

EU trade controls rules on the move – What you need to know on classification changes and the upcoming modernisation of the EU dual-use regime

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The EU regime for controlling the exports from the EU of products and/or technology that can be used for both civil and military purposes (dual-use items) is now 10 years old. As a result of the changes in technology and ever-evolving threats to Member States' national security, controls on dual-use items are now subject to greater scrutiny and legislative changes.

This update provides a high level overview of the recent activity in this area of trade law, focusing on:

- The upcoming revised list of dual-use items, which includes a new definition of controlled encryption algorithms, which will extend controls to quantum-resistant encryption, and a new decontrol note for information security items specially designed for a 'connected civil industry application;
- The revival of the recast of the Dual-Use Regulation; and
- The UK preparatory work to adapt the control of dual-use items after Brexit.

New list of dual-use items

EU export controls on dual-use products are set out in Regulation 428/2009 for the control of exports, transfer, brokering and transit of dual-use items (Dual-use Regulation).

On 17 October 2019, the European Commission (Commission) adopted a [delegated regulation](#) to incorporate the 2018 reviews of the dual-use international framework, notably the Wassenaar Arrangement and the Missile Technology Control Regime (MTCR) in Annex I to the Dual-Use Regulation. In practice, this means that the list of controlled items and associated technologies will be subject to changes within the next few weeks, including in categories 3A001, 3D005, 5A002 and 9A004.

The main proposed changes include:

- New decontrol note for 'open-cell foam' electromagnetic wave absorbing materials (1C001)
- Amendment to control entry for gear machine tool including a cascaded structure for the control criteria (2B003)

- New local definition of ‘measuring range’ for linear displacement measuring instrument (2B006.b.1)
- Amendment to control entry for Digital-to-Analogue Converter to avoid overlapping of the controls (3A001.a.5.b)
- New entry for ‘other’ discrete microwave transistors (3A001.b.3.f)
- New entry for signal generators with specified ‘Radio Frequency modulation bandwidths’ (3A002.d.5)
- Amendment to control entry for multi-layer mask control (3B001.h)
- New entry for software designed to restore operation of microcomputers/ microprocessors after Electromagnetic Pulse (EMP) or Electrostatic Discharge (ESD) disruption (3D005)
- New definition of controlled encryption algorithms that includes quantum-resistant algorithms. These algorithms are expected to become increasingly common as a result of the fast development of quantum computing, which has the potential to break existing encryption (5A002)
- New decontrol note for "Information security" items specially designed for a ‘connected civil industry application.’ This exemption targets Internet of Things items using published or commercial cryptographic standards (5A002)
- Amendment to control entry for cryptographic activation token, including a Technical Note for the local definition of ‘cryptographic activation token’ (5A002)
- Amendment to control entry for hydrophones operating over 1000m (6A001.a.2.a.6)
- New Note 6 for lasers defining ‘Single transverse mode’ and ‘Multiple transverse mode’ (6A005)
- New entry for masks and reticles designed for optical sensors (6B002)
- Amendment to control entry for underwater submersible vehicles (8A001.c)
- New entry for air-launch platforms for space launch vehicles (9A004.g)
- Deletion of entry for technology for diffusion bonding for gas turbine engine components (9E003.a.7)

Further, the proposed changes include the following points (which do not reflect the international regime changes:

- 6A108.c. – New control for certain radomes has been created. The radome control existed in MTCR (M18A3) but not in Annex I to the Dual-Use Regulation
- 4A101 – The double quotes around hybrid computers have been removed
- 7A103.c. – The acronym for “CEP” has been amended in MTCR to “Circular Error Probable,” thus the control text can now use the global “CEP” definition found in WA
- 9A106.b. – The MTCR change to 3A3 has highlighted the fact that the Annex incorrectly had a control for liquid and gel rocket motor casings, insulators, and nozzles. This has been removed

- 9A108 – The MTCR change to 3A3 has highlighted the fact that the Annex was missing control on hybrid rocket motor casings, insulation components and nozzles. The control has been amended to include them

These changes have been adopted by the Commission and will come into force before the end of 2019, in the absence of any objections from the EU Member States or the European Parliament (Parliament).

Modernisation of the dual-use regulation: where are we and what do you expect from the new Commission?

