This joint handbook is co-sponsored by the EU and China.

Joint EU - China Handbook on Export Control of Dual-Use Items

Volume 2

Handbook on Export Control of Dual-Use Items in the EU

Part I

Explanatory Remarks on European Export Control

Federal Office of Economics and Export Control BAFA

An EU project implemented by BAFA.

Joint EU - China Handbook on Export Control of Dual-Use Items

Foreword

This Handbook is an introduction to the main Chinese and EU provisions concerning export control. It is intended for companies that export and for their personnel responsible for export control compliance.

In the 2004 “Joint Declaration of the People’s Republic of China and the European Union on Non-Proliferation and Arms Control”, the EU and China agreed that the proliferation of weapons of mass destruction poses a serious threat to international peace and security. In several seminars and study visits in China and in the EU, cooperation has steadily deepened within the framework of the EU Cooperation in Export Control of Dual-Use Goods.

Many companies develop new products, find new commercial outlets and gain profits from exports. Whereas the financial risks of such export transactions are analysed in detail, the export control sector is largely regarded as a bureaucratic obstacle, a cost factor and a competitive disadvantage. However, if those provisions are not observed, companies may jeopardize their good reputation. As a result, entire markets may break away, and the involved personnel may be subject to criminal punishment. Conversely, knowledge of the relevant provisions and administrative procedures can facilitate transactions and be beneficial for companies when it comes to making use of privileged procedures.

This is why export control is a top management issue.

This book wants to be a tool for detecting risks, solving problems and exporting responsibly. It is a book written by experts intended for exporters on each hierarchical level. It is not an academic book and refrains from quoting literature; instead, the book concentrates on the factors which are of interest to people dealing with export procedures on a daily basis.

Export control law is rather complex. For example, provisions may stem from different sources of law, e.g. constitutional law, parliamentary legislation, ministerial regulations, decrees, orders. On the one hand, exporters are expected to know these provisions and to abide by the law in force; on the other hand, they are obliged to observe new legal developments and keep themselves informed about the frequent changes in export control law.

This task is even more difficult for foreign exporters: In today’s globalised world, more and more companies decide to open branches in other countries. A European company, for example, that sets up a business in the People’s Republic of China, does not only need to observe European export control law, but must also know and abide by the Chinese law on export control. This handbook is an attempt to inform both about European and Chinese export control law in place and thereby help European exporters become aware about the Chinese law and vice versa.

If the handbook also improved mutual understanding of the respective provisions among the EU’s and China’s licensing and customs personnel, the authors would – naturally – welcome this development, too.

Volume 2 – Handbook on Export control of Dual-Use Items in the EU

Part I – Explanatory Remarks on the European Export Control

Part I – Foreword

This volume of the joint EU – China Handbook on Export Control of Dual-Use Items wants to give a practical insight into the EU system of export control, the implementation of the main EU legal provisions as well as their consequences on the daily work in different areas of export control.

The handbook concerning the EU provisions focuses on the following main areas of export control:

- The legal bases of EU export control – What you need to know
- The licensing application procedure – how to file a valid application
- The export procedure at customs
- Internal Compliance Programme –the licensing perspective
- Internal Compliance Programme – industry perspective
- Warnings and "red flags" – how to recognise illegal procurement attempts
- Sanctions – restrictive measures of the United Nations and the European Union
- Penalties – the consequences of illegal exports –potential risks for companies and employees

It has to be made clear that in the EU system of export control, the EU legal provisions are binding for all EU Member States. They are, however, only basic provisions, especially in the areas of application procedure, internal compliance programmes and penalties. The EU provisions have been further implemented by additional national provisions of the EU Member States. In short: The EU is in charge of export control legislation; implementation of export control legislation is up to the EU Member States.

Therefore, the handbook focuses mainly on the basic common provisions and procedures. Further information on the national provisions of the EU Member States will be provided on the respective websites of the Member States' authorities (see links).

The content of the handbook is solely in the responsibility of the respective editors, who have been working in the field of export controls for years. Nevertheless the content is not legally binding and does not necessarily reflect the EU opinion.

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Abbreviations

a. o.	Among others
AEO	Authorised Economic Operator
AG	Australia Group
Art.	article
BAFA	Federal Office of Economics and Export Control
BG	Businesses Groups
BIS	Department for Business, Innovation and Skills
BU	Business Unit
CEC	Corporate Export Controls
CECO	Chief Export Control Officer
CEO	Chief Executive Officer
CFSP	Common Foreign Security Policy
GEA	General Export Authorization
DEC	Export Control Division
DU	Dual Use
ECCN	Export control classification number
ECO	Export Control Officer
ELAN	German electronic system for the electronic application procedure
ERP	Nuclear reactor
EU	European Union
EUC/EVE	End-use documents
EUR	Euro
ExCo	Philips Executive Committee
GBP	General Business Principles
IC	Import Certificate
ICP	Internal Compliance Programme
ID	Identification
ISP	Swedish Agency for Non-Proliferation and Export Controls
ITT	Intangible transfer of technology
JA	Joint Action
MTCR	Missile Technology Control Regime
NBC	nuclear, biological, chemical
NGA	National General Export Authorization
NRC	Nuclear Regulatory Commission
NSG	Nuclear Suppliers Group
OSCE	Organization for Security and Co-operation in Europe
PAWA	Austrian Electronic Licensing System
PROTECT	Philips Expert Advice System
SGI	Strategic goods indicator
UK	United Kingdom
UN	United Nation
UNSCR	United Nations Security Council Resolution
WA	Wassenaar Arrangement
WMD	Weapons of Mass Destruction

1. The legal bases of EU export control – what you need to know

This introduction to export control law wants to convey the indispensable tools for the observance of the export control law. Only persons who are familiar with these tools and master them can detect risks, solve problems and export in a responsible manner

These tools are therefore also the basis for the internal export control organisation in companies as stated further below.

Export control is governed by laws and regulations. Therefore it can not completely be avoided to discuss legal aspects in this document. At the same time, the significance and application of the regulations in practice are put in the foreground. Readers with a legal background will miss references to legal texts, court rulings and other legal sources and even notice legal inaccuracies and gaps. This is intentional. This manual is primarily geared towards readers that do not have a legal background. It is therefore supposed to help readers to orient themselves in export control law with the help of the most important markers. Discussing all possible alternatives bears the risk of missing one or the other goal.

A. Subject-matter, objectives and tools of the export control law

I. The subject-matter – What is export control law?

Many companies export their products, services and know-how around the globe with great success.

If you want to export, a large number of regulations such as customs procedures, fiscal law, statistics regulations, preferential law, contractual law, transport regulations, etc. have to be observed.

Export control law is only a part of these export regulations and trade control. It only includes provisions that restrict free export for reasons of foreign policy and security policy. Only these regulations are discussed in this manual.

Other export restrictions were passed to protect public order, the environment, the consumers, cultural heritage, etc. For example, waste export is controlled for reasons of environmental protection. For more details concerning other export restrictions contact the customs authority in the country from whom you want to export.

Export controls based on foreign policy and security policy might easily be mistaken for bureaucratic hurdles. The truth is that the respective provisions create clarity concerning the possibilities and risks of exports and other acts related to foreign trade. For exporters, they are indispensable parts of risk management and help to ease their exports while avoiding damage to their reputation and potential financial losses. For the countries introducing export controls, they help to reduce risks for their security and the international peace by fighting against proliferation of weapons of mass destruction and unwanted delivery of sensitive goods to the wrong destinations.

II. What are the objectives of export control law?

Generally the principle of free foreign trade applies at the European level in the field of foreign trade transactions. Restrictions are, however, possible if they are required to serve higher purposes. The EU export control law is motivated by foreign and security policy and international obligations the EU Member States have to comply with. The prior objective is to protect stable security and international peace. Both are threatened above all by weapons of mass destruction and conventional armaments. Countless wars, civil wars and crises around the world prove the topicality of this threat. Besides government armies, the threat posed by terrorists has come into public focus since the terrorist attacks of 11/9/2001.

In many sectors, export control law is shaped by international agreements, arrangements and resolutions of international organisations (e.g. a central source is the United Nations Security Council Resolution 1540/2004 concerning the Non-proliferation of Weapons of Mass Destruction). An important foreign policy motive for export control law is the implementation and observation of these international specifications.

III. Which legal tools are required for achieving the objectives of export control law?

At first glance, the objectives of export control can be achieved by prohibiting the exports of weapons of mass destruction and conventional armaments. However, export control is not that simple:

On the one hand:

Not every export of conventional armaments is a direct threat to the EU and peace.

On the other hand:

Indirectly, the export of materials, equipment, technology etc. for the development or production of arms can pose a threat. In the long run, these exports may even result in a larger threat.

EXAMPLE
Countries obtaining the technology for the production of armaments make themselves independent of the delivery of the ready-made weapons.

Not only military equipment and technology can be applied to develop or produce armaments. In many sectors "civil" equipment and technology is also sufficient (so-called "dual-use goods", meaning goods that can be applied for both military and civil purposes).

EXAMPLE
Parts for a civil but also for a military vehicle can be produced on a machine tool.
The development of biological and chemical weapons starts in the laboratory with laboratory equipment that is also required for medical research.

However, the other way - controlling all exports that may be in any way related to weapons - is also not feasible. Many civil exports would then also be controlled.

Export control law has to try to strike a balance between the two options. On the one hand, the export industry may not be hindered in clearly civil transactions, on the other hand, transactions that may pose a threat to security and peace must be controlled. Statutory regulations may not do justice to each single case because they have a general wording. Therefore, the general regulations may also cover exports, which turn out to be unproblematic when considering the individual case. Export control law tries to solve the dilemma as follows:

Prohibition of activities that are incompatible with the objectives of export control.

EXAMPLE
For example the delivery of weapons, ammunition and other military equipment as defined in arms embargoes.

No prohibition or licensing requirements for activities that do not pose a fundamental risk to security or peace.

Licensing requirements for the export of specific dual-use items (Art. 3 EU Dual-Use Regulation): Licensing requirements lead to a check by the competent authorities, which determine whether the export jeopardises the objectives of export control in any case. This is an important criterion for any decision. The licence is granted when the check turns out that the transaction does not pose a threat. Otherwise, the licence is denied. In other words: The barrier is raised or it stays down. When the licence is granted, the exporter is "only" faced with the efforts of the application procedure, but may export his goods etc. in the end. However, when the licence is denied, the effect is the same as with a prohibition: The export is not possible.

Rules

- Export control law covers the export restrictions substantiated by foreign and security policy
- Export control is supposed to ensure safety and international peace
- Export control not only applies to companies exporting armaments
- Export control also applies to companies exporting civil products
- The tools of EU export control law are prohibitions and licensing requirements. Licensing requirements are not the end of an export but instead enable the proper examination of each individual case

B. The co-responsibility of the export industry for achieving the objectives of export control

Export control should have priority in companies for several valid reasons. However, in practice, export control is often regarded as a bureaucratic hurdle, cost factor and competitive disadvantage. Many companies cannot comprehend that their civil products might be "abused" for military “purposes”. This point of view is one-sided and dangerous:

- "Civil" products can indeed also be used in a military context
- Export control is an indispensable part of responsible risk management and can protect against wrong investments, accusation and prosecution

- Export scandals can threaten a company's existence:
  Export scandals are a popular issue in the media and also closely monitored abroad. Not only internationally operating companies have a reputation to lose. In the end, export scandals have an adverse effect on every company and the economy of the exporting country. If your company is merely suspected of performing illegal exports, you may be branded as a "black sheep" in foreign trade.

- Export scandals may force legislature to increase controls

The export industry must accept export control as a necessary means to secure peace. A functioning export control system secures foreign markets in the long run.

EXAMPLE
The delivery of some machines to country X for a rocket programme could result in a short-term profit for one single company (provided the company is not being prosecuted and punished with high fines!). The entire export industry would profit much more if country X relinquished its rocket programme and had been subjected to strict export controls.

The export industry must make the best of the "annoying demands"“. This means that an effective and modest export control can only be achieved in cooperation with the authorities. Also, the management must understand and promote export control in the company as a positive, long-term investment.

Rules

- Export control is a management issue and the management must act as role model
- Companies have to accept export control as inevitable
- Export control secures markets in the long run and must be understood as a long-term investment

C. The effects of export control law on companies

Essential tasks for practical implementation are the detection of risks and the solving of problems for a responsible approach to exporting.

Check list

Detection risks

Detect prohibitions because they make any legal transaction impossible.

Detect licensing requirements because a licence has to be applied for prior to exporting

Prohibitions and licensing requirements must already be considered when drafting a contract and planning production (business risk)

The non-observance of provisions is punishable under criminal law (risk of punishment)

Employees who neglect the provisions may also face legal consequences, meaning loosing their job (job risk)

Unreliable companies may be exempted from simplified procedures, licences may be revoked or refused

Companies which produce first and realise too late that they need a licence, which is not granted in the end, have to pay the production costs, a contract fine and loose their customer on top of everything. The company might not be granted any further licences for other exports.

Check list

Solution of problems

At least acquiring basic knowledge on how to detect risks

Organising export control internally

Assigning reliable employees

Obtaining security in handling the procedures and asking the licensing authority in case of doubt

D. The multilateral framework of EU export controls

The export control law companies in Europe have to observe is meanwhile largely governed by international guidelines or mainly already consists of European legislation in the dual-use items sector. The export control objectives demand internationally coordinated export control. Ideally, the same regulations apply in all industrialised countries. However, this ideal situation has not been achieved so far although a lot has been achieved to reach this goal in the past 25 years. For example:

- With the EU Dual-Use Regulation (Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (See Volume 3), uniform provisions apply in all EU Member States for the export of dual-use items
- A code of conduct issued by the EU for arms exports obligates all EU Member States to observe uniform licensing criteria
- International export control regimes (Wassenaar Arrangement, Australia Group, Nuclear Suppliers Group, Missile Technology Control Regime) jointly prepare goods lists and rules of conduct and enable the exchange of information
- The UNSCR 1540 contains binding obligations for all participating states to adopt legislation to prevent the proliferation of nuclear, chemical and biological weapons, and their means of delivery, and establish appropriate domestic controls over related materials to prevent illicit trafficking

However, this multilateral framework is of slight significance in everyday export control. The non-committal framework still has to be anchored in legislation. Legally binding prohibitions and licensing requirements are only laid down in EU regulations and in additionally EU Member States national laws and ordinances.

