Update on Developments in EU Export Control (2006/2007)

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Introduction

The last year has seen significant activity by the European Union (EU) in relation to export control rules in general and dual-use rules in particular. This activity is expected to conclude with new legislation being proposed on the EU dual-use regime during 2007 and it is thought highly likely that these new and improved EU dual-use controls by the end of 2008. The content of the European Commission's proposals for reform provides an excellent basis on which to review the successes and failings of the existing regime.

Background

The current rules creating the EU dual-use regime are to be found in Council Regulation 1334/2000 (as amended) which set up the "Community regime for the control of exports of dual-use items and technology".

Amongst its various provisions[2] the Regulation sets out :

- a series of operative provisions which establish the requirement to obtain an authorisation to export dual-use goods;
- provides a detailed list of products that are deemed to be dual-use goods (Annex 1) for which an authorisation for export outside the EU is required;
- identifies a list of highly sensitive goods for which special measures are applicable both as regards export outside the EU AND in relation to internal transfers within the EU;
- creates a Community General Export Authorisation (CGEA) which derives its legal effect from EU law
- establishes a whole series of areas in which Member States are required to provide for the implementation of the rules in the Regulation OR over which Member States retain powers to supplement the measures of the Regulation.

This last element ensures that the regime bears all of the hallmarks of the European Union itself - the creation of a Community regime for dual-use goods goes some considerable way towards creating a single EU-wide regime but then falls short in sometimes small but significant elements. Indeed, bearing in mind the considerable degree of international coordination that exists in relation to dual-use goods, the Community regime seems to be increasingly a misnomer. A better description would be to call it a highly coordinated series of 27 national regimes.

Comparing the EU and US systems

When we compare the EU regime to that of the USA we can see some quite significant differences (quite here being very much in the American sense of quite).

The USA rules are applied at a federal level by a sole federal administration (albeit with a number of agencies contributing to fulfil this role). The EU regime has by definition 27 different sets of national bodies responsible for establishing procedures and applying the rules. Inevitably this leads either to actual or at the least perceived differences in treatment between equivalent transactions.

In Belgium, implementation of 1334/2000 is allocated to the three federal regions of Belgium (Flanders, Wallonia and Brussels Capital). Although derived from a former national based regime, each region now has its own set of rules and already there are indications that whilst substantially similar different outcomes may be produced in the different regions. And Belgium has a population of less than 10 million people.

The equivalent for the USA would be to think of export and trade controls being administered at a sub-State level.

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Differences between national regimes in the EU

The reality of the current EU regime is that those who use it could quite easily forget that it is anything to do with the EU at all. At the coal face, the procedural rules implementing 1334/2000 (with the partial exception of the CGEA) are all established at a national level and these rules can and do differ substantially.

Some of the more obvious differences include:

- Member States offer different forms of export authorisations – whilst corresponding to the general categories of licence (general, specific or individual) they do not have the same scope or coverage.
- Not all Member States offer on line systems to apply for authorisations.
- Not all Member States provide for a rating procedure by which an exporter can establish without the need to complete a full application for authorisation whether or not a good or technology is rated as dual-use or not.
- Not all Member States publish and observe maximum time periods within which applications for authorisations must or should be processed. It would by no means be an exaggeration to note that this single issue is the most common source of commercial complaint concerning the operation of the existing EU system[3].
- The Member States do not even follow standard procedures for either the forms to be completed to apply for an authorisation or for the documents to be provided to support such applications.

Thus for example, in relation to End Use Undertakings, there is neither a single agreed format for use in the EU, nor consensus on when an EUU is required and fundamentally no consistent approach in monitoring the implementation of EUUs. In Ireland at present there is no requirement to provide an End Use Undertaking for exports of dual-use goods (although the Irish Authorities may during the authorisation procedure require that one is obtained). In the UK by contrast an EUU is required for all exports of dual-use goods.

It is also pretty much impossible for a company to agree its own form of EUU which it would use throughout the EU. This is because of content issues and the requirement of some but not all national administrations to insist on the mandatory use of its form of EUU.

It is clear that the text of an EUU must be adapted to the nature of the transaction eg sale to end user vs sale to intermediary. The UK authority, the Export Control Organisation (a part of the UK's Department of Trade & ndustry) has provided a sample text which may be used by exporters. The ECO text is not however mandatory and therefore exporters can create their own customised versions - provided that their versions contain as a minimum all of the information required in the ECO version.

In Germany however, BAFA, the national authority, requires that an EUU is only valid if given in a specific prescribed form. Thus an exporter's customised version of the UK ECO form would not, irrespective of its actual content, be acceptable. The content would not however be likely to be the same as is required in Germany because of the substantial difference in approach adopted by BAFA in relation to the scope of control. In particular its desire to control the re-export of goods by the original purchaser. Thus BAFA's EUU requirements are more extensive than those of ECO.

If BAFA's version represents the Highest Common Factor version of EUU, an exporter would in theory need to standardise to this level of content in order to be able to standardise its EUU for the European Union. And this would still not work for other Member States who similarly require specific formats for their EUUs.

The next area is transparency and predictability. In the USA information is made public in relation to denied persons and prohibited parties - a search of the BIS database will reveal not whether a licence will be granted but the fact that in principle the identity of the customer will not result in the licence being denied.

There is simply no equivalent publicly accessible research database in the EU. Indeed many EU based exporters in effect rely direct or indirectly on the US data. It is only a matter of time before exporters then find that the Denied Persons List is not accepted as proof of anything in the EU - nor indeed in the USA. Exporters can still have authorisations refused in the EU for customers who are not listed on the US lists - and vice versa.

