Client Alert: EU Dual-use Regime

Introduction

Dual-use items are goods, software and technology that can have both civilian and military applications. The European Union controls the export, brokering and transit of dual-use items to third countries, as well as intra-EU movements of highly sensitive dual-use items. The dual-use regime aims to prevent the proliferation of nuclear, chemical, and biological weapons, as well as circumvention of conventional arms controls and is guided by multilateral initiatives on export control, such as the Australia Group, the Wassenaar Arrangement, the Nuclear Suppliers Group and the Missile Technology Control Regime. This VBB Insight sets out the key obligations under the dual-use framework and outlines the anticipated reform of the EU dual-use regime.

What goods, software and technology fall under the EU dual-use regime?

Regulation (EC) No 428/2009 (***Dual-use Regulation***) governs trade in goods, software and technology that qualify as dual-use items. There are three ways to establish whether a good, software, or technology qualifies as a controlled dual-use item under the Dual-use Regulation:

- Goods, software or technology that are listed in Annex I to the Dual-use Regulation (***dual-use list***). The European Commission issues an indicative correlation table that lists CN codes of controlled items. The dual-use list is updated annually. Updates also take into account developments in multilateral cooperation on export control. The 2020 update will be adopted in late October 2020. It will add surveillance software, following the amended Wassenaar Arrangement Control List.
- Goods, software or technology that are not listed in the dual-use list (***unlisted items***) but can be used in connection with nuclear, biological or chemical weapons and related missile technology, for military end-use in a country under embargo, or for use related to military goods that were previously exported from the Union without the required authorisation may also require authorisation. This "catch-all" clause allows the authorities of a Member State to control the export of an unlisted item if they suspect this item may be intended for one of the aforementioned uses. The exception also applies if the exporter is aware of such uses, in which case he or she must inform the authorities.
- Goods, software or technology that are not listed in the dual-use list and do not fall under the catch-all exception may still be subject to an export ban or require an export authorisation if they are determined by a Member State to pose risks in terms of public security or human rights violations.

When is an authorisation needed?

The Regulation identifies three groups of transactions involving dual-use items that require authorisation (controlled transactions):

- Exports and re-exports of dual-use items, including the transmission of controlled software and technology by telephone or electronic means, from the EU to a third country.

- Brokering services provided by a broker established in the EU and directed at the sale or purchase of dual-use items in a third country for transfer to another third country, or the negotiation or arrangement of sales, purchases or the supply of dual-use items from one third country to another.
- Transit of dual-use goods, meaning the transport of non-Union dual-use items passing through the EU customs territory and destined for a third country, if the end-use of the transiting items falls within one of the uses specified in the catch-all provision.

Intra-EU transfers of dual-use items require authorisation if it concerns highly sensitive items listed in Annex IV of the Dual-use Regulation. Member States may also choose to require an authorisation for transfers of other dual-use items within the EU if the final destination of those items is a third country.

How to obtain an authorisation?

Exporters, brokers or transferors who intend to make a controlled transaction must apply for an authorisation, which takes the form of a government-issued license. The authorities of the EU Member State where they are established are responsible for applying and enforcing dual-use controls. The authorities issue authorisations for controlled transactions, decide whether to control unlisted items under the catch-all provision and may subject a given transaction to conditions, including the provision of end-use(r) statements. The important role of the Member States under the Dual-use Regulation means that dual-use controls may be applied differently across the EU. Traders are thus advised to remain aware of the practice of the relevant national authorities.

How will the EU dual-use regime be reformed?

The Dual-use Regulation is currently under review and an amendment is expected in late 2020. The Commission has proposed to expand the scope catch-all clause, to allow Member States to control the export of unlisted items that may be used in connection with human rights violations and cybersurveillance. Yet, several Member States and industry associations oppose this proposal, arguing it may be too restrictive. The amended Regulation may also introduce controls on the provision of technical assistance such as training, knowledge transfer or consulting services related to exports of dual-use items supplied from the EU to a third country. Information sharing between EU Member State authorities and transparency of decision making is also expected to improve.

Ensuring compliance with dual-use controls can be challenging. The Commission recently published a non-binding model internal compliance program (*ICP*) that offers procedures to ensure compliance and covers risk assessment, screening strategies, record keeping, and informational security. It is expected that dual-use reform will lead to stricter compliance obligations and that parts of the model ICP may become mandatory. Compliance is further aided by maintaining good contacts with the authorities of relevant Member States, who may issue additional guidance on compliance and the interpretation of certain provisions.

Van Bael & Bellis has a well-established export control and sanctions practice, advising a wide range of international clients, including individuals, corporations and governments. Our team assists clients at every step of the compliance process, regardless of the type of transaction or item, the type of end-use (military, dual-use, nuclear or otherwise), or the intended country of destination (intra or extra-EU). The firm's team

also regularly represents clients in challenging restrictive measures and sanctions before national and international courts, including the CJEU and the WTO dispute settlement bodies.

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