Rules

- Export control law is essentially governed by international standards
- Legally binding prohibitions and licensing requirements are only laid down in EU regulations and in EU Member States national laws and ordinances

E. The legal bases of dual-use export control

Each exporter has to know:

- Which legal sources (laws, regulations, circular directives, announcements, etc.) are indispensable for the export control law in practice?
- Where do I find these provisions?
- How can I inform myself in time about statutory changes?

Besides the basic provisions, there is a varying need for additional regulations depending on the product spectrum and the sales markets. Therefore, the sets of regulations may vary greatly in different companies. For export control in practice, it is important that the exporter familiarises himself with the regulations for his specific business transactions.

EXAMPLE
Embargoes against terrorists apply independently of the type of goods and the location of the terrorists. Therefore, these regulations must be available within every company.

Producers of armaments must be familiar with the EU Member States national legislations concerning armaments and observe these primarily.

On the other hand, companies exporting general laboratory equipment must concentrate on the regulations for dual-use items.

Check list

Which EU regulations must exporters be familiar with?

Regulation	Why do exporters have to know these regulations?
EU embargo regulations	These contain prohibitions of different business activities
EU Dual-Use Regulation with Annex I Annex II Annex IV	Duty to obtain an export licence for goods listed in Annex I Duty to obtain a transfer licence for goods listed in Annex IV Annex II contains the EU general export authorisations EU001 to EU006
EU Anti-Torture Regulation	These contain prohibitions and licensing requirements concerning foreign trade with goods which could be misused for the purpose of torture
EU Member States national legislation	May contain additional export control provisions concerning dual-use goods and armaments

Where can exporters find these provisions and how can they inform themselves in time about legal amendments?

The above and all further relevant EU provisions are contained in the official bulletin:

- EU Official Journal : http://europa.eu.int/eur-lex/lex/de/index.htm
- The website of the European Commission: http://ec.europa.eu/trade/creating-opportunities/trade-topics/dual-use/index_en.htm
- The website of the European Council: http://www.consilium.europa.eu/eeas/foreign-policy/non-proliferation,-disarmament-and-export-control-/security-related-export-controls-i.aspx?lang=de
- The website of the European External Action Service: http://eeas.europa.eu/cfsp/sanctions/index_en.htm
- The respective websites of the EU Member States (See also Volume 3): http://trade.ec.europa.eu/doclib/docs/2011/july/tradoc_148094.pdf

Of course it is not sufficient to obtain these regulations just once. In practice, the application of the export control law is aggravated by the fact that provisions are frequently amended. These legal changes must be observed.

Rules

- The exporter must learn which regulations apply for his transactions
- These regulations must be available within the company

- Changes to these regulations must be monitored

F. Basic terminology of export control law

I. The numerous facets of foreign trade

Trade includes a large number of business activities and involves very different actors.

EXAMPLE
The following entities may be involved in an export transaction from the EU (e.g. UK) to the USA: the producer, the buyer in UK, the financing bank, the shipper, a shipping company owner, a representative of the supplier abroad, a foreign dealer and the final customer.

The delivery of the goods is often tied to additional activities.

EXAMPLE
A company sells five machine tools to a foreign customer. Besides the delivery it commits itself to the following activities: Acceptance in EU in the customer's presence, assembly and commissioning abroad, training of employees, surrender of training documentation, delivery of replacement parts and maintenance.

There are also many different ways to deliver goods to a foreign customer.

EXAMPLE
Delivery from Germany via Hamburg by ship directly to Bombay or through Switzerland by truck to Genoa and by ship or by air transport with transhipment in Qatar or delivery not from Germany but instead from Italy or the USA or delivery via one or several brokers or delivery of a self-produced machine or purchase in Germany or in another country.

II. The selection of export control legislators

The state organs in charge of export control that phrase and pass the corresponding provisions are faced with important decisions:

- Which activities are to be subjected to export control?
- Who will be responsible for this?
- How will these activities be controlled?

Some benchmarks provide the framework:

- Intentions are not to control the entire foreign trade
- Only as many controls as the objectives of export control require.
- The controls must be suitable and necessary and may not be out of proportions.
- Only differentiated regulations consider the most varied real-life situations

Besides this, there is enough room for arrangements. Companies can benefit from a differentiating export control law, but the large number of provisions obstructs the view for the basic terminology of export control law.

1) Compass Basic terminology

The basic terminology is the compass to guide you in export control law. Without this compass, the exporter cannot detect the risk and solutions.

The compass is supposed to help recognise circumstances, which may be subject to prohibitions and licensing requirements. Knowing the basic terminology helps you to translate an issue into the language of the export control lawyers and locate the respective regulations much faster.

SIMPLE EXAMPLE
Company A sends some repair instructions for a testing machine by fax to a long-standing customer in India. Translated into "legalese", this is an intangible export by means of electronic media.

EXTREME EXAMPLE
German citizen Wiesel with residence in Brazil asks ABC company in Frankfurt/Main whether it could perform a training course in London for Indian engineers regarding the operation of lasers. An acquainted Brazilian scientist is supposed to assist ABC company with this training. An Indian expat would be available as an interpreter. For better preparation, the training records are supposed to be accessible beforehand as download on the homepage of ABC company by means of a password.

Experts will only be able to solve this case because they master the general terminology. This way, they can detect which information is still missing (e.g. technical parameters of the laser). They can also detect which information is completely irrelevant here (in this case: the interpreter).

The following explanation may be partially somewhat unsatisfactory, because it only becomes feasible once it includes further explanations on the prohibitions and licensing requirements. On the other hand, it will facilitate the understanding of the control systematic.

The basic terminology compass can be adjusted by asking "what", "where from" and "where to", "who", "how" and "by whom".

2) What? The reference objects of export control

Export control mainly deals with the fact that an exporter sells and delivers "something" to a foreign customer, to put it in simple terms. For this "something", export control uses the following terms:

Goods:
Goods are products, software (data processing programmes) and technology (see Art- 2 EU Dual Use Regulation). Not only the goods but also the software and the technology must be available in physical form. Mere ideas are not technologies and therefore also not goods.

Goods are movable items that may be subject to trade. Therefore, all industrial products are goods.

Software:
Software is a collection of one or several programmes or micro programmes contained on any storage medium (see terminology definition in Annex I Dual Use Regulation).

Technology:
Technology is specific technical knowledge required for the development, production or utilisation of a product and manifested in the shape of technical documentation, for example (see terminology definition in Annex I Dual Use Regulation).

Armaments
Armaments are all goods listed in the EU military list (see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:069:0019:0051:EN:PDF).
Among these are arms, ammunition, bombs, military vehicles, aircraft and ships, military electronics, military software and technology. Whether these products generally have an exclusively military nature, depends on whether they are specially designed for military purposes.

Dual-use items
Dual-use items are goods that can be used for both civil as well as military purposes. These goods are not specially designed for military purposes. In general, these goods are mainly used for civil purposes and requested by civil customers. However, they can also be used for military purposes and could therefore generally jeopardise the aims of export control. The military application purposes can take on many different forms. In order to be classified as dual-use items, it is already sufficient that the goods can be applied in connection with the development, production or use of armaments. A special technical standard is not required in this case. This applies to countless industrial products. Therefore, exporters should be very careful when thinking that their products can only be used for civil purposes and the assumption that export control does not concern them.

EXAMPLE
Examples of goods used exclusively for civil purposes: Baby toys, music CDs, novels
Examples for dual-use items: Laboratory equipment, electric cables, car jacks, water treatment equipment, tools like hammers, chisels and drills, notebooks

3) Where from and where to? The regional reference

Export control becomes involved when goods are delivered from country A to country B. Different territories have to be distinguished:

- European Union (EU/Community): The customs territory of the European Community;
- Third countries: all territories outside of the EU;
- EU Member States: The territories of the countries of the European Union

Export control law also works with further country terms to describe the export transaction. Licensing requirements also often only apply when the purchasing country and/or the country of destination are stated in a specific country list.

Country of (final) destination:
The country, in which the goods are exported and used, consumed or processed; if this country is not known, the country of destination is the last known country to which the goods were exported.

Purchasing country:
The country in which the buyer who purchases goods from the seller is established.

Country of Consignment:
The country where the goods are exported from.

Country of origin (from an export control point of view):
The country where the products are originally produced or extracted.

4) What? The controlled activities

The delivery of goods from country A to country B can have different names, depending on the country of destination and the delivery terms. In addition, export control also controls other activities besides the delivery of goods.

Export:
What is commonly known as an export is an exit of goods under the export control law.
The following definitions will be sufficient for now:
An export is the delivery of goods from the European Union to a third country.

Transfer:
A transfer is the intra EU delivery of goods from the territory of one EU Member State to one or more other EU Member State(s)

There are two different types of transfer:

Transfer with a final destination inside of the EU:
Delivery to another EU Member State in which the goods are to remain;

Transfer with a final destination outside of the EU:
Initial delivery to a customer in another EU Member State and subsequent export of the goods by the customer.

EXAMPLE
The UK company A sells and delivers several computers to its French customer, Societe B. Societe B sold the computers to Samba company in Brazil. A delivers from UK to B in France, B delivers to Brazil.

A different situation can be observed in cases in which no customer is involved in the delivery through the EU Member States, who would then take care of the subsequent export at his own responsibility. If merely shipping agents and other “aides” are involved, we are dealing with an export.

EXAMPLE
The UK company A sells several computers to Samba company in Brazil. The computers are initially transported by a UK shipping company, which takes the computers to Rotterdam. There they are loaded onto a ship with destination Brazil.

Data transfer (intangible transmission):
At the beginnings of export control, it was only possible to export goods physically. This is still the case today with machines, facilities, etc. However, software and technology can also be exported with electronic media. The technical aids are unimportant for the goals of export control. It may not play a role whether technical data material is sent via air mail or e-mail.

The decisive fact is that the software or technology reaches the customer abroad. Therefore, data transmission is also classified as exports and transfers. The intangible transfer of software and technology through electronic media, internet, fax or telephone is subject to the same rules as regular mail dispatch.

For distinction from services, however, please note that an export/transfer is only given if the software or technology is available in physical form and merely transmitted electronically.

Transit:
Transit is the mere transportation of goods through the EU territory.

Legally transit shall mean a transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community. Non-Community dual-use items' shall mean items that have the status of non-Community goods within the meaning of Article 4(8) of the Community Customs Code. Those goods are generally goods not produced in the EU and not released for free circulation in the EU customs territory.

The transit of non-Community dual-use items listed in the EU list of dual-use items may be prohibited by the competent authorities of the EU Member State where the transit occurs if the items are or may be intended, in their entirety or in part, for uses in connection with weapons of mass destruction.

Before deciding whether or not to prohibit a transit, an EU Member State may provide that its competent authorities may impose an authorisation requirement in individual cases.

An EU Member State may also extend the application of transit controls to non-listed dual-use items for uses in connection with weapons of mass destruction and to dual-use items for military end-use and destinations in embargo countries.

Transit controls are applicable, however, only if this is just a mere transport. In other cases, e.g. transhipment, the further transport is treated like an export, which may be prohibited or subject to approval in line with the general rules. Transport-related reloading or repackaging is no longer a transit if e.g. the country of destination is changed during the transport (detour, change of destination) or if the goods are essentially processed or modified.

EXAMPLE
If some trucks bound for transit receive a special camouflage lacquering during their storage at the free port of Hamburg. This is no longer a mere transport through the economic territory. Now the further delivery to a third country is subject to EU export control law.

The selection of the customs procedure may also lead to changing the applicable export control rules from transit to export.

Check list

Transit

Mere plain transport through the EU territory.

No release to free circulation.
Otherwise you are always dealing with an export.

No other customs treatment as external transit procedure, free warehouse or free zone without approved inventory records.
Otherwise the transaction is subject to export licensing under EU Dual-Use Regulation.

Brokering services
The term brokering services includes different business activities, see Art. 2 Nr. 5 EU Dual-Use Regulation.

- The negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or —
- The selling or buying of dual-use items that are located in third countries for their transfer to another third country.

The sole provision of ancillary services is excluded. Ancillary services are transportation, financial services, insurance or re- insurance, or general advertising or promotion

Services ("technical assistance")

For services, the export control law uses the term "technical assistance", see Art.1 a) Council Joint Action 2000/401/GASP (which has been implemented by national legislation of the EU Member States).

"Technical assistance" means any technical support related to repairs, development, manufacturing, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, training, transmission of working knowledge or skills or consulting services;

“Technical assistance” includes any technical service. The external form is insignificant. Technical support may be provided manually, orally as well as by phone or electronically.

EXAMPLE
Further examples: Testing, measuring, trying, analysing, training, education, know-how transfer in the scope of employing foreign staff or lectures.

Examples for non-technical services, which are therefore also not classified as technical support: Brokering of technical services, translation of technical documents, legal or commercial activities in connection with technical services.

The multifarious forms of technical support require a distinction from exports. Due to the fact that export licensing requirements are much more extensive, they always have to be checked first. Many services are tied to exports.

EXAMPLE
Tools are required for repair work.

Activities that are generally classified as services are exports in terms of the export control law. This especially applies in cases in which technologies or software is transmitted electronically.

EXAMPLE
Technical documents required for urgent repairs are sent by fax to a Chinese customer. This is a technology export by means of data transfer.

Check list

Export or technical assistance?

Are goods, software or technologies, that are available in tangible form, carried along physically to a country, sent, etc. or transmitted in intangible form by means of data transfer?

If yes: check export licence requirements.
If no: check licence requirements for technical assistance (of the respective EU Member State concerned).

Is technology being transferred that is not available in tangible form?
Check licence requirements for technical assistance. This cannot be an export because an export presupposes that the technology is available in tangible form.

Other activities and legal transactions
Embargoes, the Anti-Torture Regulation and further laws governing special goods may also contain regulations for activities and legal transactions that have not been discussed so far. For example: the possession, production, the sale or transfer of goods, the provision of funds or economic resources and services.

