulated according to two frameworks and two corresponding lists. The legal basis for the dual-use items regime is provided by Council Regulation (EC) 428/2009 ('Dual-Use Regulation') [1]. The regulation is accompanied by a common EU Control List of Dual-Use Items, which is regularly amended to reflect updates to relevant international regimes and export control arrangements as well as commercial and technological developments. The list was last amended in October 2020 [2]. The current Dual-Use Regulation is soon to be replaced by Regulation (EU) 2021/821 [3], which was adopted on 20 May 2021 and will enter into force on 9 September 2021. Regarding export controls for military items, the EU framework is provided by the EU Common Position on arms export control [4], last amended in September 2019, while the 'EU Common Military List' enumerates the items covered by the framework. As with dual-use items, the list is regularly updated, taking into account similar national and international lists, most recently in February 2020 [5].

Dual-use items and export controls

Dual-use items are goods, software and technology that have both civilian and military applications. In order to contribute to international peace and security and prevent the proliferation of Weapons of Mass Destruction (WMD) or serious violations of human rights, the EU and its member states control the export, transit, brokering and technical assistance of such items, by imposing authorisation (or 'license') requirements for all these activities. These export controls are in line with EU obligations under relevant international law, including UN Security Council Resolution 1540 on the non-proliferation of WMD to non-state actors, the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological Weapons Convention. They also reflect commitments under key multilateral export control regimes, which include the Australia Group [6], whose objective is the non-proliferation of chemical or biological weapons; the Wassenaar Arrangement, which seeks to enhance transparency in transfers of conventional arms and dual-use items [7]; the Nuclear Suppliers Group [8], whose members pursue the non-proliferation of nuclear weapons and the means to manufacture them; and the Missile Technology Control Regime [9], which aims to limit the proliferation of missiles and missile technology.

Within the EU, dual-use items may be traded freely, except for some particularly sensitive items (e.g., certain items of stealth, CBRN or missile technologies, explosives, cryptography software), whose transfer remains subject to prior authorisation by national competent authorities.

The EU export control regime

Dual-use goods and technology

The dual-use export control regime in the EU is governed, as already mentioned, by legislation at the EU level. The Dual-Use Regulation not only establishes a common EU list of dual-use items that require authorisation, but also outlines a common set of assessment criteria, common types of authorisations (Union general, national general, global or individual) [10], and common 'catch-all' provisions for end-use controls on non-listed items based on end-use or end-user criteria (e.g., if they may be intended for the development of WMD or for military use in a country under an arms embargo). Although the Regulation provides for common rules directly applicable throughout the EU, the responsibility for its implementation, including with respect to deciding on authorisations and enforcing legislation and penalties, lies with the member states. Furthermore, in addition to the controls established at the EU level, member states may introduce national measures in certain cases based on public security or human rights considerations. Dual-use exports may also be subject to restrictive measures (sanctions) imposed by the EU on specific countries.

Military goods and technology

Similar to the dual-use framework, the EU export control regime for military goods and technology is also governed at the EU level. In addition to establishing the Common Military List of items to be controlled, the Common Position outlines a set of 8 common risk assessment criteria for member states to apply when deciding on licensing, as well as a notification and consultation mechanism for denials and certain transparency provisions. The Common Position and the Military List both reflect member states' international commitments and obligations, including in the context of the Arms Trade Treaty, the Ottawa Convention on the prohibition of anti-personnel mines, and the Wassenaar Arrangement [11]. While it resembles the dual-use framework in its structure, the EU regime for military export controls is further geared towards preserving the sovereign prerogatives of member states, which retain exclusive competence over arms export controls in accordance with Article 346 TFEU. Its primary aim, therefore, is to encourage coordination and convergence among national policies. In particular, and despite the fact that the Common Position is legally binding, the interpretation and implementation of its provisions are fully up to the member states, while there is no mechanism to verify or enforce their compliance and no provision for standardised reporting.