The EU's national authorities do of course maintain lists of unacceptable customers – and such lists are generally confidential and are not circulated. In a rare break with this tradition the UK's ECO responded to the growing concerns over the difficult political relationship with Iran by issuing a list of entities who in the opinion of the UK authorities are known to be involved in WMD activities. The ECO notice then confirms that :
« Inclusion of an entity on the list does not necessarily indicate that an export licence would be refused. Conversely non-inclusion of an entity on the list does not necessarily mean that there are no end-use concerns with that entity. »

Proposals to reform the EU system

Which brings us to the European Commission's proposals to reform 1334/2000. The proposal is not at all new - it has been sometime already in the making with work commencing as long ago as 2004. Indeed one of the drivers for the current proposal is to bring EU rules into line with UN Resolution 1540. Unlike so many proposals, the Commission has put in considerable effort to consult with interested parties, take on industry concerns and be seen to be much more open and transparent in its legislative process. This process then is already at this level a success.

The Commission started the process of reform by engaging consultants to undertake a review and study of the operation of 1334/2000 during 2004/05. Consultations with industry continued during 2006. At the very end of 2006 the Commission adopted a Communication on the revision of 1334 and a proposal for a Council Regulation to replace it[4].

The Commission then organised a further hearing to consult with industry on the new proposal on 26 January 2007. A note prepared by the Commission of this event is also available on the Commission's website[5].

Despite the extensive consultation and even though the area is regarded as highly technical it is worthwhile underlining that the proposal remains only this ie work in progress and that significant changes can and may be made during the EU's complex legislative process.

Subject to this caveat, the following is the way in which the Commission summarised the key changes that are likely to be made to the EU dual-use regime in 2008:

Improved Security

- introduction of EU rules to comply with UN Resolution 1540 bringing goods in transit through the EU within control and also introducing brokerage controls for WMD goods or technologies
- mandatory application of criminal sanctions by Member States for serious export control offences
- improving exchange of information between national administrations
- tougher procedural rules to be applied in cases where one Member State intends to authorise an export previously refused by another Member State or which another Member State considers are contrary to its essential security interests
- improved co-operation between Member States on national controls application to non-listed items

Improved Regulatory Environment

- replacement of the intra-EU prior authorisation system for highly sensitive goods with a prior notification procedure
- clarification of how the Regulation applies to exports of intangibles to harmonise currently divergent national treatments
- granting EU exporters who export in full compliance with EU rules, total legal certainty in cases where these exports are considered to be illegal by third countries
- promotion of use of global licences based on reliance on internal controls adopted by exporters
- provision for the creation of indicative deadlines for processing applications for authorisation

There are a number of elements here which draw the attention - but given the location of this conference the one which stands out the most is of course the reference to the impact of conflict between EU laws and those of third countries - could this become another Helms Burton – Cuba – EU Blocking Regulation issue ?

It seems to me that this is not the intention - and that the background of the issue is too important to both sides, with broad consensus clearly existing on the need for rigorous controls. But this does not alter the fact that there are substantial differences between the two systems and that the Commission's other plan - to initiate a process of dialogue to explain the Community's system - will not of itself be sufficient.

One of the objectives of the European Commission is clearly to move the USA towards accepting that it should treat EU 27 as a single export destination for US dual-use control purposes. In the light of the nature of the reforms and the fact that there will still be differences across all of the Member States in terms of procedures, monitoring and enforcement I would imagine that at the very least the USA will want to wait and see how substantial are the benefits of the new rules in practice before it makes any such commitment.

Next, there is no attempt at this stage to increase the level of centralisation of controls at an EU level. Indeed there is not even at this stage a proposal to keep an EU register of those exporters relying on the CGEA - at present exporters must registered in their home Member State.

There are no provisions included which would eliminate or reduce the extent to which Member States are entitled to adopt their own national measures supplementing those of 1334/2000. In other words there will still be differences in scope and coverage of the rules potentially in all 27 Member States.

Finally in relation to the concern that Member States are interpreting the scope of Annex 1 in different ways, the Commission seems to have ducked the issue entirely and suggested that greater reliance should be made on classification procedures within the international MTR agreements. The opportunity to bring forward some form of EU forum to resolve disputes – as applies in relation to Customs classification - was not taken up.

Conclusion

As stated at the outset this proposal would bring forward substantial changes to the EU dual use system. The changes fall far short however of what industry would really like ie a system which enables the most experienced of exporters and those with the strongest track records of compliance to be treated differently and authorised in advance to export with compliance being monitored ex-post through verification visits.

Instead we will be left with a system where national divergence in scope, substance and procedure will remain. Such differences will continue to encourage companies to take decisions on export procedures based on perceptions of the user-friendliness of competing national regimes.

You might think that as a result of the above EU based operators would look at the system here in the USA, wishing that it might be extended to the EU. One of the surprising conclusions of the study commissioned by the EU Commission on the current dual-use regime was that EU exporters felt that our EU system was just as good as Australia, Canada and Japan's. But in relation to the USA (as with China and Russia) it was better. In relation to the USA the report notes that:

"Many companies who had experience of the US system commented about the complexity of US administrative practice and legislation".

Perhaps we should record this outcome as a manifestation of the principle *"Better the Devil you know. . .".*

Footnotes:

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[2] *The Regulation comprises only 24 articles and 4 annexes*

[3] *The complaints fall into a number of categories: a general complaint that all authorisation applications take too long to process; a concern that exporters based in other Member States get better service from their national authorities; the same concern but at an international level, eg. US exporters get their approvals more quickly; and finally that some Member States interpret Annex 1 of 1334/2000 in such a way as to conclude that a given product does not require an export autorisation when the exporter knows or believes that an autorisation would be required by other Member States.*

[4] *These documents are numbered COM(2006)828 and 829 respectively. Both are available at the Commission's web-site see at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0828en01.pdf*

[5] *[ ]*