5) Who? The acting and responsible subjects and other participants

If the export control law governs licensing requirements for exports, transfers, commercial transactions, etc., it also has to define who has to observe and apply for these licences. This requires further definition because different companies or persons in various functions are regularly involved in these activities. The general

guideline for the selection is the question of who is responsible for the performance of the activities. In case of doubt, always ask yourself: Who is the principal? Who guides and controls the activities? This principal theory applies exemplary to the term "exporter".

Exporters and transferors

If companies have to apply for a licence at the licensing authority, they usually have to do this as the exporters. Therefore, it is one of the most important basic terms. The definitions in the EU Dual-Use Regulation (Art. 2, no.3) are helpful but not clear at first view; “Exporter’ shall mean any natural or legal person or partnership:

- On whose behalf an export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining the sending of the item out of the customs territory of the Community. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the exporter shall mean the person who has the power for determining the sending of the item out of the customs territory of the Community

- Which decides to transmit or make available software or technology by electronic media including by fax, telephone, electronic mail or by any other electronic means to a destination outside the Community

When the benefit of a right to dispose of the dual-use item belongs to a person established outside the Community – pursuant to the contract on which the export is based – the exporter shall be considered to be the contracting party established in the Community.

Therefore the following explanations deviate from the wording. They apply accordingly to the term "transferor".

The principal theory is decisive. The central idea of the principal theory is the responsibility of the person in charge of the export, meaning the one who decides in the end whether the export takes place at all. An exporter is a person who manages the export as the principal on the basis of his own economic and legal relations to the foreign customer. This is generally the contracting party of the customer. He is legally obliged to deliver the goods on the basis of the contract. The export is primarily in his economic interest. If he involves others in the delivery, they only become active on the basis of their contract with the exporter. However, they do not have a contract with the foreign customer.

The shipper, the haulage contractor and the warehouse keeper are not exporters. They merely fulfil their contract with their domestic client.

The subcontractor is also not the exporter. Even if he delivers directly to a foreign customer by order of the main contractor, he is not the exporter. He has no own economic or legal relations with the customer. With the delivery, he only fulfils his contract with the main contractor.

The broker of an export transaction is also not an exporter. He is not involved in the export contract as a contracting party. Therefore, any commission agreement with the client is of no significance.

The following aspects are insignificant for the principal theory:

- The ownership of the goods

EXAMPLE
The ownership may be transferred to a bank for securing a loan.

- Risk bearing clause and “incoterms”

EXAMPLE
The agreement „fob“ does not change the fact that the supplier controls the export.

- The mere presentation of the export declaration

Exporters in customs law and export control law may vary; in any case, no one becomes an exporter in the sense of the export control law by merely registering himself as "exporter“ in the export declaration.

In the following case, mere reference to the contract would not be appropriate because the responsibility and control rests with others:

- The contracting party merely acts as a nominee
- The handling of the export and its examination in terms of the export control law was transferred to an independent subsidiary for decision

In another case example, the principal is not held responsible as exporter. If, pursuant to the general rules for licensing requirements under the EU Dual-Use Regulation, a non-community resident would be the exporter, the provisions determine a European company that is involved in the export contract as the exporter. Background: The European company can be held liable more effectively by the competent authorities.

EXAMPLE
The German company A receives the order to deliver three vacuum pumps to company C in Iran from company B located in Panama. Company A is not the contracting party of company C, but only subcontractor of company B. Nonetheless, the provisions define company A as exporter.

Broker
This term is defined in Art 2 Nr. 6 of the EU Dual Use Regulation. According to that, the term “broker” shall mean any natural or legal person or partnership, resident or established in an EU Member State of the Community who carries out brokering services (as explained above) from the Community into the territory of a third country.

Checklist:

- Natural or legal person or partnership resident or established in a Member State of the Community

- Carrying out brokering services
  (the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or the selling or buying of dual-use items that are located in third countries for their transfer to another third country)

- From the Community

"Transitor“, "Trader“, "Service provider“ or "Technical supporter"
These terms are put in inverted commas because they are not legally defined. Principals performing the transit, the commercial transaction, etc. are held responsible. The explanations of the term "exporter" apply accordingly.

Community resident or established
These terms are used in different contexts: e.g. in the term exporter, for the licensing requirements for brokering services as well as for technical assistance and in the EU General Licences.

The circumstance of whether someone is established in or outside of the EU territory is decided by the place of residence or usual location with natural persons and with legal entities by the location or registered office of the management.

Recipient, end-user, purchaser (consignee)
Besides the subjects taken into responsibility for the licensing requirements, there are participants appearing, above all, on the other side of the transaction as beneficiaries, e.g. the customer in an export business.

These participants have a central significance in the application procedure for an export licence.

- The recipient is the Non-EU-resident who is the first to physically receive the goods.
- The end-user is the Non-EU-resident who uses or consumes the goods in the end.
- The purchaser or consignee is the Non-EU-resident who might not receive the goods physically and is then therefore not the recipient or end-user but partner of the exporter to whom the invoice is sent.

6) How and by whom? The control instruments and authorities

The available control instruments are prohibition and licensing requirement. Licences under the EU Dual-Use Regulation and embargoes in the field of goods and service transactions have to be applied for at the responsible licensing authority.

The compliance with the restrictions is monitored i. a. by the customs authorities. Within the scope of the export procedure under customs law, they check the admissibility of the export. Required licences must be presented together with the export declaration. If the customs authority is not sure the export requires a licence, it may refuse to process it and request the exporter to present a confirmation by the responsible licensing authority stating that no licence is required.

Rules

- Not all activities in foreign trade are subject to export control
- Compass basic terminology: If you want to detect the risks, you must be familiar with the basic export control terminology
- You can only determine prohibitions and licensing requirements if you are familiar with the basic terminology

G. The systematic of export restrictions

There are two forms of export restrictions in the EU framework: prohibition, and licensing requirements. The licensing requirements may be preceded by information duties.

The review sequence is:

- Prohibition
- Licensing/information requirement

Within this order, note that European regulations have priority to possible additional national regulations of the EU Member States.

Check list

What does the EU control and what do the EU Member States?

The EU Member States lay down prohibitions and licensing requirements for

- armaments and
- technical assistance

(see additional national regulations of the EU Member States)

The EU adopts prohibitions and licensing requirements

- for dual-use items
- embargoes with the exception of armaments
- transit
- brokering

(see especially EU Dual-Use Regulation)

The EU Member States may adopt additional regulations for

- dual-use items (e.g. brokering services and transit)
- embargoes

(see additional national regulations of the EU Member States)

Rules

- Review sequence: prohibitions, licensing requirements, information duties (EU law has priority to national law)
- Observe the jurisdiction

H. Prohibitions, especially embargoes

Prohibitions are exceptions in export control and are limited to factors that are incompatible with the objectives of export control.

Prohibitions with diverse objectives

The so-called anti-boycott regulation prohibits German and European companies to observe individual US embargoes (Regulation (EC) no. 2271/96).
The so called anti-torture regulation (Regulation (EC) no. 1236/2005) prohibits exports of equipment intended for capital punishment or torture.

Embargoes
Most prohibitions in export control law contain embargoes. Exercise special caution in business contacts with embargo countries. All business contacts should be thoroughly examined for possible prohibitions beforehand! In case of doubt, we strongly recommend clearing up the issue with the competent authority of the EU Member State in question.

Embargoes are international economic sanctions against individual countries, organisations, companies or private persons. Compared to other restrictions of the export control law, they are different in certain aspects:

- The main motive is not mainly the non-proliferation of weapons of mass destruction. Instead embargoes are supposed to exert economic pressure on those responsible in case of wars, civil wars, terrorist threats, human rights violations etc.
- Embargoes may affect entire subsections of foreign trade.
- Embargoes affect industry sectors, goods and activities that are otherwise not subject to export control
- Embargoes partially use other basic terminology than the general export control law
- Very differentiated regulations, both in European as well as in national law of the EU Member States
- Frequent law amendments
- For detailed information about the present EU embargoes, refer to the homepage of the European External Action Service at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

You also will find additional information in part 8 of this handbook.

I. The licensing requirements for exports and transfers at a glance

The licensing requirements for dual use goods exports and transfers are the core of export control. Four criteria are essential:

- Licensing requirements for listed and non-listed goods
- These licensing requirements distinguish between export, transfer with subsequent export or transfer with final destination in the EU
- The export of listed goods is always subject to licensing
- Licensing requirements for non-listed goods only exist in connection with sensitive use

Goods/ use	Export	Transfer with subsequent export	Transfer with final destination in the EU
Annex I	Art. 3 (Annex I)		
Annex IV	Art. 3 (Annex IV as part of Annex I)	Art. 22	Art. 22
Non-listed goods i. c. w. ABC weapons Missiles	Art. 4 (1)		
Non-listed goods i. c. w. Conventional military end-use	Art. 4 (2) (Countries under arms embargo)		
Non-listed goods for unapproved arms exports	Art. 4 (3)		

Art. and Annex refers to the EU Dual-Use Regulation
Note: In some EU Member States additional lists of controlled goods exist which have to be observed. Check the homepage of the relevant EU Member State.

I. List checks are indispensable

The check of whether goods are included in one of the goods lists is indispensable. You can only perform responsible internal export control if you know your goods and have checked the lists. This will help you find the pertinent licensing requirements much faster. There is no individual case in which all provisions illustrated in the overview of the licensing requirements apply. The characteristics of the goods already are important pre-selection criteria.

EXAMPLE
Anyone exporting goods listed in Annex I must always apply for a licence.
The same applies to the export of goods listed in Annex IV.

Listed dual-use items, however, are not subject to licensing when transferred to a final destination in the EU.

However, please note: The export of listed goods is always subject to licensing. Anyone not exporting listed goods must only observe the bottom half of the overview.

The list coverage can often be cleared up by obtaining information on the listing of the goods from the competent licensing authority of an EU Member State.

Check list

Licensing requirements for exports and transfers

The export/transfer is not prohibited.
Therefore: First check for prohibitions, especially embargoes!

Are there special regulations that have priority or have to be observed additionally?
E.g. for goods controlled by the anti-torture regulation

Are the goods to be exported listed in a control list ("listed goods")?
Check control lists! Obtain information about the control list if applicable.
The export of listed goods is always subject to licensing.
The transfer of listed goods to other EU countries with known subsequent export is almost always subject to authorisation.
The transfer of listed goods with final destination in the EU is only subject to authorisation if armaments or some few highly sensitive dual-use items are concerned. (Annex IV items).

Are the goods not listed in a goods list ("non-listed goods")?

II. An application: "to make sure"

Export control law is not an easy affair. Licensing requirements depend on many circumstances, the evaluation of which is partially difficult and therefore also subject to dispute. This applies to the determination of the relevant facts, e.g. the definition of technical parameters, as well as to the legal assessment.

EXAMPLE
Armaments are goods specially designed for military purposes and therefore no dual-use goods. It may be a difficult technical question in individual cases to determine whether certain goods have such a special design. However, this factor is decisive for the licensing requirement.

Therefore: In case of doubt apply for licence at the competent licensing authority of the relevant EU Member State. The risk of a criminal offence is too high. Better filing one application too much than not. Nobody does regard such applications as a sign of lacking expertise. A "good“ application “to be on the safe side” in which the applicant explains his doubts with respect to a licensing requirement may indeed document the applicant’s expertise and reliability.

Rules

Criteria of the licensing requirements:

- listed and unlisted goods
- export, transfer with subsequent export or transfer with final destination in the EU
- export of listed goods is always subject to licensing
- Licensing requirements for unlisted goods only exist in connection with sensitive use
- List checks are indispensable
- In case of doubt, apply for a licence ("to make sure")

J. The control lists: Annexes I and IV

When checking the licensing requirements for listed dual-use items, the exporter has to consider at least two different goods lists:

- The European Annex I and
- The European Annex IV to the EU Dual-Use Regulation

Besides this there are additional national lists of some EU Member States.

Note: For military goods, national legislation of the EU Member States has to be observed. The respective control lists are based on the EU military list (links: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:069:0019:0051:EN:PDF).

Annex I: EU List of dual-use items divided into 10 categories

Category 0:	**NUCLEAR MATERIALS, FACILITIES, AND EQUIPMENT**
Category 1:	**SPECIAL MATERIALS AND RELATED EQUIPMENT** (Materials, chemicals, micro-organisms and toxins)
Category 2:	**MATERIALS PROCESSING**
Category 3:	**ELECTRONICS**
Category 4:	**COMPUTERS**
Category 5:	**TELECOMMUNICATIONS AND "INFORMATION SECURITY"**
Category 6:	**SENSORS AND LASERS**
Category 7:	**NAVIGATION AND AVIONICS**
Category 8:	**MARINE** (Marine and naval technology)
Category 9:	**AEROSPACE AND PROPULSION** (Propulsion systems, spacecraft and the related equipment)

The **Annexes I and IV** to the EU Dual-Use Regulation only contain dual-use items, no armaments. Annex IV is a subset of Annex I and contains dual-use items that are classified as being so sensitive that even their transfer within the EU is always subject to licensing. This concerns goods in the categories nuclear technology, camouflage technology and missiles.

I. The relation between the national export control lists of the EU Member States and Annex I

Some EU Member States have added some additional items to the EU list which is allowed by the EU regulation under certain circumstances. In case of doubt, the exporter needs both lists. He may not be simply content with the EU or national list. This procedure might be complex but, ultimately, there is no alternative. He needs the current Annex I to reliably check the licensing requirements pursuant to the EU Dual-Use Regulation, and he needs the current list of the respective EU Member State to reliably check the additional national licensing requirements.

