

Reforms to the EU and UK Export Controls Regimes

Export Control Coordinators Organization Conference

Sunwinder Mann (Associate)

Baker & McKenzie LLP, Washington DC/London

(sunny.mann@bakernet.com; +1 202 452 7066)

28 June 2007

Historical development in the EU

- Until 1995: controls at national level only
- Since July 1995: first regime at EU level because export controls fall within EU's exclusive competence:
 - Regulation 3381/94
 - Decision 94/942/CFSP
- Since September 2000: Regulation 1334/2000
- December 2006: significant reforms proposed

The EU export controls regime

- Regulation 1334/2000 (as amended) – applies directly in all 27 EU Member States (most recent accessions: Bulgaria and Romania)
- EU-wide rules (including establishment of common dual-use list)
- Military items dealt with under separate national regimes, but with some degree of coordination at EU level:
 - Common Military List
 - EU Code of Conduct on Arms Exports
 - Common Position on Control of Arms Brokering
- National implementation by EU Member States, particularly in respect of licensing and enforcement

Exports of EU dual-use items

- EU control list in Annex I of EC Regulation
- Only exports to outside EU caught (apart from limited exceptions) and require export licence
- Licence required for intra-EU transfer of most sensitive items in Annex IV
- Generally does not apply to items simply passing through the territory of the EU (transit rules)

WMD end-use / “Catch-all” clause

- WMD end-use: chemical, biological or nuclear weapons and related missile delivery systems
- Any items (even if not on Annex I) may also require export licence if exporter
 - is aware OR
 - has been informed by authorities OR
 - has grounds for suspecting (optional control) that item is or may be intended for a WMD end-use

Military end-use

- Although the EC Regulation does not strictly apply to military goods, it catches exports of any items not listed in Annex I if exporter:

- is aware OR
- has been informed by authorities

that item is or may be intended for “military end – use” in countries under an arms embargo agreed by EU, OSCE or UN

Licensing and enforcement issues

- The EU does not issue export licences (other than CGEA covering exports to 7 “friendly countries” including US)
- Member States may grant or refuse an export licence (other than CGEA)
- Enforcement, prosecution and penalties are left to Member States
- Penalties must be proportionate, dissuasive and effective – generally a mixture of criminal and administrative

US controls v. EU controls comparison

- Differences between EU and US systems
 - More unilateral listings in US control list
 - No deemed export rules in EU
 - No re-export rules in EU
 - US extraterritorial rules
 - Greater enforcement in US and more innovative enforcement (e.g. denial of export privileges)
 - No concept of dealing in illegally exported items

UK Legislation

- Export Control Act 2002 – framework statute
- Secondary Legislation:
 - Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (“EGTACO”)
 - Trade in Goods (Control) Order 2003 (“TGCO”)
 - Trade in Controlled Goods (Embargoed Destinations) Order 2004 (“TCGEDO”)
 - Export of Radioactive Sources (Control) Order 2006

What does EGTACO provide for?

- Implementation and enforcement of EU controls on dual-use exports
- Additional UK controls on dual-use exports
- Controls on military exports
- WMD end-use catch-all controls

Controls on exports of UK military goods and technology

- List of controlled military goods set out at Schedule 1 to EGTACO
- Exports to outside the UK (including to other EU states) require a licence

TGCO

- Controlled goods – Military, paramilitary and security goods (essentially anything on UK Military List apart from “restricted goods”)
- Restricted goods – Long range missiles and torture equipment
- Related software and technology not included

Controlled goods

- Licence required if person in UK:
 - Arranges transfer between 2 overseas countries
 - Acquires or disposes (or agrees to acquire or dispose) where may result in transfer between 2 overseas countries
 - Any act (or agreeing to do any act) in return for a fee/consideration calculated to promote arrangement or negotiation of contract resulting in transfer between 2 overseas countries
- Not caught if sole involvement:
 - Transport, finance, insurance, general advertising or promotional services

Restricted goods

- Licence required if
 - Supply or deliver (or agree to supply or deliver)
 - Do any act calculated to promote supply or delivery of restricted goods between 2 overseas countries
- Applies to persons in UK and UK persons anywhere
- No exemption for transport, insurance (etc.) services

TCGEDO – UK embargoes

- Prohibits “trafficking and brokering” activities of all UK Military List items in relation to embargoed destinations
- Not including software and technology
- Armenia, Azerbaijan, Burma, Congo, Iran, Ivory Coast, Lebanon, North Korea, Sudan, Uzbekistan and Zimbabwe

EU sanctions – whom do they apply to?

