

Client Alert: EU publishes proposed amendments to the Dual-use Regulation

On 10 November 2020, the European Council and the European Parliament agreed on the text of a long-awaited amendment to [Regulation 428/2009](#) setting up an EU regime for the control of exports, transfer, brokering and transit of dual-use items ("**Dual-use Regulation**"). The [proposal](#) widens the scope of the EU dual-use control regime to cover cyber-surveillance technology and the supply of technical services related to dual-use items. Changes also include new conditions to obtain an export authorisation and the introduction of national control lists. This Client Alert sets out the proposal's key points.

1. CATCH-ALL CONTROL FOR CYBER SURVEILLANCE TECHNOLOGY

As expected, the Council and Parliament have agreed to expand the scope of the Dual-use Regulation to cover cyber-surveillance items ("**CSIs**"), meaning "dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems". The proposal notes that items used for purely commercial applications including billing, marketing, and network security, are not intended to fall under this definition.

Today, Annex I to the Dual-use Regulation, which lists dual-use items that require an export authorisation, already lists several CSIs. However, the proposal introduces a "catch-all" control provision, enabling licensing authorities of the EU Member States to require an authorisation to export a CSI that is not listed in Annex I, if the item is or may be intended for use in connection with internal repression and/or the commission of serious violations of international human rights and international humanitarian law.

Notably, the dedicated catch-all for CSIs will be separate from the catch-all provision for unlisted dual-use items in general, which will be retained from the currently applicable Regulation. Consequently, licensing authorities of the EU Member States will not be able to require an authorisation for unlisted dual-use items other than CSIs out of concern for the former's use related to human rights violations or internal repression. Conversely, unlisted CSIs will also be controlled under the general catch-all provision.

The proposed catch-all provision for CSIs will require exporters to exercise due diligence and notify the licensing authority of the EU Member State from where he intends to export the items if they are aware of the fact that the items are intended for use in connection with internal repression or serious violations of human rights and international humanitarian law. The EU Member States may set a stricter standard, requiring exporters to notify the licensing authorities of the Member State once they have ground to suspect that the items are or may be intended for such uses. However, the authorities must not wait for a notification before deciding to require an authorisation. The proposal requires exporters to apply for an authorisation as soon as the competent licensing authority informs them that the items are or may be intended for an unauthorised use described in the catch-all provision.

The proposal also includes a procedure to ensure that the catch-all provision for CSIs is uniformly applied. If an EU Member State requires an authorisation under this provision, it must notify the Commission and the other Member States, who then have 30 days to inform the notifying Member State that they consider that an authorisation should be required for all similar transactions. If all EU Member States so notify, a

description of those transactions will be published in the Official Journal of the European Union so that these may be uniformly controlled under the CSI catch-all provision, on a Union-wide basis.

2. TECHNICAL ASSISTANCE

Currently, the European Union controls the export, transit and brokerage of dual-use items. The proposal adds to this list the supply of “technical assistance” related to dual-use items, covering “technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service” in the form of “instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance.”

However, the supply of technical assistance may only be controlled if the relevant service is supplied by:

- any legal or natural person, regardless of where that person is established, from the territory of the Union to an entity based in a third country (e.g. providing advice on the development of nuclear weapons in a third country through online communications from a Member State);
- an EU-established person, in the territory of a third country (e.g. sending a technician to a third country to assist with maintenance of missiles that may be used to carry nuclear warheads); or
- an EU-established person, to residents of third countries who are temporarily present in the Union customs territory (e.g. training third country citizens to assemble a listed item that may be incorporated into military goods listed in the military list of a Member State).

Additionally, the licensing authority of an EU Member State may only require an authorisation for the supply of technical assistance if it relates to a dual-use item that is listed in Annex I and that is or may be intended for one of the uses described in the general catch-all provision. These are:

- use in connection with chemical, biological or nuclear weapons, and related missile technology;
- military end-use if the buyer country or country of destination is subject to an arms embargo; and
- use as parts or components of military items that have been exported from the territory of any Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State.

The supplier of technical assistance must notify the competent licensing authority if it is aware of the fact that the item for which it intends to supply technical assistance, is intended for one of those uses.

The EU Member States may choose to also control technical assistance relating to unlisted dual-use items and to require the supplier to notify the licensing authorities once it has grounds to suspect that the items are or may be intended for one of the uses described in the general catch-all provision. The proposal excludes certain types of assistance from the authorisation requirement, including the supply of technical assistance to the armed forces of the EU Member States overseas and the transmission of information in the public domain.

3. REVISED EXPORT AUTHORISATIONS

The proposal also revises the conditions to obtain certain types of export authorisation. Exporters who apply for an individual export authorisation, which allows exporting one or more dual-use items to one end user or consignee in a third country, will always be required to provide an end-user statement. Exporters applying for a global export authorisation, allowing the export of a type or category of dual-use items to one or more specified end users and/or in one or more specified third countries, will have to implement an internal compliance program and may also need to provide an end-user statement.

The standard period of validity for individual and global export authorisations will be reduced to two years. However, the proposal introduces the notion of a large project authorisation. This is an individual or global export authorisation that allows exporting a type or category of dual-use items to one or more specified end users in one or more specified third countries for the purpose of a specified large-scale project. A large project authorisation will be valid for the duration of the project, up to four years.

In addition, the proposal adds four Union general authorisations, which allow, under certain conditions, exports of specified controlled items to specified destinations without the need to apply to the competent licensing authority for an individual authorisation. There are four new Union general authorisations, including one for low value consignments (<5000 EUR) and another for the transmission of software and technology from EU-established persons to wholly owned subsidiaries and to sister companies directly and wholly owned by the same parent company.

4. NATIONAL CONTROL LIST

The amended Regulation will allow Member States to prohibit or control the export of dual-use items that are not listed in Annex I, for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations. National control lists must be notified to the Commission and other EU Member States, who must require an export authorisation for items exported from their territory if that item is included in the national control list of another EU Member State. National control measures will therefore have a Union-wide effect.

5. CONCLUSION

The proposal is a major overhaul of the EU dual-use regime. With the introduction of controls of exports of CSIs and the addition of the supply of technical assistance, dual-use controls are set to cover a larger part of EU exports of technology and the cross-border supply of knowledge. The European Union will also be able to consider the use of certain items for internal repression or committing human rights violations as a reason to restrict their export. In doing so, the proposal shifts the focus of EU dual-use controls from a tool designed to combat the proliferation of nuclear, biological, and chemical weapons to an instrument that can serve the European Union's wider policy objectives in line with its new "strategic autonomy" policy.

The amended Dual-use Regulation will require exporters of dual-use items, as well as providers of related services to review their compliance procedures. The proposal's broad scope and the severe penalties that enforce its application ensure an important role for official guidance, capacity building, and the publication

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of an updated model internal compliance program that may clarify the extent of the exporter's due diligence duty. The updated Regulation is expected to enter into force in early 2021.

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