II. Common principles of the EU Dual-Use Regulation Annexes I and IV

- The list coverage of the goods basically depends on objective technical criteria
- Whether goods are designed for a special purpose exclusively depends on their objective technical design and functionality
- Listed main components also retain their listing as a part of unlisted goods if they can be easily removed or used for other purposes
- Replacement parts are only covered if they are listed as specially designed components in an item
- Goods retain their listing if they can be disassembled into individual parts but also easily reassembled again
- Technology and software are not covered if they are generally accessible.
- Basic research is not covered

K. Licensing requirements for the export/transfer of listed goods

I. Exports

The export of listed goods is always subject to licensing.
The export/transfer licensing provisions (Art. 3 (1) EU Dual-Use Regulation, Art. 22) have a simple structure:

- There must be an export/transfer, and
- The goods must be listed

II. Export of goods from other EU Member States

The export licensing requirement for dual-use items in Annex I also applies to exporters in case of exports from other EU Member States as the state where the exporter is established.

On the other hand, the export licensing requirement for special national dual-use items of an EU Member State only applies to exports outside of the economic territory of the respective Member State. Therefore in case of exports from other EU Member States, the national law of the Member State has to be observed additionally.

III. Transfers with a final destination outside of the EU

The EU Dual Use Regulation provides for the possibility that a Member State may impose an authorisation requirement for the transfer of other dual-use items from its territory to another EU Member State in cases where at the time of transfer:

- The operator knows that the final destination of the items concerned is outside the Community
- Export of those items to that final destination is subject to an authorisation requirement pursuant to Articles 3, 4 or 8 in the EU Member State from which the items are to be transferred, and such export directly from its territory is not authorised by a general authorisation or a global authorisation
- No processing or working as defined in Article 24 of the Community Customs Code is to be performed on the items in the EU Member State to which they are to be transferred

If an EU Member State has introduced these authorisation requirements has to be checked by the transferor in the respective national legislation. In principle, these transfers are just as much subject to licensing as exports. However, the licensing requirement presupposes that the transferor knows that his EU customer will afterwards export the goods out of the EU. This restriction, which is of great relevance in practice, results from the idea and the purpose of the licensing requirement. The export licensing requirements and the control policy are not supposed to be circumvented by deliveries in the single European market if the supplier knows that the goods will be exported at the end of the delivery chain. However, if he is not aware of the subsequent export, this is merely a transfer for him.

IV. Transfers with a final destination inside of the EU

These transfers are only subject to licensing when they concern dual-use items stated in Annex IV.

L. Licensing and information requirements for the export/transfer of non-listed goods (catch-all controls)

The export of listed goods is always subject to licensing. There is no such simple maxim for the export of non-listed goods. Non-listed goods are never subject to licensing per se. Otherwise, every export would be subject to licensing in principle.

Check list

Basic structure of licensing requirements for unlisted items

Licensing requirement only if, in individual cases, the non-listed goods are intended or may be intended for use in connection with either

- Weapons of mass destruction (nuclear, biological, chemical) or related missiles, or
- Conventional armaments in countries under arms embargo like Iran, North Korea or Syria, or
- previously illegally exported armaments

And: the exporter is aware of this use or the competent licensing authority of an EU Member State informed him about this use.

I. Information provided by the licensing authority / knowledge of the exporter

Licensing requirements for listed goods are based directly on the regulations. In case of non-listed goods, additional elements must be taken into consideration. A licensing requirement only exists in two alternatives.

By notifying the exporter, the authority substantiates a licensing requirement.

- This notification generally is released to the exporter by mail, fax or e-mail
  With this, the authority notifies the exporter that the goods of a concrete export transaction are or may be intended for a purpose in connection with weapons of mass destruction (WMD)
- This information legally substantiates a licensing requirement for the given export transaction
- At this point, the exporter has to apply for a licence

In case of a specific export transaction, if the exporter knows that the goods are intended for use in connection with WMD, etc.

- He in turn must inform the licensing authority. For this purpose, it is recommended to fill an application for an export licence
- Then the authority decides on the application/case
- The exporter must wait for the decision

Note that the authority may already substantiate a licensing requirement if the goods could be intended for a sensitive purpose. Precise indicators of a sensitive use are sufficient in this context. On basis of the EU Dual Use Regulation the exporter is only obliged to notify if he knows that the goods are intended for a sensitive purpose.

Note:
A Member State may adopt or maintain additional national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I already if the exporter has grounds for suspecting that those items are or may be

intended, in their entirety or in part, for uses in connection with WMD or related missiles

II. How does the exporter "become aware"?

The exporter may obtain his knowledge of a sensitive use from very different sources: e.g.

- The customer informed him
- The customer's advertising in his brochures or on the homepage
- Clear indicators in the order documents
- Specific requirements on the goods
- Impressions gained at a visit to the company
- Information about the consignee or other notices by the licensing authority
- Black lists of sensitive entities or individuals, if published by the EU or EU Member States or even other countries
- The overall picture of several indicators

The basic provisions do not oblige the exporter to conduct research. However, he may also not export "into the blue" or ignore clear indications. The desire for high turnovers may not obstruct the view of export control. The exporter has to check whether he or someone of his staff "is aware"; if this is the case, he is obliged to inform the competent licensing authority of the relevant Member State. This means: the exporter has to check all available information to see whether this leads to "awareness“.

III. The risks with non-listed goods - ask the licensing authority

With non-listed goods, investigations at the company's own responsibility may be a walk on a tightrope. What do I know about my customer? Am I "aware"? Do I have to inform the licensing authority? Have I overlooked important information? If you answer these questions wrongly, you might unintentionally supply a nuclear biological or chemical weapons programme, etc. Therefore, the following also applies in this case: In case of doubt, ask the licensing authority. The authorities do not see such questions as a sign of lacking expertise. On the contrary, this may be proof of responsible export control.

The competent authority after assessing the request might then give the advice to apply for a licence to make sure or answer the question in other ways (e.g “no licence required”).

Written information of a licensing authority can also be presented to the customs authorities as a proof of the admissibility of an export. Therefore, requests to make sure are also recommended in a case where you expect problems with customs treatment. The customs authorities are authorised to stop exports if they are not convinced of their exemption from licensing. Such a stop may result in substantial costs for the exporter because of the delay of the delivery.

IV. The sensitive uses

It is true for all variants that the non-listed goods do not have to have any special technical qualities. In principle it is enough that they are objectively technically suited for the sensitive use. The regulations may therefore also apply to goods that can be characterised as bulk or shelf goods.

The following sensitive uses are to be distinguished:

1) WMD and missiles (Art. 4 (1) EU Dual-Use Regulation):

Use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of WMD or in connection with the development, production, maintenance or storage of missiles for WMD.

The extensive catalogue makes it clear that all relevant deliveries for WMD should be subject to export control. Most important in practice are deliveries for the development and production phases. Please note that the development of weapons can already start in research institutes and laboratories, and therefore be quite remote from completed weapons with respect to space and time.

2) Conventional armaments (Art. 4 (2) EU Dual-Use Regulation):

Use in connection with conventional armaments referring to three case groups:

- Incorporation into military items
- Production, test or analytical equipment for the development, production or maintenance of armaments
- Unfinished products for an arms production plant

In the following purchasing or destination countries:

- Countries subject to an arms embargo decided by the EU, the Organisation for Security and Cooperation in Europe (OSCE) or imposed by a binding resolution of the Security Council of the United Nations

For detailed information about the present EU embargoes, refer to the EU homepage at: http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

3) Supplies for illegally exported armaments (Art. 4 (3) EU Dual-Use Regulation)

The restrictions under Art. 4 EU Dual-Use Regulation have to be observed by all exporters for exports from EU countries.

The transfer of non-listed goods from one EU Member State to another with final destination outside the EU is generally subject to the same licensing requirements. Transfers with final destination within the EU are exempted from licensing.

M. Simplified Procedures

There are different forms of simplified procedures on EU level: General export authorisations and global authorisations (licences) enable more than one export with one licence, as compared to the individual authorisation (licence) granted in normal cases.

I. Union General Export Authorisations (GEA)

These are the most important simplified procedures in practice because they spare companies most licence applications. GEA are granted "ex officio" and allow an unlimited number of exporters an unlimited number of exports of certain goods to certain countries as specified in Annex II of the EU Dual-Use Regulation.

Companies wanting to use a general export authorisation must notify the first use to the competent authority of the Member State where the exporter is established. Further requirements are published by the EU Member States and the EU commission (see above chapter E).

“Any exporter who uses this authorisation must notify the competent authorities of the Member State where he is established of the first use of this authorisation no later than 30 days after the date when the first export took place or, alternatively, and in accordance with a requirement by the competent authority of the Member State where the exporter is established, prior to the first use of this authorisation. EU Member States shall notify the Commission of the notification mechanism chosen for this authorisation. The Commission shall publish the information notified to it in the C-series of the Official Journal of the European Union.”

Reporting requirements attached to the use of this authorisation and additional information that the Member State from which the export is made might require on items exported under this authorisation are defined by EU Member States.

A Member State may require the exporters established in that Member State to register prior to the first use of this authorisation. Registration shall be automatic and acknowledged by the competent authorities to the exporter without delay and in any case within 10 working days of receipt, subject to Article 9(1) of this Regulation.

The following GEA are currently in force on the EU level (EU GEA) and published in regulation (EU) Nr. 1232/2011:

- EU001 - Exports to Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Liechtenstein) and United States of America
- EU002 - Export of certain dual-use items to certain destinations
- EU003 - Export after repair/replacement
- EU004 - Temporary export for exhibition or fair
- EU005 - Telecommunications
- EU006 - Chemicals

EU003 and EU004 authorises exports to 24 destinations including China (including Hong Kong and Macao).

Several prerequisites and restrictions have to be observed when using general export authorisations.

Check list **GEA**

Export bans take priority and are not invalidated by the GEA

Is the export subject to licensing after all?

Check the authorised goods and country group

When the exporter is established in an EU Member State, the export of dual-use items is also allowed from each other EU Member State as basis of an EU GEA

Deliveries to free zones and free warehouses are excluded

Not applicable if items may be intended for use in connection with WMD

Notification with the licensing authority

Remark in field 44 of the export declaration required

Reporting requirements after the export

Observe the additional details of each general export authorisation

Link:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0026:0044:EN:PDF

Additional national general export authorisations (NGAs) – may be issued by individual EU Member States, provided that they:

- Do not conflict with existing EU GEAs
- Do not cover any of the items listed in Annex IIg to Regulation 428/2009.

France, Germany, Greece, Italy, Sweden, the Netherlands, and the UK currently have these authorisations. NGAs are published in the official journal of the issuing country.

II. Global Export Authorisations

Global export authorisations (licences) – may be granted by individual EU Member States to one exporter and cover one or more items to one or more countries/end-users. A global export authorisation allows an exporter to export a large number of goods to different recipients in different countries. It is up to each Member State to decide on the conditions in granting of such licences.

N. Licensing requirements for services ("technical assistance“)

Licensing requirements may not only be in effect for "classic" technical services like repair, maintenance, measuring and analytical work or training. Possible application fields are also the employment of foreign employees and the know-how transfer to guest scientists and students or by means of lectures.

This area is covered by EU Member States national legislation based on an EU Council Joint Action (JA). For details, see the Art. 1 Council Joint Action of 22 June 2000 (2000/0401/CFSP) (Official Journal L 159, P. 216).

Technical assistance in the EU is under control for uses in connection with weapons of mass destruction and related missiles.

Technical assistance shall be subject to controls (prohibition or an authorisation requirement) where it is provided outside the European Community by a natural or legal person established in the European Community and is intended, or the provider is aware that it is intended, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons (Art.2 JA).

The following exemptions have to be taken into account:

Technical assistance is not to be controlled

- where it is provided in a country listed in Part 2 of Annex IIa to the Dual Use Regulation
- where it takes the form of transferring information that is "in the public domain" or "basic scientific research" as these terms are respectively defined in the international export control regimes, bodies and treaties; or
- where it is in oral form and not related to items required to be controlled by one or more of the international export control regimes, bodies and treaties.

The EU Member States additional regulations for "technical support" “may be more differentiated and can cover additionally technical support e.g. in connection with other military end-uses provided in countries of destination subject to an arms embargo or technical assistance provided in the territory of the EU for a Non-EU resident.

O. Licensing requirements for brokering transactions

Subject to Art 5 EU Dual-Use Regulation an authorisation shall be required for brokering services (as defined in Art. 2 Nr. 5 Dual-Use Regulation, see above F.II.4)) of dual-use items listed in Annex I Dual Use Regulation if the broker has been informed by the competent authorities of the Member State in which he is resident or established that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4(1) Dual Use Regulation. If a broker is aware that the dual-use items listed in Annex I for which he proposes brokering services are intended in their entirety or in part, for any of the uses referred to in Article 4(1) Dual Use Regulation, he must notify the competent authorities which will

decide whether or not it is expedient to make such brokering services subject to authorisation.

Check list

Licensing requirements for brokering transactions

1) Is the transaction concerned a brokering transaction?

Is it a negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or -
the selling or buying of dual-use items that are located in third countries for their transfer to another third country?

2) Which group of goods is concerned?

Listed goods contained in Annex I Dual Use Regulation?
(For non-listed goods in connection with weapons of mass destruction or dual-use items for military end-use in countries subject to an arms embargo, the national legislation of the respective EU Member State may apply).

3) Where are the goods?

In a third country and intended for export to another third country or in the EU customs territory but not subjected to import clearance and intended for export to a third country (therefore merely a transit); ergo delimitation to transactions in which an export or transfer from the economic territory takes place. In this case, the more extensive licensing requirements for exports and transfers apply.

4) Intended end-use?

Are the items in question in their entirety or part intended to be used in connection with weapons of mass destruction?

5) Knowledge of the intended end-use ?

Is the exporter aware of (in some EU Member States already “grounds for suspecting” may be sufficient) the intended sensitive end-use of the dual-use items for which he proposes brokering services (leads to duty to inform the competent authority and await their decision)?

or

has he been informed accordingly by the competent authority?

6) Observe the group of persons involved!

The licensing requirements apply to companies and persons resident or established in the EU.

(Additional national licensing requirements of some EU Member States may apply for EU nationals carrying out brokering services from outside the EU).

P. Transit (Prohibitions/Licensing requirements)

According to Art 6 of the Dual Use Regulation, the transit of non-Community dual-use items listed in Annex I may be prohibited by the competent authorities of the EU Member State where the transit occurs if the items are or may be intended, in their entirety or in part, for uses in connection with weapons of mass destruction.