The recast of the Dual-Use Regulation, which began in September 2016 with a Commission proposal for a new regulation on the export control of dual-use items, has been revived by the new Parliament. The recast proposal is now in the final stages of inter-institutional negotiations.

By way of background, the recast of the Dual-Use Regulation aims at bringing the EU regime in line with the most recent legal and technological developments, introducing among others, a new "human security" element to export controls, aimed at preventing the abuse of certain cyber-surveillance items by regimes with a questionable human rights record. The recast proposal also adds a new legal basis for export licences for encryption, low-value shipments and intra-company technology transfers.

On 17 January 2018, the Parliament adopted (with an overwhelming majority of 571 votes in favour and 29 against,) a series of amendments to the Commission's proposal, including: (1) a new human security dimension, with a catch-all clause applicable to non-listed cyber-surveillance items to allow controls where such items are used to violate human rights, in particular the right to privacy, data protection, freedom of expression, freedom of assembly and association; and (2) due diligence obligations on exporters concerning dual-use items that may be intended for human rights violations. In addition, the list of cyber-surveillance items subject to export controls under Section B of Annex I should take into account the risk of such items being used for violations of human rights. The Parliament also voted to delete encryption items from the list of cyber-surveillance items.

On 5 June 2019, the Council adopted its negotiating position for the inter-institutional negotiations. The Council rejected many of the Commission's proposals which have been endorsed by the Parliament, especially the ones relating to cyber-surveillance technology and human rights. According to the Council, classifying cyber-surveillance technology as dual-use items would introduce controls that have not been agreed at an international level, which could put EU companies at a disadvantage with respect to non-EU competitors.

The three institutions involved in the legislation, i.e., the Commission, the Parliament and the Council, would need to agree on a joint text for its vote and adoption. This is currently expected in 2020.

What about the UK and Brexit in all of this?

In light of recent developments in the UK political sphere, a no-deal Brexit on 31 January 2020 remains a possibility which would pose significant disruption to companies from an export controls perspective. In the event that the UK exits the EU without having a withdrawal agreement with the EU, the UK will immediately be regarded as being a third country for the purposes of EU export control.

Currently, the export of most dual-use items between EU countries does not require a licence with the exception of sensitive items classified under Annex IV of the EU Dual-Use Regulation. In the event of a no-deal Brexit, the overall framework of controls for dual-use exports will not change. However, the movement of dual-use goods from the UK to the EU would require an export licence in the same way as is currently mandated for non-EU destinations. This includes the export of items listed in the recently updated Annex I of the Dual-Use Regulation (i.e. the amendments to Annex I agreed at the Wassenaar Arrangement and MTCR).

As a result of the potential disruption to exports of dual-use items post-Brexit, the UK Government has published the [Open General Export Licence \(OGEL\) for exports of dual-use items to EU countries](#), for exports of dual-use items from the UK to the EU. This new export licence will remove the need for businesses to apply for individual licences and can be used immediately after the UK leaves the EU, following registration on SPIRE, the UK's online export licensing system. The new UK OGEL permits the export of all items in Annex I of the Dual-Use Regulation (which will capture the new amendments to Annex I agreed at the Wassenaar Arrangement and MTCR), other than the more sensitive items which are set out in Annex IV. These Annex IV items already require a licence for an export from one EU Member State to another, and therefore the position will not substantively change after a no-deal Brexit.

Further, for exports of dual-use items from the EU to the UK post-Brexit, businesses will need to apply for a new licence, issued by an EU Member State, for exporting dual-use items from EU Member States to the UK. The Council has proposed to add the UK as a permitted destination to Union General Export Authorisation (GEA) EU001, to minimise any additional licensing burden for those exporting dual-use items from the EU to the UK.

What does this mean for you?

These changes would result in additional compliance obligations for companies and might require them to adapt their internal compliance policies accordingly. More specifically, you should take the following steps in preparation for the above changes:

- Review the changes proposed in the new list of dual-use items to assess if they extend controls to any of the products in your inventory.
- Monitor discussions on the modernisation of the dual-use regulation and engage with the relevant authorities (e.g. Commission and Member State authorities) to anticipate any changes to your compliance obligations, such as new due diligence requirements regarding dual-use items that may be intended for human rights violations.
- If you trade with the UK, review post-Brexit licensing options and anticipate the steps required to ensure dual-use compliance once the UK leaves the EU.

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