SPECIAL REPORT

European Parliament and Council Approve Recast of EU Dual-Use Regulation: A Review of Key Changes

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INTRODUCTION

Since it first went into force in 2009, the European Union's regulation on the export control of dual-use items has undergone several updates to account for emerging technological and other challenges, including cybersecurity and human rights issues. Following a November 2020 provisional agreement, a recast of the regulation was adopted by the European Parliament and the Council of the EU on 10 May 2021 and was unanimously approved by EU Member States a week later.

The following provides an overview of some of the new and updated provisions in the recast.

REGULATION SETTING UP A UNION REGIME FOR THE CONTROL OF EXPORTS, BROKERING, TECHNICAL ASSISTANCE, TRANSIT AND TRANSFER OF DUAL-USE ITEMS (RECAST)

ARTICLES	TITLE	NEW PROVISIONS (IN ITALIC)
Chapter 1	**Subject and Definitions**	
2	**Definitions**	**'Export' henceforth means:** • *a re-export (i) within the meaning of Article 270 of the Union Customs Code or (ii) where a transit occurs and an exit summary declaration has to be lodged* • *transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to a destination outside the customs territory of the Union; it also includes the oral transmission of technology when the technology is described over a voice transmission medium* **'Exporter'** means any natural or legal person *or any partnership* **Definition of the five** categories of export authorizations (items 12 to 16), notably the ***'large project authorisation'*** ***'Cyber-surveillance items'*** *means 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 (item 20)* ***'Essentially identical transaction'*** *means a transaction concerning items with essentially identical parameters or technical characteristics and involving the same end-user or consignee as another transaction (item 22).* This definition is used in Articles 6 and 16 to ease Member States cooperation.
Chapter 2	**Scope**	
4	***Protection of information***	[For the export of dual-use items not listed in Annex I] *All exchanges of information shall take place in accordance with the legal requirements concerning the protection of personal information, commercially sensitive information or protected defence, foreign policy or national security information. Such exchanges of information shall be made via secure electronic means.*
5	***Export of cyber-surveillance items***	*An authorisation shall be required for the export of cyber-surveillance items not listed in Annex I if the exporter has been informed by the competent authority that the items in question* ***are or may be intended, in their entirety or in part, for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law;***

		• ***if that is the case**, the exporter shall notify the competent authority. That competent authority or Member State shall decide whether or not to make the export concerned subject to authorisation* ***Diligence obligations** on the exporter who should notify to the competent authority any suspicion on the use of exported cyber-surveillance items* *Establishment of an exchange system between Member States and the Commission on cyber-surveillance items subject to authorization* *publication of information regarding the cyber-surveillance items and destinations subject to authorisation requirements as notified by Member States (see below Annex X)* *Reference to Article 16 for all annulment, suspension or revocation of export authorisations*
6	**Brokering services**	***Diligence obligations** of the broker who should notify to the competent authority any suspicion on the use referred to in Article 4(1) of exported cyber-surveillance items*
7	**Transit**	*Extension of the authorisation requirement for the specific transit of dual-use items on:* • *the **natural or legal person or the partnership** that holds the contract with the consignee in the third country and has the power to determine the sending of the items passing through the customs territory of the Union*
8	**Technical Assistance**	A Member State may adopt or maintain national legislation imposing an authorisation requirement on the provision of technical assistance where a provider of technical assistance *has grounds for suspecting that dual-use items are or may be intended for any of the uses referred to in Article 4(1)* *No export authorization for listed exceptions mentioned in point 3*
9	**Authorisation or prohibition for Items not Listed in Annex I**	*Establishment of a national control list for such dual-use items*
10	**Member State Cooperation for Items not Listed in Annex I**	*Authorisation required for the export of dual-use items if another Member State imposes an authorisation for those items on the basis of a national control list, and if the exporter has been informed that the items are or may be intended for uses of concern with respect to public security or to human rights considerations* *A Member State which refuses an authorisation must inform the Commission and the other Member States* *A Member State which imposes an authorisation must provide the other Member States and the Commission with the relevant information (items and end-users concerned). The other Member States shall give due consideration to that information and shall*