Before deciding whether or not to prohibit a transit, a Member State may provide that its competent authorities may impose an authorisation requirement for the specific transit of such dual-use items in individual cases.

A Member State may extend the application to non-listed dual-use items for uses in connection with weapons of mass destruction and to dual-use items for military end-use and destinations subject to an arms embargo.

The transit provisions establish the possibility for EU Member States to prohibit transit operations on a case-by-case basis. Licence applications are not required for all transit operations, as it is the case for exports of listed goods from the EU to a third country. Therefore a company which plans the transit of dual-use items through the EU territory has no special duties concerning licence applications. Only the appropriate customs declaration has to be made. In relevant cases the competent authorities will stop the transit and check if a prohibition has to be implemented.

Nevertheless a company which is responsible for a transit should check in advance if the goods and the probable end-use may be relevant in connection with WMD and if so inform the authorities. Otherwise the transaction may be stopped which may result in time consuming checks and endanger the economical aims of the transaction.

Note: Dual-use items covered by the Dual Use Regulation which are imported from third countries (Non-EU Member States) and subsequently released for free circulation in the Community are not covered by the transit provisions. They should be considered as Community goods and will be subject to an export authorisation requirement if transferred outside the EU afterwards.

Q. Notifications and information to clear up licensing requirements

The difficulties of the export law lead to many questions. Do I need a licence? Are my goods listed? Is there sensitive information about my customer? Is the use of a general licence excluded? Am I even the exporter in a certain constellation? The exporter cannot or may not want to answer each of these questions on his own responsibility. He has various methods available to clear up these questions with the competent authorities of the EU Member States. He should e.g.

- Ask the competent authority for instructions concerning the licensing procedure e.g. legislation, forms, classification of goods, simplified procedures
- Inform the competent authority about unclear or suspicious circumstances and ask for instruction
- Notify to the competent authorities if he is aware of intended sensitive end-uses of the items he wants to export

R. Information, reference and safekeeping requirements

Besides prohibitions and licensing/information requirements, exporters have to observe some "secondary obligations":

I. General obligation to provide information, Art. 21 EU Dual-Use Regulation:

Among others, the competent authority of every EU Member State can demand information on any order or transaction involving dual-use items and may enter the premises of persons with an interest in an export transaction or brokers involved in the supply of brokering services.

II. Safekeeping and presentation of records for exporters and brokers, Art. 20 EU Dual-Use Regulation:

To prove that prohibitions and licensing requirements were observed:

- All relevant data (items, quantity, exporter, consignee, end-user, end-use) concerning the export/brokering (e.g. Business papers such as invoices and transit documents) have to be kept.
- Safekeeping period of at least 3 years. Longer periods may be applicable on the basis of other regulations, e.g. fiscal law.

III. Customs procedures, Art 16, 17 EU Dual-Use Regulation:

- When completing the formalities for the export of dual-use items at the customs office responsible for handling the export declaration, the exporter shall furnish proof that any necessary export authorisation has been obtained.
- A translation of any documents furnished as proof into an official language of the Member State where the export declaration is presented may be required of the exporter
- Member States may provide that customs formalities for the export of dual-use may be completed only at customs officers empowered for this purpose. This information is published in the Official Journal of the EU.

IV. Reference duty, Art. 22 (10) EU Dual-Use Regulation:

When transferring goods listed in Annex I to other EU states, a note has to be included in the business records for the customer stating that the export of these goods is subject to licensing.

2. The licence application procedure – how to file a valid application

A. General remarks

The main principle of EU Dual-Use Regulation is that controlled items cannot leave the EU custom territory without an export authorisation being granted. The list of controlled items is set out in Annex I of the Regulation and is divided into 10 categories. For example, 0 stands for nuclear materials, facilities and equipment, 9 for propulsion systems, space vehicles and related equipment.

Each category is divided into five subsets: A (equipment), B (test and inspection equipment), C (materials), D (software) and E (technologies).

There is a Correlation Table, which matches up the Customs Taric Codes with the Dual-Use (DU) Codes, based on the Dual-Use Regulation, which cover items exported from EU Member States which need a licence. (see: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131339.pdf)

The list of controlled items is based on control lists adopted by international export control regimes – the Australia Group (AG), the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement (WA) and the Missile Technology Control Regime (MTCR).

There are four types of export authorisations that are referred to in the EU Dual-Use Regulation:

I. The Union General Export Authorization (EU001):

The Community General Export Authorization (EU001) covers most of the exports of controlled items to eight countries (United States of America, Canada, Japan, Australia, New Zealand, Switzerland, Lichtenstein and Norway).

Practical Example
An exporter intends to export a listed item to a customer in Canada. EU001 allows him to ship the goods without applying for an export licence. Prior to the export, however, (or not later than 30 days after the export took place) the exporter has to notify the national licensing authority of the first use of this General Authorisation. In addition he has to periodically report what has been exported under EU001. It is important to mention that the use of a General Authorisation has to be mentioned in box 44 of the Single Administrative Document

II. Further Union GEA (EU002 to EU 006) introduced by Regulation 1232/2011:

- EU002 – export of certain Wassenaar controlled dual-use items to certain destinations
- EU003 – export after repair/replacement
- EU004 – temporary export for exhibition or fair
- EU005 – telecommunications
- EU006 – chemicals

Union GEA as described above are granted by the EU Dual-Use Regulation. The administrative process is the same with all GEA EU001 to EU006. For more details concerning Union GEA see above chapter 1.M.I.

Practical Example:
An exporter intends to export Thiodiglykol listed under 1C350 of Annex 1 of the Dual Use Regulation to Argentina, Croatia, Iceland, South Korea, Turkey or the Ukraine.

As this chemical is listed in the Union GEA EU006 he needs not to apply for an individual licence.

III. National General Export Authorizations (GEA):

Most licences however are issued by the 27 EU Member States in form of National GEA, Global Authorizations and Individual Licences:

These authorisations can be issued by individual EU Member States under the conditions set out in article 9 of the EU Dual-Use Regulation.

NGAs issued by individual EU Member States need to be in line with existing GEAs (cannot conflict with GEAs) and cannot cover any of the items listed in part 2 of Annex II of the Regulation (NGAs must exclude such items from their scope).

NGAs are published in the official journal of the issuing EU Member State. Several EU Member States have these NGA´s in place: France, Germany, Greece, Italy, Sweden, the Netherlands, and the UK.

Practical Example:
A German exporter intends to export certain graphite listed under 0C004 of the Dual Use Regulation to countries except weapons embargo countries according Article 4(2) of the Dual Use Regulation or to Afghanistan, Algeria, Israel, Yemen, Jordan, Pakistan and Uzbekistan.

In this case the exporter may use the German National GEA EU009 (Graphite).

IV. Global authorisations:

Global authorisations are granted to one exporter and covering several items to several countries/end-users.

These licences are issued in cases of minor control interest taking into account the presence of an internal compliance system of the exporter.

V. Individual licences:

Individual licences, generally for one exporter and covering exports to one end-user outside of the EU. These are the most common licences issued.

There is free circulation in the EU single market for dual-use items with some exceptions. The list in Annex IV specifies the items that are controlled prior to being

transferred within the Community of the EU. If suppliers want to transfer these very sensitive items within the EU they have to apply for a licence at their national authority. Details of the national competent authorities are published in the Official Journal of the EU and an update is published regularly.

VI. Export licence application procedure:

An exporter should first check if he, according to the EU Dual-Use Regulation, is the "exporter" as this clarifies the question who is responsible for the performance of an export activity and in which EU Member State he is eligible to apply for a licence, as the exporter has to apply at the licensing authority of the EU Member State in which he is resident.

The addresses of the 27 licensing authorities can be found at the following website:

http://trade.ec.europa.eu/doclib/docs/2011/july/tradoc_148094.pdf

In a second step the exporter should always check whether the applicable regulation or the specific case provides for an exemption. Finally, it has to be checked if simplified procedures exonerate the exporter from application duties.

If an exporter has ascertained that his export project is subject to licensing, an application has to be filed, except in cases of GEA described above. In this case the first use of the Union GEA (EU001 to EU006) has to be notified to the national authority prior to the export or not later than 30 days after the date when the first export takes place. In addition the exporter has to submit periodical reports to the national authority on the goods exported under the different GEAs. GEA can only be used if the preconditions are met. Illegal exporting under a GEA is a legally prosecuted offence!

The exporter could also apply for a Global Licence which may be granted by the licensing authority of the EU Member States if the exporter has regular shipments and the goods or country of destination are of minor interest taking into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation.

If none of the named licence procedures are applicable, the exporter has to apply for an individual licence.

B. Prior to the application

Preliminary examinations should already be conducted in this phase and the exporter should get in touch early with the interested party/customer to obtain information of importance for an export licence application. It is often easier to clear up facts that have to be communicated when applying for an export licence during the contract negotiations than after the placement of the order.

I. Which forms?

As the issuance of an export licence is the responsibility of the individual EU Member States, different forms for applying for a licence are in place. In some EU Member States the application can be done by electronic means. This makes copies and paper forms in use obsolete: e.g. in Germany, Austria, UK and Sweden.

The licence, however, is standardised and has the same layout and content in all EU Member States.

1) Filing a written application:

In case of a written application, exporters have to submit the original forms which are in most cases available at the respective homepage of the National Authority of the EU Member State.

Exporters have to fill in the forms with a typewriter (or print it out with a printing programme). Most EU Member States have published comprehensive instructions for filling in the forms.

For example, see the instruction forms of the German BAFA, or the Austrian Federal Ministry for Economy Family and Youth. These forms explain the individual fields, illustrate correlations (so-called plausibilities) and explain the procedure by means of a case example.

These instructions are located on the licensing authority's homepage:

Germany:
www.ausfuhrkontrolle.info
see: "Forms, sample forms"

Austria:
www.bmwfj.gv.at/Außenwirtschaft/exportkontrolle-online

The homepages of other EU Member States may be found at the following Internet page:

http://trade.ec.europa.eu/doclib/docs/2011/july/tradoc_148094.pdf

2) Filing an electronic application:

Several EU Member States (Austria, Czech Republic, Denmark, Germany, Hungary, Ireland, Poland, Spain, Sweden and the United Kingdom) give the option to file an electronic application. In some EU Member States, however, only an electronic application is allowed (Austria, UK).

Austria
http://www.bmwfj.gv.at

Czech Republic
http://www.mpo.cz/

Denmark
http://www.dba.erhvervsstyrelsen.dk/export-controls

Germany
www.ausfuhrkontrolle.info

Hungary
http://mkeh.gov.hu/

Ireland
http://www.djei.ie/trade/marketaccess/exports/index.htm

Poland
http://www.mg.gov.pl/

Spain
http://www.comercio.gob.es/

Sweden
http://www.isp.se

United Kingdom
https://www.gov.uk/export-control-licence

Below some examples of Member States working with electronic applications are given.

The link can be found on the home page of the Austrian Ministry for Economy Family and Youth:
www.bmwfj.gv.at/Außenwirtschaft/exportkontrolle-online

The German “ELAN” gives Exporters the option to file electronic applications for export/transfer licences and submit these to the licensing authority.

The exporter can access the ELAN software via a link on BAFA's website:

www.ausfuhrkontrolle.info
See: "Forms, online forms".
In order to use the programme, you need to register electronically.

In Austria it is mandatory to apply electronically via the “PAWA” system as long as the technical capabilities of the exporter allow for such procedures - which is practically always the case. Additionally, as a precondition for activating an account, the exporter has to nominate a “responsible person” within the company who has to introduce an internal compliance system (ICP) as well.

The Swedish export control authority ISP (http://www.isp.se), which is a completely independent authority, offers the option of an electronic application as well.

In the UK the electronic application system can be found on the homepage of the Department for Business Innovation and Skills (BIS):

www.spire.bis.gov.uk/eng/fox/espire/LOGIN/login
A registration of the exporter is necessary before BIS activates the exporter's account.

In case of an electronic application exporters usually enter the system with a user ID and a password. In Austria the system works with an electronic signature card.

The advantages of an electronic application system are obvious:
The exporter can apply for a licence at any time and the electronic application makes it superfluous to purchase the forms on paper. The software further prevents exporters from submitting incomplete applications to the licensing authority.

II. Which records?

It should be noted that it is generally not sufficient to merely complete the required forms. Exporters should always keep in mind that they have to provide as much information as possible to the application in order for the authority to be able to properly process the application without possible questions about the applications intend. The licensing authority can only approve an application if the facts are clear and free of contradictions so that no questions arise.

The clearer the exporter can be on the use of the goods to be exported (civil use) in his application for an export licence, the higher the probability that he will be granted the necessary licence.

Exporters should clear up certain preliminary questions prior to filing their application, especially:

1. Internal company records
2. Exact classification of the goods regarding Annex I including product descriptions
3. Conveyance of information about the export transaction from all company sectors involved
4. Information about the customer (e.g. new customer or regular customer along with information disclosed during the contract negotiations)
5. The customer's records (recipient, end-user)
6. Details about the intended use and project description if applicable
7. Company profile, especially with new customers, that describes the company in more detail (e.g. the number of employees, year of founding, production programme or business sector, details about production quantities)

With regards to the question of how much exporters should go into detail when applying for a licence, it should be noted that it is necessary to submit all details and records that completely document the underlying facts in a comprehensible way when applying for an export licence.

Practical Example:
An exporter applies for a licence for certain listed chemicals to a new customer, fills in the application form and includes an end-use certificate. If he had transmitted the production capacity of the consignee as well, it would have turned out that the requested quantity is much higher than what the end-user needs for his production purposes; a fact that could influence the licensing decision of the authority.

1) Complete and free from contradictions

Exporters have to complete the entire export application form. This initially concerns completing all fields in the form, especially the so-called "mandatory fields", which always have to be completed. Instruction forms of the different licensing authorities may inform exporters about these fields.

2) Transparency

The exporter must strive to make the project "transparent“ and provide the licensing authority with all the information required for the application for an export licence to help reviewers comprehend the export project.

Any facts which are not clear to the applicant will definitely raise questions at the authority as well.