The new Dual-Use Regulation

In what constitutes a significant reform of the EU dual-use export control regime, driven by the need to keep pace with rapidly evolving technological, economic and political circumstances, the new Dual-Use Regulation is scheduled to enter into force on 9 September 2021. The new Regulation aims to address the risks posed by cyber-surveillance and other new technologies to international security and human rights, improve the harmonisation of national legislation, reinforce cooperation among national competent authorities, strengthen compliance obligations for businesses, and decrease administrative burdens. To that end, it introduces a number of important new provisions.

Enhanced controls, cooperation and transparency around cyber-surveillance items

Perhaps the most important feature is the strong focus on cyber-surveillance and human rights. In particular, the new Dual-Use Regulation imposes a 'catch-all' prohibition of unlicensed exports of all cyber-surveillance goods and technology that are not already on the dual-use list and could be used for internal repression or human rights violations, while member states are also allowed to impose their own additional controls. Furthermore, an EU-level coordination mechanism is introduced, to facilitate the exchange of information among member states concerning the licensing of such items.

New Union General Export Authorizations

The new Dual-Use Regulation adds two new Union General Export Authorisations, to ease the authorisation process for intra-group transfers – that is, from a parent company to its subsidiaries or between two subsidiaries of the same company – of software and technology to certain destinations under specified conditions, as well as for exports of cryptographic items to all but a few countries (China is notably excluded from both authorisations).

"Transmissible" Controls

The new Dual-Use Regulation introduces a provision on so-called "transmissible controls". This allows export licensing authorities of a member state to impose new national export controls on items not already on the EU dual-use list on the basis of national measures established by another member state for public security or human rights considerations.

Internal Compliance Programme obligations

The new Dual-Use Regulation enhances the compliance and reporting obligations of businesses. It requires all relevant stakeholders to introduce an 'Internal Compliance Programme' (ICP), which includes specific policies and procedures, such as due diligence measures, record-keeping and registers, in order to facilitate compliance with the Regulation and obtain global export authorizations.

Technical Assistance and Brokering

The new Dual-Use Regulation harmonises the rules concerning technical assistance, which are currently regulated at the national level. It introduces controls related to all listed dual-use items if intended specific military uses, which member states can also apply to non-listed items. Moreover, in a first for the EU, the scope of the relevant provisions extends to technical assistance delivered to non-EU nationals temporarily present within the EU, effectively creating a 'deemed export' control similar to the respective US legislation. In the same vein, the Regulation broadens the definition of 'broker' – that is, a natural or legal person that purchases, sells, or negotiates or arranges the purchase, sale or transfer of dual-use items between two third countries – to cover entities not resident or established in the EU that provide brokering services from its customs territory.

Enhanced cooperation on implementation and enforcement

The new Dual-Use Regulation provides for enhanced information exchange between national competent authorities and the Commission with a view to supporting effective and consistent application of controls. It foresees the creation of a secure system for information exchange, which is to be connected with

member stations' electronic licensing systems, and the establishment of a Dual-Use Coordination Group to monitor the implementation of the Regulation, as well as of an Enforcement Coordination Mechanism to support information exchange and cooperation between national competent authorities and enforcement agencies.

Enhanced reporting rules

The new Dual-Use Regulation introduces new public reporting rules aimed at increasing transparency on the export of dual-use items. In particular, the Commission is required to annually present a public report which will include, inter alia, information on authorisations, denials and prohibitions under the Regulation, as well as on the enforcement of controls. Concerning cyber-surveillance items in particular, the report will include dedicated information including the number of applications received by item, the issuing member state and the destinations concerned, as well as whether the applications were granted or not.