- Within the territory of EU
- Aircraft or other vessels under jurisdiction of an EU Member State
- A national of any Member State wherever located
- Any legal person, group or entity which is incorporated or constituted under the law of a Member State (*Any legal person, entity or body which is incorporated or constituted under the law of a Member State*)
- Any legal person, group or entity doing business within the Community (*Any legal person, entity or body in respect of any business done in whole or in part within the Community*)

EU sanctions – what do they cover?

- Preferred types of sanctions at EU level:
 - freeze of funds and economic resources
 - prohibition on making funds and economic resources available
 - prohibition on granting credit or purchasing shares
 - prohibition on selling arms and related material
 - prohibition on providing arms related financing and/or technical advice or assistance
 - visa/travel ban
- Prohibition covers direct and indirect measures
- Very rare to have complete prohibition on trade with specific country (cf. Iraq)

EU economic sanctions against third countries and groups

Country	Freeze of funds and economic resources	Ban on making funds or resources available	Ban on grant of credit or purchase of shares
Belarus	<input type="checkbox"/>	<input type="checkbox"/>	
Burma / Myanmar	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DR Congo	<input type="checkbox"/>	<input type="checkbox"/>	
Croatia	<input type="checkbox"/>	<input type="checkbox"/>	
Iraq	<input type="checkbox"/>	<input type="checkbox"/>	
Ivory Coast	<input type="checkbox"/>	<input type="checkbox"/>	
Lebanon	<input type="checkbox"/>	<input type="checkbox"/>	
Liberia	<input type="checkbox"/>	<input type="checkbox"/>	
Iran	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
North Korea	<input type="checkbox"/>	<input type="checkbox"/>	
Sudan	<input type="checkbox"/>	<input type="checkbox"/>	
Serbia	<input type="checkbox"/>	<input type="checkbox"/>	
Syria	<input type="checkbox"/>	<input type="checkbox"/>	
Zimbabwe	<input type="checkbox"/>	<input type="checkbox"/>	
Al-Qaida/Taliban	<input type="checkbox"/>	<input type="checkbox"/>	
Global Terrorist Financing	<input type="checkbox"/>	<input type="checkbox"/>	
ICTY	<input type="checkbox"/>	<input type="checkbox"/>	

* NB: Military embargoes cover a much broader range of countries

Conflict between EU and US sanctions rules – EU blocking rules

- Regulation 2271/96 targets extra-territorial effects of US sanctions under Helms-Burton, CACR and ILSA
- Is this still relevant?
 - US still using extraterritorial measures
 - EU has appointed Commission ‘point person’
 - Revision of blocked laws?

Key aspects of EU proposal (1)

- Incentivise use of internal compliance programmes
- Trafficking and broking obligations for controlled Annex I items where WMD end-use
- WMD end-use controls for controlled Annex I items in transit through EU
- Remove need for pre-authorisation for intra-EU movement of most sensitive Annex IV (Annex V) items
- Mandatory criminal penalties

Key aspects of EU proposal (2)

- Harmonise approach to intangible transfers
- Greater use of CGEAs
- Increased coordination and communication between Member States
- Commission to negotiate with third countries on extra-territorial controls
- Next steps?

Key aspects of UK consultation

- Amend trafficking and brokering regime for military items
- Control overseas production of military equipment
- Extend military end-use controls
- Registration system for UK arms traders

Other EC/UK Developments

- Proposal to relax controls on intra-EU transfers of military items
- Enforcement trends
- Extradition

Reforms to the EU and UK Export Controls Regimes

Export Control Coordinators Organization Conference

Sunwinder Mann (Associate)

Baker & McKenzie LLP, Washington DC/London

(sunny.mann@bakernet.com; +1 202 452 7066)

28 June 2007