III. Guidelines

Many licensing authorities have prepared check lists that formulate the requirements on a complete application. If exporters observe these points they can make the export project transparent. The check lists help to obtain the necessary details and documents throughout all phases of an export project (during the negotiations, upon application).

The depth of the examination by the authority and the extent of the necessary details cannot be generalised but naturally depends on each individual case (goods, country and end-user).

A sample of a check list (application preparation, application, completeness of the application) is contained in the Annex (see chapter 2 G).

C. Filing an application

I. The logic behind the applications

An application for an export licence is tied to formalities, meaning exporters have to use specific forms (see above). The sample of an export licence is contained in Annex IIIa of the EU Dual-Use Regulation. The licences granted by the competent authorities in the EU Member States are supposed to match this sample. In some EU Member States such as the Federal Republic of Germany, not only the licence granted corresponds to this sample but to a great extent also the application itself. Other States have developed their own application form (e.g. Austria; UK) to meet their own needs. The export licence however is, as has been mentioned previously, standardised in all EU Member States.

1) Parties involved, goods, other details

The application and the granted licence enable exporters to comprehend certain factual contexts at a glance. For this purpose, they reflect topics in a logical order. The most important ones are:

- The parties involved (these are the foreign or domestic persons or companies)
- Details about the goods to be exported
- Other important details that further explain the requested export

2) Completion instructions:

- The aim of these manuals is to explain main topics in the application form of the licensing authority.

- The completion instructions for the application forms pursue two essential purposes:
  - Firstly, each field is explained in proper detail
  - Secondly, they are structured in such a way that the individual coherent details are processed systematically

As an example for completing instructions, some of the most important sections of an application are explained in-depth below, in order to ease filling in an application (for basic terminology see also above chapter 1 F):

(1) Parties involved:

This is, first of all, the exporter himself. According the EU Dual-Use Regulation only he is entitled to file an application.

With respect to the parties involved these are the recipient and any other entity such as brokers and middle men that are involved in the respective business.

Of course, the contract or order documents must reflect the business arrangement of these parties

(2) Goods:

Under this topic, exporters first have to name and describe the goods in detail, especially performance or accuracy of particular equipment. A general description such as “machines” or spare parts is not sufficient. In addition, the exporters have to specify the details, especially with respect to quantity and value. Additionally, exporters have to make sure that the technical documentation and end-use documents (IC/EVE) as well as the details about the end-use are in a plausible context to the entire goods description, the parties involved and the order or contract documents

(3) Other details:

Additional information needs to explain the requested export in more detail and describe the connections between the parties and goods involved.

The most important documents in this regard are the order or contract documents as well as further details about the recipient and the end-user (so-called company profile). Additional information and other remarks are, for example, details of other participants which were not stated so far, including all brokers, commercial agents, shippers and/or carriers. Further additional information is especially required in connection with advance deliveries or licences.

3) Typical errors in an application

Some typical errors that commonly appear in an application in practice are the following, which lead to errors and to inquiries with the applicant, result in substantial time loss and contradict all efforts to cut processing times.

The following examples shall help exporters to avoid such errors and assist them in their business transactions.

(1) Incomplete details:

One of the errors most often found in applications is the submission of incomplete applications. Most application forms of the various licensing authorities distinguish between fields that always have to be filled out (mandatory fields) and fields that only have to be filled out if required (optional fields).

Electronic applications prevent this error as the system automatically informs the exporter that certain information is missing. If, however, exporters submit applications in writing, they should make sure that all mandatory fields are filled in.

(2) Missing documents:

In all EU Member States, exporters are obliged to enclose certain documents to the application. These are, above all, final end-use documents available in different forms (with different contents). The end-use form is one of the key documents necessary and is a mandatory item to be presented. The licensing authorities of the EU Member States prescribe in which cases specific end-use documents have to be submitted. In some rare cases no end-use documents may have to be passed on for instance a preliminary export to a fair. More information can be obtained on the websites of the licensing authorities.

(3) Responsible Person:

Furthermore, it might be mandatory in some EU Member States (Germany, Austria) to nominate a person on the company's executive level who acts as the so-called "person responsible for exports". This nomination is tied to certain formal declarations and preconditions. The responsible person must be a reliable individual and not have been convicted under the law.

(4) Questionable position of the exporter:

Only the exporter is authorised to file an application according to EU Dual-Use Regulation. Who this is depends on who manages the business. This position is usually decided by two criteria:

Being the contractual partner of the recipient in the third country and having the power of disposal of the goods (see above chapter 1.F.II.5) for more details).

Practical Example:
If, for instance company "A" additionally enters a buyer "B" in the application form who resides in another EU Member State, this indicates that company "A" is not entitled to file the application as company "A" is NOT an "exporter" according to the EU Dual-Use Regulation. In this case, the licensing authority will not accept the application and refer to the EU Member State in which the "real" exporter is resident. Written inquiries together with a substantial time loss are the resulting consequence.

(5) Contradictory statements:

Exporters should assure themselves that all statements in the application are certifiable and free of contradictions. This means that they can be substantiated on the basis of the supplementary documents and do not contain any contradictory statements.

This applies above all to the Customs Combined Nomenclature Code (field 15 of the export licence). The exporter needs to indicate this Code for statistical purposes as well as for customs clearance and may contact the customs authority for the right code. Usually the licensing authorities will not check the exporter's statements in this regard. If, however, a wrong statistic classification code is filled in at the time of application, this will generally first be noticed at the customs clearance at the time of export. As a consequence, the export may be refused and customs may insist on a correction.

(6) Signature:

It goes without saying that an application has to be signed by a person who has the right to sign for a company. In some EU Member States the application can be signed by the "responsible person" only.

In cases where an electronic application is filed this error does not exist as only the person whom the licensing authority gave user ID and password can apply. The same is true with electronic application systems which work with electronic signature.

4) Overview on additional most common errors:

The following overview states the most common errors and helps exporters to prevent them:

The right form:
Exporters should always check which forms to use on the licensing authority's website. For instance, a common error is that the forms for „military goods" are used for dual- use goods.

End-use documents (EUC):
Import Certificates are documents in which the importing country certifies that it has knowledge on the import of a certain item and that a subsequent export needs a licence of the importing country.

End-use certificate can be issued by governments or private end-users and certify that they are the end-users of an item and that the goods will not be re-exported. Some EU Member States also ask for a declaration that no re-export is performed without their written consent.

Import Certificate, and the private or official EUC is in most cases a precondition for granting a licence as well as documentation on the original company letterhead of the recipient/end-user and the name of the signatory legible in print.

Company profile:
Simply referring to the recipient's web site is not sufficient in most cases. The licensing authority has to be informed by the exporter of key figures of the recipient/end-user to assess if the stated end-use is plausible.

Order/contract/invoice:
Missing copies of the contracts or invoices in the application will delay the process, too.

D. Granting the licence:

I. The procedure

Based on the exporter's application, the licensing authority may grant export or transfer licences, in some EU Member States in electronic form.

1) External form; the licence

Most licensing authorities generate the licence with a print programme. Irrespective what application form the licensing authority has in place, the licence is, as has been stated, standardised in all EU Member States and has to be in the form described in Annex III a of the EU Dual-Use Regulation. Should EU Member States have developed their own application form, which contains additional questions and information to be given, this information remains internal and will not be shown on the licence.

2) Original, copy and customs attribution

The licence issued in hard copy includes the original of the licence and a copy for the customs authorities (generally the export customs office). On the back of each document is a form for entering the exports to be performed and the control of utilization. In case of an electronic licence, the exporter receives an electronically

signed file. In some EU Member States the customs office receives a data set of the licence as well, which means, that the exporter does not need to present the licence in hard copy any more but must only refer to his electronic licence at the customs location.

3) Tamper-proofing:

Export licences are very valuable. Therefore, it cannot be ruled out that someone tries to forge such a licence (which is punishable by law). For this reason, the licence is endowed with as many authenticity characteristics as possible. The most important ones are used uniformly by all licensing authorities in the EU:

Colour design
The original of the licence is either printed on paper with blue or yellow sinuous lines. Export licences based on the EU Dual-Use Regulation have a blue background. Some EU Member States use the same form of the licence for other transactions such as the export of weapons. Such export licences based on national legislation have a different head and different coloured background.

Nowadays, more and more EU Member States develop systems of electronic application as, besides several other advantages this avoids fake licences.

Signature by the licensing authority
The export licence is usually signed by hand. The copy is not signed. In cases of an electronically signed licence or an electronic file however, the licence is NOT signed but has a reference in the signature box that according to national legislation a signature is not necessary.

II. What is licensed?

Exporters may not perform an export that is subject to licensing without the previous explicit approval of the responsible authority of the EU Member State. Only goods covered by an export licence may be exported. That means if for instance technical assistance or software and technology is part of a project, it has to be applied for and licensed as well.

Elements that define the content of the granted export licence are above all:

- The parties involved
    - The exporter (field 1 of the export licence); a granted export license is non-transferable to other persons or legal entities!
    - The recipient (field 5 of the export licence) as well as the end-user, if applicable (field 10 of the export licence)
    - The country of final destination (field 13 of the export licence)
    - Possible other parties involved (in as much as expressly noted in field 23)

- Goods
  - The goods to be exported, incl. quantity and value (fields 14 and 16–18 of the export licence)
  - The customs commodity code in field 15 (many licensing authorities do not check the correctness of this code, as has been mentioned, which might lead to problems with customs clearance)
  - The type of export (field 21 of the export licence)
  - The total value (field 23a of the export licence)

- Validity period, collateral clauses
  - Limitation of the validity period (field 3 of the export licence)
  - Collateral clauses (field 16 of the export licence) that substantiate or restrict the granted licence or demand certain measures from the exporter

E. After granting the licence

Even after a licence is granted, the exporter has to fulfil certain obligations. Such obligations may be mandatory as collateral clauses, other obligations result immanently without requiring special mention in the licence.

I. Fulfilling collateral clauses

A licence may depend on the fulfilment of certain prerequisites, preconditions or legal conditions. In this case, field 26 of the licence or an attachment to the licence will inform the exporter about such clauses.

Collateral clauses are above all conditions and requirements:

1) Requirements

A requirement may order the exporter to tolerate or abstain from doing something without having an influence on the validity of the licence itself. However, the non-fulfilment of a requirement may lead to the revocation of the export licence as well as to fines, because the non-compliance may be penalised as a misdemeanour.

2) Conditions:

A condition is a different case. The fulfilment of a condition has a direct influence on the validity of a licence. Either by making the validity dependent on the fulfilment of the condition (so-called „condition precedent“) or by cancelling the validity of a granted licence (so-called "condition subsequent").

Generally there is a certain deadline to fulfil collateral clauses. If an exporter cannot meet the deadline he has to inform his authority including a justification why the deadline cannot be fulfilled, since non-compliance might be an offence.

Practical Example:
The exporter receives a licence with the condition to present a delivery verification document from the customs authority of the consignee's country after the export took place.

II. Extension of the validity period

Due to national practice of the EU Member States each export licence is only valid for a certain period (so-called "limitation"). An export licence may no longer be used after the expiration of its validity. Any exports after expiration of the validity are unauthorised and might be a criminal offence

It might be possible to extend the validity period depending on the practice of the EU Member State the exporter is resident. If extension is possible the exporter has to submit an application for this purpose. In some EU Member States the exporter has to substantiate why he was not able to use the licence within the validity period. For the purpose of extension the exporter has to return the original licence as well as the copy of the licence with his application in order to check how much of the total quantity of a licence has been utilised.

In some EU Member States an extension is generally not granted if the licence is not valid any more at the time of applying for extension. Other EU Member States do not grant an extension if the licence is still valid for a sufficient period of time.

III. Considering modifications

The Licensing Authority considers various aspects in its decision to grant an export licence. The basis of the decision are the facts the exporter communicated in the application for an export licence.

In the time between granting of the licence and the actual export, in rare cases, circumstances may have occurred that would have influenced the decision of the licensing authority. Exporters therefore have to consider all information which they become aware of until the time the goods are exported. After all, it could result in a substantially changed situation. Changes in facts or new information could also result in a circumstance that the licensing authority would not have granted the export licence would it have had knowledge at the time of application. The consequence may be that the export licence is revoked.

Hiding relevant information on changes in this regards may be regarded as obtaining an export licence by fraud which in most EU Member States is punished under criminal law just like an unauthorised export.

Practical Example:
Shortly before the export the exporter receives information that licensed items are distributed by the stated end user to other customers, but hides this information.

IV. Write off

The export (also a partial export) must be indicated on the write-off list on the back of the licence as well as on the copy. This is generally done by the customs office of export. Due to the fact that transfers (to other EU Member States) are not cleared by customs, exporters have to write off such deliveries themselves if a licence within the EU is necessary.

Notice of the need to indicate in the business papers that the export of goods needs an export licence:
Such requirements only arise in certain cases, especially in the case of goods transfers within the EU. With the transfers of goods listed in Annex I to the Dual-Use Regulation (but not mentioned in Annex IV) the company has to indicate in its business papers that the export of these goods requires a licence.

F. After the export

(See also chapter 1.R)

I. Safe keeping

Another secondary obligation exporters have to consider is the obligation to keep safe or retain granted licenses and business papers for a specific time period:

- 3 years for records about performed exports and transfers according to the EU Dual-Use Regulation
- Some EU Member States have longer periods for retaining the relevant documents and orientate themselves on the statutory period of limitation of a possible violation

The safekeeping periods either starts with the year in which the export or the transfer took place or with the expiration of the general validity. This means that the actual period for keeping the documents can be much longer taking into account the possible extensions of a licence.

II. Return

In some EU Member States it is an obligation to return a granted paper licence in the following cases:

- When it becomes invalid before being fully used
- When the exporter no longer intends to use the licence
- When the validity of the licence has expired
- If exporters receive a replacement licence for a lost licence and then discover the original.