Comparison with the US export control regime

The US export control regime shares with that of the EU the goal of balancing national security and export competitiveness. In terms of basic structure, the US regime is based on three sets of legislations and respective item lists, in contrast to the EU's two. Control of dual-use items is governed by the 2018 Export Control Reform Act (ECA) [12] and the International Emergency Economic Powers Act (IEEPA) [13], which are implemented according to Export Administration Regulations (EAR) [14]. Responsibility for implementing US export controls spans several different licensing and enforcement agencies: The Department of Commerce's Bureau of Industry and Security (DOC/BIS) regulates and licenses exports of dual-use goods and technologies and some defence articles, based on nine categories of dual-use technologies described on the Commerce Control List (CCL) [15]. The Department of State regulates and licenses exports of munitions based on the Arms Export Control Act (AECA) [16], the International Traffic in Arms Regulations (ITAR) [17], and the US Munitions List (USML) [18]. Export and licensing of nuclear-related items is governed by the Atomic Energy Act [19] and implemented by the Export and Import of Nuclear Material and Equipment [20] and the Assistance to Foreign Atomic Energy Activities [21] regulations [22]. Finally, the Department of the Treasury administers restrictions on exports based on US sanctions. Administrative enforcement of export controls is conducted by the governing agency, while criminal penalties are issued by units of the Departments of Homeland Security and Justice [23]. Although the US system appears to be more diffuse, a comparison between the US and the EU systems must take into account the fact that the EU regulations overlay a diverse set of national export control systems that can be as complex as the US one.

With respect to dual-use export controls, the two regimes have similar scopes, covering export, transfer, transit, brokering and technical assistance of controlled items. However, unlike the EU, the US regime also covers the activities of US persons relating to specific items even if located outside US jurisdiction. Furthermore, both regimes control items for reasons of national security and foreign policy and do so on the basis of the major multilateral frameworks and unilateral policy, including for reasons of international peace and security and against countries that are subject to unilateral economic sanctions. Important differences here include that the US regime authorises export controls for reasons of short supply, a provision that is absent from EU legislation, as well as tighter US export controls on 'hot section technology' (related to civilian aircraft) to all destinations except Canada.

As regards the dual-use items covered by the export controls, the EU and US lists are very similar. They are structured around the same categories and functional groups, reflecting US and EU coordination of

export control lists at the major multilateral frameworks (NSG, WA, AG, MTCR) as well as include catch-all clauses for non-listed items based on end-use and end-user (e.g., with a presumption of export denial if the non-listed item is destined for a military end use or an entity known to be engaged in weapons proliferation). A notable difference here is that the CCL explicitly enumerates not only controlled items, but also foreign persons and end-uses that threaten US national security and foreign policy goals. Finally, in a parallel to the EU's efforts to address the risks posed by cyber-surveillance and other new technologies to international security and human rights, ECRA requires the US Government to identify and establish export controls on "emerging and foundational technologies that are essential to US national security" that are not governed by existing regulations (e.g., AI and machine learning, biotechnology, robotics). The Department of Commerce is currently leading an interagency and stakeholder-outreach process to comply with this requirement.

The UK's export control regime

The UK's export control regime is based on three sets of legislation and respective item lists. The UK has retained in its national law the EU's 2009 Dual-Use Regulation and its associated list as the basis of the dual-use export control regime for Great Britain [24]. As such, it is no surprise that the UK and EU dual-use export control regimes largely overlap in terms of strategic rationale, scope and substance. With respect to military goods, export controls are based on the Export Control Order 2008 [25], which includes the UK Military List and the UK Dual-Use Control List [26] – the latter complementing the list accompanying the 2009 EU Regulation as retained in UK law [27]. Responsibility for administering the UK's system of both military and dual-use export controls and licensing lies with the Department for International Trade's Export Control Joint Unit. The revision of the EU and US export control regimes may have some limited impact on the UK's regime. The emergence of substantial differences in approach is unlikely, given that the Dual-Use Regulation is still largely the product of international frameworks in which the UK continues to participate. Nevertheless, the UK has demonstrated readiness to chart its own distinctive approach to trade controls, exemplified by its unilateral global human rights-related sanctions regime [28]. As London seeks to pivot towards a stronger global posture, it is foreseeable that it will seek to update its export control regime to take into account technological developments and perhaps align more closely with that of the United States.