		inform their customs authorities and other relevant national authorities.
11	**Intra-Union Transfer**	*Intra-Union transfer authorisation shall be applied for in the Member State from which the dual-use items are to be transferred*
Chapter 3	**Export Authorisation and Authorisation for Brokering and Technical Assistance**	
12	**Definition**	The following types of authorisations for export may be issued or are established under this Regulation: – Individual export authorisations; – Global export authorisations; – National general export authorisations; – Union general export authorisations for exports of certain items to certain destinations under specific conditions and requirements for use as set out in Sections A to H of Annex II: • ***General Union export authorisation for encryption technology. Authorisation in principle for all countries. Prohibition for the countries listed p. 512 of Annex II (see below)*** • ***General Authorisation for Intra-Corporate Export of certain software and technology from the Union to the countries listed p. 508 of Annex II (see below)*** *Individual and global export authorisations are granted by the competent authority of the Member State where the exporter is resident or established; or where the dual-use items are located if the exporter is not resident or established on the customs territory of the Union* *Individual export authorisations and global export authorisations shall be valid for up to two years, unless the competent authority decides otherwise* *Large project authorisations shall be valid for a duration to be determined by the competent authority, but no longer than four years, except in duly justified circumstances based on the duration of the project* *Individual export authorisations shall be subject to an end-use statement; Global export authorisations may be subject to an end-use statement if appropriate* *Member States shall notify the Commission immediately of any national general export authorisations issued or modified. The Commission shall publish such notifications in the C series of the Official Journal of the European Union*
16	**Refusal to grant suspension,**	Before the competent authority of a Member State decides whether or not to grant an authorisation or to prohibit a transit:

	modification and revocation	– Examination of all valid denials to ascertain whether an authorisation or a transit has been denied by another Member State for an essentially identical transaction – Mandatory consultation of the competent authorities of the Member States which issued such denials: • *The competent authorities of the Member States consulted shall make known within 10 working days whether or not they consider the transaction in question to be **an essentially identical transaction**. If no reaction has been received within 10 working days, the competent authorities consulted shall be regarded as not considering the transaction in question to be an essentially identical transaction. If more information is required to correctly evaluate the transaction in question, the competent authorities of the Member States concerned shall agree on the extension of that 10-day period. However, the extension shall not exceed 30 working days.* If, following such consultation, the competent authority decides to grant an authorisation or allow the transit, it shall notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision
Chapter 4	**Amendments of List of Dual-Use Items**	
Chapter 5	**Custom Procedures**	
Chapter 6	**Administrative cooperation, implementation and enforcement**	
23	**Exchange of Information**	*Member States shall inform the Commission without delay of the laws, regulations and administrative provisions adopted in implementation of this Regulation, including:* – *List of the competent authorities of the Member States (grant export authorisations, prohibit the transit etc.);* – *Measures referred to in Article 25(1)* [i.e., sanctions]. *Direct cooperation and exchange of information between the competent authorities. The information exchange may include relevant licensing data, ; information regarding the application of controls; number of operators with an ICP and data on exports of dual-use items carried out in other Member States; information regarding national control* *The exchange of licensing data shall take place with due consideration to legal requirements concerning the protection of personal information, commercially sensitive information or protected defence, foreign policy or national security information.*

24	***Dual-Use Coordination Group***	*Common training programmes for officials of the Member States*
Chapter 7	**Transparency**	
26	***Guidelines and Recommendations***	*Available guidelines and/or recommendations for best practices for the subjects referred to in this Regulation. The provision of guidelines and/or recommendations for best practices to exporters, brokers and providers of technical assistance shall be the responsibility of the Member States where they are resident or established.* *The Commission submit an annual report to the European Parliament and the Council on the implementation of this Regulation. That annual report shall be public.* *With regard to cyber-surveillance items, the annual report shall include dedicated information on authorisations, in particular on the number of applications received by item, the issuing Member State and the destinations concerned by those applications, and on the decisions taken on those applications. The information contained in the annual report shall be presented in accordance with the principles set out in paragraph*
Chapter 8	**Control Measures**	
Chapter 9	**Cooperation with Third Countries**	
29	**Dialogues with third countries**	*Council may authorise the Commission to negotiate with third countries on agreements providing for the mutual recognition of export controls of dual-use items covered by this Regulation*
Chapter 10	**Final Provisions**	
31	**Regulation (EC) No 428/2009 is repealed.**	*Transition period*

