

## Tracking EU And Transatlantic Export Controls

*Law360, New York (August 23, 2011)* -- On June 30, 2011, the European Commission issued a Green Paper on the European Union's export control regulations for dual-use items having both civil and military applications.[1]

The Green Paper is a discussion document and launches a four-month consultation process in which interested businesses, associations and other stakeholders are invited to participate. It identifies a number of key weaknesses in the current EU dual-use export control regime and presents possible areas for reform. The Green Paper, however, devotes little attention to potentially significant transatlantic implications and the ongoing reform of U.S. export control rules.

Following the end of the consultation period on Oct. 31, 2011, the commission intends to publish a report on the results of the consultation in January 2012. This will be followed by formal amendment proposals to the EU Council and Parliament later that year.

### Europe's Existing Dual-Use Export Control Regime

Europe's existing dual-use export control regime is laid down in EU Regulation 428/2009.[2] Goods and technologies that require export authorization are listed in Annex I of the regulation. The list constitutes a consolidated and regularly updated version of the control lists agreed upon pursuant to international export control regimes (Australia Group, Nuclear Suppliers' Group, Missile Technology Control Regime and the Wassenaar Arrangement). Items not listed in Annex I may also be subject to export controls under certain conditions specified in the regulation.

Four types of authorizations are currently available under the regulation, three of which are issued by individual member states (individual, global and national general export licenses). An EU General Export Authorization (EU GEA) EU001, is issued by the EU and applies across all member states.

The existing dual-use regulation is a political compromise between the need for a uniform EU-wide export regime and the desire of EU member states to preserve for themselves a significant margin of discretion. Accordingly, the current regime suffers from important weaknesses that make it more difficult and costly for businesses to comply.

The rules are complex and unharmonized and vary across the European Union — ranging from extremely tough restrictions in some EU member states, to the use of broad national facilitation measures and exemptions in others; they do not adequately address some of the challenges stemming from new threats to EU security and the rapid technological progress that has occurred; and do not facilitate timely access to controlled items and technologies.

For companies whose operations span multiple jurisdictions, the current system is even more complex and often requires multiple clearances for a single transaction as a result of parallel member state and EU-wide export control procedures and regimes. Finally, disparities between EU and U.S. regulations continue to hamper global trade and investment, and impose costs on businesses on both sides of the Atlantic.

## **Six Key Elements of Reform Proposed**

The commission's new Green Paper acknowledges many (though not all) of these problems and recognizes that it is in the EU's interest to make the system less of a hindrance on competitiveness and innovation — i.e., to reduce the burden that export controls impose upon industry. Setting out a mid- to long-term vision of export controls in the EU, the Green Paper contemplates six key areas of reform:

### *1) A common risk assessment approach of all export control authorities.*

Such an approach, applied across the entire EU, would promote consistency in member states' export policy decisions and review mechanisms, avoiding situations where licensing authorities reach different conclusions in comparable circumstances and ensuring a level playing field for EU exporters.

### *2) Improved exchange of information about suspicious transactions and licensing decisions.*

Without access to appropriate information, member states' licensing authorities currently lack sufficient bases for making decisions about specific export transactions. Currently, information is exchanged mainly on an informal, bilateral basis, and systematic data exchange takes place only regarding denials issued by licensing authorities. The Green Paper contemplates a more systematic and thorough information exchange system, including details of licenses, exporters and suspicious entities.

### *3) Phase out National General Export Authorizations in favor of EU General Export Authorizations.*

Many EU member states, as well as several other countries, already prioritize their work by making low-risk transactions eligible for National General Export Authorizations (NGAs), which authorize exports of eligible controlled items to a broad range of destinations with reduced administrative burdens.

At the EU level, an existing EU General Export Authorization allows for the export of most controlled items to seven favored destinations, including Canada and the US. Two new general authorizations are under discussion in Brussels. The European Commission believes that EU General Export Authorizations should be expanded in the future to replace more NGAs.