International trends in export controls

The reform of the EU's dual-use export control regime should be understood in the context of broader international trends in the field. The newly introduced provisions on cyber-surveillance not only reinforce the EU's toolkit for supporting human rights globally, but also signal an important shift in the Union's overarching approach to export controls and its trade policy instruments more broadly. In particular, whereas the 2009 Regulation largely represented a compilation of provisions from relevant international regimes, the revised Regulation's strong focus on cyber-surveillance represents a unilateral step beyond that internationally agreed scope. This move has potentially far-reaching implications given the EU's geopolitical ambitions and the importance of new technologies and their supply chains in the context of intensifying international competition.

Against that background, dual-use export controls are increasingly being used as instruments of economic statecraft. Exemplifying this trend, the US has put in place over the past few years an extensive set of export control restrictions, including a strong extra-territorial dimension, aimed at restricting the transfer of emerging technologies to China and has called on its allies to follow its lead [29]. Importantly, the regime has a strong extra-territorial dimension – for instance, the Foreign-Produced Direct Product Rule

was amended in August 2020 to prevent any company from selling without a license to Huawei any product made anywhere in the world with US technology [30]. The US measures have had a significant impact, seriously damaging the operations of telecommunications companies ZTE and Huawei and leading to the collapse in 2019 of China's then leading memory-chip maker Fujian Jinhua [31]. Several other major Chinese companies, such as SMIC (semiconductors), DJI (civilian drones) and Hikvision (surveillance systems), have since been added to the Department of Commerce's CCL. In March 2021, the US also implemented broad-based export control restrictions on the provision of military and dual-use items to Russia, through the suspension of certain license exceptions for transactions involving items controlled for national security reasons [32].

In what is widely seen as a reaction to US moves, China recently overhauled its own export control regime. Its new Export Control Law, which entered into force in 2020, includes provisions that furnish the legal basis for Beijing to take 'reciprocal measures' against "any country or region whose abuse of export control measures endangers the national security and interests of China". It is also explicitly extra-territorial in scope, in that it expressly applies to individuals and organizations outside the territory of China that violate its requirements, endangers China's national security interests or interferes with its international obligations. The new law is complemented by a blacklist of importers and end-users, as well as a List of Unreliable Entities, first developed in 2019, under which listed entities can be restricted or altogether prevented from trading with or investing in China [33]. While Beijing has still to make use of these instruments, their very development indicates increased readiness to respond to US export controls in a more active way. US trade restrictions have already led many Chinese firms to seek alternative suppliers or develop the necessary technologies themselves. This has galvanised a united domestic front in favour of economic and technological self-sufficiency, deepening the two countries' economic and technological decoupling [34]. As the Sino-American rivalry hardens, China's new export control regime likely presages further geopolitically driven export control decisions by both sides.

Conclusions

The EU's revised Dual-Use Regulations represents a significant reform of its dual-use export control regime, which will enable the Union to keep pace with the rapidly evolving technological, economic and political landscape. It features a number of important provisions that mark important steps forward in encouraging the harmonisation of disparate national export control regimes as well as cross-border cooperation on implementation and enforcement across the Union's territory. The clear focus on cyber-surveillance technologies signals the EU's enduring concern for the promotion and protection of human rights, but also a greater readiness to use export controls to assert its own values and interests against a backdrop of intensifying international competition over both influence and values, as well as the weaponisation of export controls for geopolitical purposes. In a similar vein, the EU could explore the use of export controls as an instrument for hindering certain actors' propensity to develop fully autonomous weapon systems, if their preference for a binding international treaty to that effect fails (as is likely) to materialise [35].

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Notes

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

[2] European Commission. 2020. Delegated Regulation (EU) 2020/1749 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, 7 October.

[3] European Parliament and Council of the EU. 2021. Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), 20 May.

[4] Council of the EU. 2008. Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, 8 December.

[5] Council of the EU. 2020. Common Military List of the European Union, 2020/C 85/01, 17 February.