G. Checklists

I. ANNEX I

The following Annex I summarises the above manual in order to assist exporters in preparing and applying for a licence:

Preparing the application

- Detecting the right licensing authority
- Classification of the items under Annex I of the EU Dual-Use Regulation
- Transmission of information about the export transaction from all company sectors involved, e.g.
    - Sales
    - Technology (development, design)
    - Customer service, service
    - Financial accounting
    - In some cases also information to the management
- Customer information (customer screening)
    - New customer or customers unknown in the industry who prefer not to disclose their identity
    - “Known customer” (reliable)
    - Unusual business conduct compared to other similar cases, e.g.
        - Refusal to disclose available and otherwise common background information or the technical/functional context of the delivery
        - High commissions, unusually good payment terms
        - Customer demands unusual or exaggerated confidentiality
    - Customer stated in the early warning letters of a EU Member State or other „red flag lists “or “black lists”
    - Special restrictions on the participants, e.g. combating terrorism, other embargoes including personal restrictions
- Demands on the goods to be exported (product screening)
    - Standard product ("off the shelf")
    - Special demands or design features that are unusual or exaggerated for the stated use.
- Internal company decisions in case an application is required

Application

This concerns the information exporters should disclose to the licensing authority in an application for an export licence and which exceed the details stated in the general check list:

Company profile

- According to the "know your customer" principle, this especially serves to:
  - Verify the existence of the recipient or the end-user (no dummy companies)
  - Be able to decide whether the goods will be used for civil or military purposes
- Details about the corporate affiliation indicate the civil or military orientation of the recipient or end-user
- With the export of preliminary goods for a production process, which will then flow into an end product (e.g. chemicals, raw materials that are processed further), details about the annual capacities and quantities are an important criterion for checking whether an legitimate end-use by the recipient or the end-user can be assumed
- Details about the size of the company with the number of employees and the year of founding are, in addition to the production capacities or quantities, additional criteria for the assessment of the final destination, especially with new customers and delivery of extensive production equipment (large quantities)
- With deliveries to commercial or trading companies, a statement of the actual end-users, e.g. by means of a list of customers or probable purchasers if known. There are special demands on safeguarding the final destination especially with deliveries to commercial companies in the critical countries with respect to the goods controlled by the export control regimes
- Details about the duration of the present business contacts to the recipient or end-user as well as about the fields these relate to
- If exporters already have longer established business contacts to the recipient or end-user, they can also provide more details

Utilization details and project description

Together with the company profile, these details are key-criteria that have a decisive influence on the question whether or not a licence may be granted for an intended export, especially with regard to shipments of goods controlled by the regimes to critical countries

A critical element is the intended use of all goods of an export licence application by the designated recipient or end-user. These details must "match" the company profile.

In case of the delivery of production facilities or extensive production equipment (e.g. several machine tools delivered to one recipient), the economic and the technical/functional context of the export transaction with the recipient or end-user must be portrayed. Questions arise, for example, whether it concerns a new development, a replacement delivery, or a production extension at the recipient or the end-user's company, or whether it is based on a governmental industrial programme.

Should exporters still not be able to obtain certain information required for the application for an export licence despite all efforts, they should get in touch with their relevant licensing authority. The same applies when details are only partially available.

II. ANNEX II

Check the completeness of the application:

- Correct form used?
- yes ~ no ~ not applicable
- Supplementary forms required?
- yes ~ no ~ not applicable
- End-use Certificate required?
- yes ~ no ~ not applicable
- Import Certificate required?
- yes ~ no ~ not applicable

- Technical documentation enclosed?
- yes ~ no ~ not applicable
- Order/contract data enclosed?
- yes ~ no ~ not applicable
- Nomination of person responsible for export required?
- yes ~ no ~ not applicable
- All parties involved stated?
- yes ~ no ~ not applicable
- Utilisation details checked?
- yes ~ no ~ not applicable
- Application completely filled out?
- yes ~ no ~ not applicable
- Application signed, name, company stamp?
- yes ~ no ~ not applicable
- Are details not conclusive or contradictory despite efforts to clear them? – Please explain in the application.
- yes ~ no ~ not applicable
- Company profile
- yes ~ no ~ not applicable
- Project description
- yes ~ no ~ not applicable

The presentation of a company profile and a project description are in principle essential elements for the substantiation of a licensing requirement particularly when exporting unlisted dual-use items (Article 4 of the EU Dual-Use Regulation). This examination is significantly influenced by the plausibility of the use stated by the applicant as well as the facts contained in the application. Therefore exporters should always enclose a company profile as well as a project description (if the delivery is part of a project) with the application for an export licence.

3. The export procedure at customs

A. Introduction

Prior to taking community goods out of the community customs territory, as a general rule, an export procedure is necessary. The export procedure consists of two separate procedural parts, i.e. placing the goods under the export procedure (step 1) and customs clearance (step 2). Correspondingly, two customs authorities are involved in the export procedure, the customs office of export (step 1) and the customs office of exit (step 2).

The formalities to be observed in the export procedure are laid down in the community customs code (hereinafter referred to as: CC) and the provisions implementing the community customs code (hereinafter referred to as: CCIP). Additional national provisions may be applicable.

B. Step 1: Placing goods under the export procedure[1]: Filing an export declaration

The export procedure is one of eight customs procedures available[2]. At the same time, the placing under the export procedure is also a customs-approved treatment or use of goods. Therefore, the general rules for placing goods under a customs procedure apply, e.g. submission of a customs declaration and presentation of the goods to customs.

In the export procedure, community goods are taken out of the community's customs territory. The primary goal of the procedure is to monitor the goods traffic with third countries especially with respect to trade policy measures, i.e. export restrictions which either contain a prohibition or a licensing requirement.

Note:
With effect from January 1, 2011, as a general rule, a prior notification (= exit summary declaration) has to be submitted before the transfer of the goods out of the community's customs territory pursuant to Article 182a to 182d CC. The extent, form and deadline for submitting the prior notification are laid down in Article 592a – 592g CCIP. For further details, see below pt. I no. 4.

I. Types of export declarations

The placing of an item under the export procedure depends on the presentation of a declaration.

The CC provides for altogether four types of customs declarations: in writing, electronically, verbally or through action implying intention (conclusive). This also

[1] For the purpose of this chapter, possible simplifications in the course of the procedure and special regulations are not included. For information regarding simplifications (i.e. small consignment, incomplete export declaration, simplified declaration procedure, local customs procedure), please refer to the member states customs authorities, http://ec.europa.eu/ecip/information_resources/links/index_en.htm
[2] Other possible customs procedures are: (a) release for free circulation; (b) transit; (c) customs warehousing; (d) inward processing; (e) processing under customs control; (f) temporary admission; (g) outward processing.

applies to the submission of a customs declaration in the export procedure. However, the submission of a conclusive export declaration is not possible in the commercial sector.

Practical Advice
Any economic operator established in the EU needs to have an EORI number (= Economic Operators Registration and Identification number). Economic operators established outside the EU have to be assigned an EORI number if they lodge a customs declaration, an Entry or an Exit Summary Declaration. For further details, please refer to the EU Commission's guidelines explaining the EORI's obligations:

http://ec.europa.eu/ecip/documents/who_is/taxud1633_2008_rev2_en.pdf

1) Export declaration by means of electronic data processing

Since July 1, 2009, the export declaration must be submitted by means of electronic data processing. For more information on how this works in detail in the different EU member states, please refer to the European Customs Information Portal:

http://ec.europa.eu/ecip/information_resources/links/index_en.htm

2) Written export declaration

In the past, for commercial exports, the export declaration generally used to be lodged in writing.

However, since July 1, 2009, a written export declaration is only possible in case the fallback concept applies, i.e. if problems occur with IT applications for lodging electronic export declarations (article 787 paragraph 2 CCIP). Regarding the forms to use in these rare cases, please refer to the European Customs Information Portal mentioned above.

3) Oral export declaration

To begin with, please take note that submitting an oral export declaration is not possible if the export is subject to prohibitions or restrictions.

For other goods not subject to prohibitions or licensing requirements, though, you may make an oral export declaration under certain circumstances (see Articles 226ff. CCIP). Example: export of goods for non-commercial purposes contained in the personal luggage of travellers or sent to private persons. With commercial exports, oral export declarations are possible if the total value per shipment and applicant does not exceed the statistic value threshold of € 1,000.

Practical Tip
When making an oral export declaration in commercial trade, you need to present a document (invoice, delivery note or similar), which states the value of the export shipment. You as the applicant decide whether you want to make an oral or an electronic declaration. This means that you can also submit an electronic export declaration for export shipments with a value below € 1,000.

4) Exit summary declarations

Starting from January 1, 2011 exit summary declarations must be lodged for goods not subject to export declarations where no exception applies.

This in principle means that an exit summary declaration is required in cases where goods are brought out of Community territory without a customs declaration (Art. 842a CCIP). Typical examples where an exit summary declaration would be required:

- Goods are moved between two EU Member States via the territory of one or several third countries (from Slovenia via Balkan countries to Greece) unless an agreement exists with those countries.
- Non-Community goods in temporary storage at an EU port are loaded for re-export from the Community

For details regarding the competent authorities and content of the exit summary declarations, please refer to the "Guidelines on Export and Exit" issued by the Customs Code Committee, Part C:

http://ec.europa.eu/ecip/documents/procedures/export_exit_guidelines_en.pdf

Practical Advice
As an exporter, you will rarely be obliged to meet the provisions regarding exit summary declarations. As stated above, for all exports, a customs declaration in the form of an export declaration is already necessary. An export declaration, however, already contains all the relevant data also needed for an exit summary declaration. Therefore, an additional exit summary declaration on top of the usual export declaration is superfluous. Article 182a CC: "Goods leaving the customs territory of the Community … shall be covered **either by a customs declaration** [= export declaration] or, where a **customs declaration is not required**, a **summary declaration**".

II. Declarant/exporter

According to the CC, a customs declaration can be filed by each person residing in the community, who is able to present the goods to the customs office in charge together with all required documents. This person is called declarant. A representative may be appointed.

According to the CC definition, the exporter is the person for whose account the export declaration is made and who is the owner of the goods at the time of acceptance of this declaration or has a similar power to dispose of the goods. Therefore, the term exporter is not identical with the term declarant.

For this reason, it would be theoretically possible that a person not established in the community is viewed as exporter. However, in this particular case, the contracting party residing in the community is instead considered the exporter. The reasoning behind this provision is that the customs authorities shall be in a legal (and practical)

position to conduct retrospective investigations, which would not be possible in case someone does not reside in the community.

In the typical case, exporter and declarant are identical. According to the CC provisions, if an export declaration has been accepted, the exporter is obliged to export the commodity out of the community's customs territory in the EU Member State. Therefore, only the exporter himself or his direct representative or a person acting on account of the exporter (indirect representative) may file the export declaration.

EXAMPLE 1
The Italian company X files the export declaration itself.

The CEO of the company X submits an export declaration for the export of an item to the customs office Rome. This way, the export declaration is submitted on the company's own behalf and account. Exporter and declarant is the company X.

EXAMPLE 2
The French company Y has a direct representative. Y engages the shipping company A to collect the item, deliver it to Brazil and perform the export procedure at the customs office Paris, France, on Y's behalf and account. The shipping company A acts on behalf and on account of the company Y. Exporter and declarant is the company Y.

EXAMPLE 3
The Spanish company Z has an indirect representative. Z engages the shipping company A to collect the item, deliver it to Brazil and perform the export procedure with the customs office Madrid, Spain. The shipping company A is expected to perform all required activities on its own behalf for a charge on the account of company Z. Declarant is the shipping company A. Exporter is the company Z.

Note: The third example is the only one where declarant and exporter are not identical.

If a company opts for representation, these circumstances need to be explained in the export declaration.

III. Competent customs authorities

The export procedure in general consists of two different procedural steps with two different customs authorities involved. This is first the **office of export (domestic)** and second the **office of exit (EU border)**.

The customs office of export in charge for accepting the export declaration is the office in whose district the exporter is located. As an alternative, the customs office in whose district the goods are packaged or loaded for export may also be the competent office of export. Both alternatives are equally-ranking. It is the declarant who decides which alternative to select.

The differentiation between the office of export and the office of exit is important for legal procedural reasons. Submitting a customs declaration is linked with certain

legal duties, e.g. the obligation to cooperate with the customs authorities (e.g. goods inspection), and also with certain legal rights (e. g. sampling for inspection by own experts).

The office of export performs a so-called **completeness check**, i.e. checks if the export declaration has been filed in the correct manner, if all documents necessary have been presented, and if the items in question have been presented in the prescribed manner.

Practical Advice
The required documents are: invoice, packing lists and consignment notes as well as any required export licences.

The customs office of export is also the one to check whether export restrictions apply. If all requirements mentioned above have been met, including licensing requirements, and if no prohibitions apply, the customs office shall accept the export declaration and release the goods for export.

Upon receipt of the export declaration, the declarant will receive a so-called Movement Reference Number (MRN) from the customs office of export. The MRN is a unique number that contains 18 digits and is automatically allocated. The customs office of export shall then release the goods for export by issuing an export accompanying document (EAD). Where authorized, the declarant may print the EAD from its computerized system. The customs office of export is responsible for transmitting all information necessary regarding the export in question to the final customs office of exit.

C. Step 2: Completion of the export procedure

After an item has been placed under the export procedure by submitting an export declaration to the customs office of export (step 1), the export is cleared at the customs office of exit (step 2).

The customs office of exit is generally located at the border to the third country. However, there may be special regulations for certain types of transport, e.g. air or sea transport.

The item in questions must be presented along with the EAD at the customs office of exit. Alternatively, customs may require electronic notification (containing the MRN) of the arrival of the goods at the customs office of exit.

The customs office of exit checks if the items presented are identical with the goods in the export declaration. The office of exit also monitors the physical export of the goods out of the customs territory.

If there is a discrepancy between the items presented and the items originally declared, the office of exit shall prohibit the exit of the goods and inform the customs office of export accordingly.

By taking the goods out of the community's customs territory, monitoring by customs authorities ends once the item in question has been taken out of the community's customs territory. With that, the export procedure is finalised.

D. Authorised Economic Operator (AEO): Benefits for reliable exporters

The concept of AEO was introduced as one of the main elements of the security amendment of the CC. An AEO can be defined as an economic operator who is deemed reliable in the context of his customs related operations, and, therefore, is entitled to enjoy benefits throughout the EU.