Annexes (NEW)

The recast also includes an updated Annex II (p. 484), which describes the EU's general export authorizations. There are now eight general export authorisations, two of which were introduced in the last recast:

1. **"General Authorisation for Intra-Corporate Export of certain software and technology from the Union to the following countries" (p. 505):**
    - Argentina
    - Brazil
    - Chile
    - India
    - Indonesia
    - Israel
    - Jordan
    - Malaysia
    - Morocco
    - Mexico
    - Philippines
    - Singapore
    - South Africa
    - South Korea
    - Thailand
    - Tunisia

This authorisation permits the export of software and technology by any exporter, which is a legal person, established in a Member State, to a subsidiary company or sister company.

The conditions to be observed are as follows:

- The company controlling the export must be in the EU or in a country subject to the general export authorisation scheme.
- The parent company must be able to obtain binding guarantees of compliance with the authorisation.
- The exported software and technology is used exclusively for the commercial product development activities.
- The exported software and technology and all resulting products remain under the full control of the exporter.
- The exported software and technology is returned to the exporter and completely deleted by the subsidiary or sister company when the development activity is completed or in the event that the subsidiary or sister company is acquired by another entity.

In addition, the authorisation does not cover cases where the Member State or company is aware of the following purposes of the export:

- Connection with chemical, biological or nuclear weapons

- Components of military products
- Military, paramilitary, police or intelligence use
- Items to be used in connection with a violation of human rights, democratic principles or freedom of expression within the terms of the Charter of Fundamental Rights of the European Union.

An exporter intending to use this authorisation shall, before using it for the first time, register with the competent authority of the Member State in which the exporter intends to do so.

The exporter making use of this authorisation shall notify the first use of this authorisation to the competent authority of the Member State in which the exporter is established, no later than 30 days after the date of first export.

The exporter making use of this authorisation shall report to the competent authority of the Member State in which the exporter is established on the use of this authorisation.

The report on the use of this authorisation shall be drawn up at least once a year and shall include at least information concerning:

- The description of the software and technology
- The quantity and value of the software and technology
- The subsidiaries, sister companies and parent companies covered by that authorisation.

Member States shall define the additional information which the exporting Member State may require in respect of goods exported under this authorisation.

2. **"General Union export authorisation for encryption technology. Authorisation in principle for all countries. Prohibition for the following countries" (p. 508):**

   Destination under arms trade embargo

   - Afghanistan
   - Saudi Arabia
   - Armenia
   - Azerbaijan
   - Belarus
   - Cambodia
   - Central African Republic
   - China (including Hong Kong and Macao)
   - Congo
   - Democratic Republic of the Congo
   - Egypt
   - Eritrea
   - Georgia
   - Iran
   - Iraq
   - Israel

- Kazakhstan
- Kyrgyzstan
- Lebanon
- Libya
- Malaysia
- Mali
- Mauritius
- Mongolia
- Myanmar/Burma
- Oman
- Uzbekistan
- Pakistan
- Qatar
- Russia
- Somalia
- South Sudan
- Sudan
- Syria
- Tajikistan
- Turkmenistan
- United Arab Emirates
- Venezuela
- Yemen
- Zimbabwe

To be authorised for export, cryptographic technology must meet standards set within the EU or fall within a security classification. The authorization also does not cover cases where the Member State or company is aware of military, paramilitary, police or intelligence use or purposes of the export.

Additional conditions also apply:

- There must be no risk of re-export or link to Annex I.
- The exporter must present a list of technical characteristics and specifications.
- A member state may prohibit exports of such goods for reasons of national security.

For more information on the recast of the EU's regulation on the export control of dual-use items, please contact your McDermott lawyer.

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