[6] The Australia Group, https://www.dfat.gov.au/publications/minisite/theaustraliagroupnet/site/en/index.html

[7] The Wassenaar Arrangement, https://www.wassenaar.org

[8] The Nuclear Suppliers Group, https://nuclearsuppliersgroup.org/en

[9] The Missile Technology Control Regime, https://mtcr.info

[10] Union General Export Authorisations allow exports of dual-use items to certain destinations under certain conditions; National General Export Authorisations can be issued by member states as long as they are consistent with existing Union General Export Authorisations; Global licences can be granted to one exporter and cover multiple items to multiple countries of destination or end users; and Individual licenses can be granted to one exporter and cover exports of one or more dual-use items to one end-user or consignee in a third country.

[11] Other relevant treaties and agreements include the Biological and Toxin Weapons Convention, the Chemical Weapons Convention, the Australia Group, the Nuclear Non-Proliferation Treaty, the Nuclear Suppliers Group, the Zangger Committee on nuclear-related strategic goods, the Missile Technology Control Regime, and the Hague Code of Conduct against Ballistic Missile Proliferation.

[12] US Congress. 2018. Export Controls Act, P.L. 115-232, Subtitle B, Part I, 13 August.

[13] US Congress. 1977. International Emergency Economic Powers Act, P.L. 95-223, 28 December.

[14] Bureau of Industry and Security. Export Administration Regulations Files, https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear

[15] Bureau of Industry and Security, Commerce Control List, https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl

[16] US Congress. 1976. Arms Export Control Act, P.L. 90-629, 30 June 30.

[17] 22 CFR § 120-130 - International Traffic in Arms Regulations, https://ecfr.federalregister.gov/current/title-22/chapter-I/subchapter-M

[18] 22 CFR § 121.1 - The United States Munitions List, https://ecfr.federalregister.gov/current/title-22/chapter-I/subchapter-M/part-121

[19] US Congress. 1954. Atomic Energy Act, P.L. 83-703, 30 August.

[20] 10 CFR § 110 - Export and Import of Nuclear Equipment and Material, https://ecfr.federalregister.gov/current/title-10/chapter-I/part-110

[21] 10 CFR § 810 - Assistance to Foreign Atomic Energy Activities, https://ecfr.federalregister.gov/current/title-10/chapter-III/part-810

[22] The items covered by these regulations are found in the List of Nuclear Facilities and Equipment (10 CFR § 110.8) and the List of Nuclear Materials (10 CFR § 110.9), the Nuclear Referral List (part of the CCL), the USML and the Activities Requiring Specific Authorization (10 CFR § 810.7). The administration of nuclear-related items is diffused among the Nuclear regulatory Commission, the State Department, the Department of Commerce and the Department of Energy.

[23] Congressional Research Service. 2020. The U.S. Export Control System and the Export Control Reform Initiative, 28 January, https://crsreports.congress.gov/product/pdf/R/R41916

[24] UK Parliament. 2019. The Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations, SI 2019/771, 1 April. Under the Northern Ireland Protocol, export controls from Northern Ireland continue to be governed directly by EU legislation and licensing requirements (that is, the updated Dual-Use regulation as from September 2021

[25] UK Parliament. 2008. The Export Control Order, SI 2008/3231, 15 December.

[26] ___. The Export Control Order - Military Goods, Software and Technology, SI 2008/3231, Schedule 2; The Export Control Order - UK Controlled Dual-Use Goods Software and Technology, SI 2008/323, Schedule 3.

[27] The export and licensing of nuclear-related items is governed by the Export of Radioactive Sources (Control) Order 2006 (SI 2006/1846) and the accompanying UK Radioactive Sources List.

[28] UK Parliament 2020. The Global Human Rights Sanctions Regulations, SI 2020/680, 5 July.

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[32] Bureau of Industry and Security. 2021. Russia: Implementation of Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act) Sanctions, 15 CFR Parts 740 and 742, 18 March.

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