### *4) A common approach to catch-all controls.*

Most export control systems have catch-all provisions that restrict exports of items not specifically listed on the EU control list, but that could nevertheless be used for proliferation purposes. According to the commission, the EU member states do not sufficiently inform each other about license applications and, consequently, authorizations or denials.

The Green Paper proposes that EU Member States should be required to exchange information and suggests that consideration may need to be given to creating an EU-wide catch-all control. Under such a mechanism, any EU Member State could ask the Commission to impose special catch-all export licensing requirements applicable to all 27 EU Member States for a certain period of time.

*5) Working towards a fully integrated internal market for dual-use items.*

The commission acknowledges that intra-EU controls inhibit economic development as companies seek to avoid cross-border cooperation that might implicate export control restrictions or recordkeeping. Therefore, the Green Paper contemplates removal of such intra-EU controls. The commission proposes a greater use of post-shipment verification mechanisms and introducing lists of certified end-users in the EU who could receive specific items or technologies without an export license.

*6) Coordinated enforcement across the EU coupled with improved access to relevant information for customs enforcement.*

Finally, the commission recognizes problems with the enforcement of the current export rules and proposes to expand the use of Authorized Economic Operator (AEO) status in the export control process.[3]

## **Transatlantic Convergence and Opportunities for Business to be Heard**

The Green Paper addresses some, but not all of the areas that are widely believed to warrant reform. Notably absent, for example, is the issue of differences among transatlantic and global export control rules. As a practical and legal matter, exporters and importers continue to face different U.S. and EU regulatory regimes for dual-use products. Such divergence is costly to exporters and importers, and hampers EU and U.S. competitiveness, volume of export trade and incentives for technological innovation.

For example, the U.S. rules encourage voluntary self-disclosures of past regulatory violations as a means to limit liability from voluntarily disclosed violations. The EU has no formally recognized system for voluntary disclosures, and companies are effectively left on their own to determine how to handle export errors.

Another area of persistent divergence is the extraterritorial application of export controls. U.S. authorities have long sought to impose controls upon non-U.S. companies and persons, and increased penalties and enforcement in this area have sought to broaden the reach and effectiveness of US export control in this regard.

The U.S., moreover, has begun a comprehensive reform of its own export control system. This parallel reform effort will address some of the same issues at stake in the EU consultations. Among the objectives of the U.S. reforms are creating a single export licensing authority, single enforcement agency, single control list, and single information technology system. As part of this effort, the US has introduced new export license exceptions, new control categories, and clarifying guidance on issues such as the handling of disclosures of controlled technologies to dual nationals. Yet, harmonization among export control regulations remains far from a reality.

In the meantime, companies impacted by these regulatory changes face the challenge of updating their systems and compliance capabilities as products migrate from one list to another, key terms are redefined, and licensing and administrative requirements are modified. Exporters will need to remain vigilant while U.S. and EU export controls are changed and, from a business perspective, it will be important to ensure that the EU and U.S. processes are undertaken in a coordinated and consistent fashion.

Importers, exporters and other interested parties have a chance to address these and other issues in the EU consultations that have now begun and are scheduled to end on Oct. 31, 2011. Taking into account their input, the commission will publish a report on the results of the consultation in January 2012, followed by a formal report to the EU Council and Parliament, as required under Article 25 of the Dual-Use Regulation, later that year. A formal proposed revision of the dual-use export regulation is expected as early as the second half of 2012, followed by a legislative process, including input from the European Parliament and the council and member states.

All of these provide possible avenues for companies and others to provide comments and influence the debate. But for those who believe they have a real interest, getting involved early is typically best.

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[1] Green Paper, The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world, presented on June 30, 2011, available [here](#).

[2] Text of the regulation can be found [here](#).

[3] An AEO is an economic operator who, by satisfying certain criteria, is considered to be reliable in their customs-related operations throughout the European Community and is therefore entitled to favorable and more centralized licensing, export control and customs clearance treatment.

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