The AEO status can be granted to any economic operator meeting the following common criteria:

- record of compliance with customs requirements,
- satisfactory system of managing commercial and, where appropriate, transport records, which allows appropriate customs controls,
- proven financial solvency and,
- where appropriate, security and safety standards.

The AEO status is granted in the form of a certificate. The AEO status granted by one member state is recognised by the customs authorities in all member states.

There are three certificates available:

- security and safety (AEO S)
- customs simplifications (AEO C)
- full (AEO F)

AEO is not mandatory. The potential AEO benefits, dependant on the type of the certificate, can be summarised as follows:

- easier admittance to customs simplifications
- prior notification
- reduced data set for entry and exit summary declarations
- fewer physical and document-based controls
- priority treatment of consignments if selected for control
- choice of the place of controls

If you have questions on AEO, legal bases, application procedure, status, etc. please refer to the AEO customs authorities in the member states:

http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/customs_security/aeo_contacts_for_traders_en.pdf

Practical Advice
Customs law, regulations and administrative practice is rather complex and elaborate. Seemingly minor details may have a significant impact when assessing the case at hand. If unsure, exporters may for a start find helpful information on the European Customs Information Portal:

http://ec.europa.eu/ecip/information_resources/links/index_en.htm

Moving from that, exporters may address the competent customs authorities in the EU member states with their particular questions. The portal will guide you towards the national customs authorities' websites.

4. Internal Compliance Programmes – the authority's perspective

A. Introduction

The underlying thought of an internal compliance programme (in short: ICP) to be officially evaluated is not altogether new. However recently, the topic has become increasingly important. Therefore, companies need to understand why they have to establish and implement internal compliance programmes. They must also be knowledgeable about the law in force and about recent changes and developments in the legal area. In addition, they need to learn what constitutes an effective ICP, i.e. the relevant criteria for (official) assessment.

B. Terminology

To begin with, the term "compliance" is synonymous with "abidance by the law" or also "adherence to the regulations". Moving from this denotation, compliance seems to ask for no more than what can be taken for granted in the first place, i.e. that the addressee of a legal provision acts strictly in accordance with the law.

Yet recently, the term "compliance" has been used in a wider meaning: Contraventions committed by company employees shall be prevented from the start by taking the adequate organisational measures.

For a proper understanding, it must be noted that with respect to foreign trade and export control, the term "compliance" comprises *all* rules and prohibitions in force. By nomeans compliance may be narrowed down to simply cross-checking lists of denied persons – this constitutes a common error.

I. Why do companies need to have an ICP?

1) Joining hands in the fight against proliferation

The fight against WMD and their means of delivery is one of the most urgent challenges of our time. A number of states currently seek to either produce or to obtain WMD. It is also known that some states strive to collect know-how about the production of WMD, and aim to sell it to other states at their profit.

This is a threat that should concern everyone, authorities and industry alike: We should all bear in mind the risk and danger of potentially assisting a WMD programme.

In order to effectively combat proliferation, the EU Member States of the European Union, amongst others, have committed themselves to the principle of non-proliferation by inter alia controlling exports of sensitive items to countries of concern. Controls also apply to the export of conventional arms.

State supervision of exports can, however, only be effective if all parties involved in export procedures (e.g. manufacturers of sensitive goods, exporters, engineers) accept and support such controls, and assist authorities with all means available. A

close and trusting cooperation between industry and authorities is indispensable in order to achieve a common objective. The Industry's specific knowledge regarding, for example, the technical composition of items or potential foreign customers may play a crucial role in export control. Industry awareness, i.e. exporters' skills and business experiences may turn out to be extremely valuable in order to detect illicit procurement attempts in time, and consequently prevent them. In this respect, a systematic approach is needed: Companies' internal procedures must be organised in a way that procurement attempts can be detected and duly prevented.

2) Safeguarding companies' good reputation, protecting Europe's good standing as a business location

The European export control system is set on companies' individual responsibility. Companies decide on their own account which contracts they conclude, which goods, software and technology they wish to export, what technical support they want to provide in foreign countries, and what technical know-how and expertise they would like to pass on to third persons.

Violations against export control provisions are not only sanctioned by criminal law. Media do not shy away from reporting on actual or even only reputed "export scandals", which are often also observed by a discerning public eye both home and abroad. Upon mere suspicion of an illegal export, a company may be stigmatised as a "black sheep" in foreign trade. Journalists' accusations do not alone affect the said company itself; negative media reporting may also have a destroying impact on the entire European business community. Depending on the magnitude and the consequences, such an incident may, in extreme cases, even jeopardise the company's economic existence.

Furthermore, a functioning export control system can in the long run contribute to securing strategically important foreign markets for the entire European export community: On a superficial note, a company may benefit short-term from exporting, for example, a machine-tool to country X intended for its missile programme. At a more profound glance, however, all companies could over the long haul profit to a much greater extent if X abandoned its missile programme. This in turn could create new business opportunities for exporting for civil end-uses.

To achieve these objectives, companies must have adequate compliance systems.

3) Observing law in force

A company wishing to participate in foreign trade needs to observe a great number of legal provisions, for example export control law, customs procedures, fiscal law, statistics regulations, preferential law, contractual law, transport regulations etc.

Note: The term "export control" is in part used in a narrow context: "Export control" insofar only pertains to legal regulations that allow foreign trade to be restricted if vital security interests or foreign relations are at stake. The term may, however, also be used in a broader context to include restrictions of foreign trade for the sake of protecting public health, the environment, consumers, cultural heritage etc. For the purpose of this chapter, the term "export control" is used in a narrow context.

In order to strike an adequate balance between controlling sensitive exports on the one hand, and not impede legitimate foreign trade on the other hand, export control law generally works with prohibitions and licensing requirements. Transactions that run counter to the objectives of export control from the start may be prohibited (e.g. activities in conjunction with chemical weapons). If a transaction, however, is subject to prior authorisation, the export control authority is going to assess whether or not the intended export is likely to interfere with the objectives of export control.

Admittedly, export control law is rather complex. In Europe, restrictions may result either from European law or from national law adopted by the EU Member States. In addition, provisions may stem from different sources of law, for example constitutional law, parliamentary legislation, ministerial regulations, decrees, orders etc. On the one hand, the exporter is expected to know these provisions and to abide by the law in force; on the other hand, he is obliged to observe new legal developments and keep himself informed about the frequent changes in export control law. A company that relies on luck or chance in order to follow the regulations is certainly ill-advised. An internal compliance system with detailed operating instructions is the only reliable method in order to ensure that the law in force is observed systematically.

4) Averting liability risks

Exporting companies and their employees may be faced with a number of liability risks, if they violate the law in force – risks that can be avoided. Violations may have serious consequences, both from a personal and from an economic standpoint.

According to article 24 of the Dual-Use Regulation, each EU Member State shall lay down the penalties applicable to infringements of the provisions of the Dual-Use Regulation. Penalties must be effective, proportionate and dissuasive.

Serious violations against export control provisions may on the one hand be sanctioned by criminal law. The management or employee acting may be punished with heavy fines or even imprisonment (for further details see chapter 9).

On the other hand, minor violations may be prosecuted as administrative offences, and punished with an administrative fine (for further details see chapter 9).

It should be noted that it may depend on the concrete circumstances of the case at hand whether an action is considered a crime (if e.g. the perpetrator acts professionally or as a member of a gang) or an administrative offence.

In some EU Member States, failure to take the supervisory measures required to prevent contraventions may be sanctioned, too (example: article 130 of the German Act on Regulatory Offences).

Parallel to criminal and administrative sanctions, civil law applies. Offenders may be held accountable under corporate law or under civil law.

Furthermore, labour law may be applicable. Employees may, for example, be dismissed as a result of failure to comply with export control regulations.

It should be in the own interest of the exporting company to avert the criminal and civil liability risks described above by taking the necessary organisational measures from the start. This may be done by establishing and implementing an internal compliance system.

5) Freedom of foreign trade and exporters' obligations

As a general rule, foreign trade is, not restricted. Legal transactions and acts in foreign trade may, however, be restricted in order to guarantee vital security interests or to prevent a major disruption of foreign relations. Transactions must also be in line with the international commitments and responsibilities of the EU Member States, especially regarding non-proliferation. Each and every company is responsible for abiding by the law.

The companies' obligation to observe export control law is the necessary drawback to the freedom of foreign trade. Consequently, the European export control system relies on the companies' individual responsibility, as their business transactions may affect European security interests or external relations. The basis for acting responsibly is a well-organised and functioning workflow within companies.

6) Licence applications

The granting of licences depends, besides a number of factors, on the reliability of the applicant. The exporter shall establish and implement proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of the Dual-Use Regulation and with the terms and conditions of the authorisation in question (compare article 12 paragraph 2 of the Dual-Use Regulation).

According to the "Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies" – the 2011 Wassenaar Arrangement document encouraging Participating States to promote the development and implementation of ICP among their exporters – exporters shall nominate a senior representative director, or other individual of corresponding status, as the Chief Export Control Officer (CECO). The CECO is responsible for:

- Development and revision of the ICP
- Development and revision of operation procedures
- Staying up-to-date with changes to relevant regulations and with any directions or guidance issued by the competent authorities
- Classification/identification, screening and approval of business transactions;
- General export control management, throughout the exporter, including direction and communication
- Assignment of personnel in charge of auditing; and
- Training

As such, the CECO is ***the*** key player in the company's internal organisation with regard to export control. He or she assumes personal responsibility for compliance with export control regulations. Additionally, in some EU Member States, the CECO needs to submit a written statement to the authorities assuring that he is going to undertake all necessary precautions to guarantee compliance with export control law.

In case the CECO violates or neglects his duties, the entire company may suffer serious economic and legal consequences: Failure to comply with export control regulations is cause for generally doubting the exporter's reliability. Should there be reason to believe that the CECO himself is not reliable, licensing applications may be turned down; licences that have already been granted may be revoked.

7) Making use of privileged procedures

Besides individual authorisations and national general export authorisations, a global export authorisation may be granted to an exporter. "Global export authorisation" shall mean an authorisation granted to one specific exporter in respect of a type or category of dual-use items which may be valid for exports to one or more specified end users and/or in one or more specified third countries (article 2 number 10 of the Dual-Use Regulation). Owing to the broad scope of such a global export authorisation, authorities need to put high requirements on the exporter's reliability. When assessing an application for a global export authorisation EU Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation (article 12 paragraph 2 of the Dual-Use Regulation).

If a company wishes to apply for a global export authorisation, a simple declaration by the CECO that he undertakes all necessary precautions to ensure compliance with export control regulations may not suffice. Authorities may in addition to that check the exporting company's credentials in the form of face-to-face consultations and/or inspection visits.

8) Improving efficiency – avoiding –unnecessary work

Time is money – an efficient ICP may save valuable time from being spent on unnecessary tasks. If, for example, a company negotiates with clients or even starts production without taking into account that the export of the goods in question is prohibited in the first place, or that a licence may obviously not be granted, time and money are spent in vain if plans must later be abandoned. Potential non-fulfilment of a contract is an unnecessary risk if companies wait until shortly before the export is supposed to take place to apply for a licence which may not be granted.

II. Which legal requirements exist for an ICP?

1) Self-interest and binding legal obligations

The introduction demonstrates: An ICP is in the interest of the exporter, and can pay off in numerous ways. Companies, could, for example, benefit from privileged procedures, such as a global export authorisation that authorities have granted due to the company's functioning internal export control system.

At the same time, the law in principle already expects the exporter to have a functioning ICP which ensures certain minimum standards.

2) Licensing procedure: Elements of Internal Compliance Programmes for Dual-Use Items

The elements of an ICP are laid down in the Annex to the "Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies". The list makes a distinction between basic elements and additional elements.

Adding to that, those elements that have been agreed to at international level are already part of the EU Member States' administrative practice.

With the help of an ICP, companies may fulfil the following obligations:

- **Organisation**: The Chief Export Control Officer (CECO) has to establish an internal organisational structure, responsible for export control, either as a stand-alone unit or as an additional task for an appropriate unit. The company shall also develop operational procedures to be applied to daily tasks. Additional element: The unit responsible for export control should be independent from the sales department or any other export oriented units
- **Selection of staff**: The company needs to assign qualified staff to deal with the management of export control issues
- **Training of staff**: The company has to train and educate export control staff and employees. Staff shall be kept informed of all changes to European and national export control legislation and procedures. Updates should occur as soon as changes are made public but at a minimum at least once every year
- **Supervision**: The CECO needs to establish a regular performance review system to confirm that the ICP is implemented appropriately, and the company is compliant with all relevant laws

It is important to note that there is no standard "model ICP" that companies can choose to simply copy and paste or impose it on their own operation procedures. Depending on the size and nature of the business companies have to conduct a risk and impact study in order to come up with a tailor-made solution for their company, i.e. a set of criteria their individual ICP must be able to meet. A multi-national enterprise like for instance the AREVA Group with its headquarters in France and branches as well as joint ventures all over the world needs a different ICP than a one-man company.

One of the basic elements of an ICP is that exporters nominate a CECO. He or she is personally responsible for the internal compliance programme implemented in the company and the staff in charge of export control.

When appointing the CECO, the following maxim applies: Export control is a matter for the CEO, or for top management! This is an expression of the companies' individual responsibility with respect to foreign trade. In light of this, it is preferable for companies to have a written commitment of compliance with export/transfer control regulations and of adherence to any relevant end-use and export restrictions. The written commitment should be known to all employees concerned with export controls. Parallel to that, the CECO should be part of the top management. His or her position should not present a conflict of interest (e.g. he/she should in principle not also be head of sales).

The CECO in principle needs to sign all licence applications and therefore demonstrate that he or she assumes responsibility in each single case. However, it is often necessary due to the size of the company that the CECO delegates the obligation to sign applications to other employees. The chain of responsibility for export control compliance should then be set down in writing. The description should provide detail on delegations of responsibility and the adopted routines in situations when the CECO is absent. It is important to note that the CECO may only delegate the obligation to sign applications, but he must not rid himself of the principle responsibility for compliance with export control law.

3) Global export authorisations: ICP as a prerequisite for licence applications

A global export authorisation is an authorisation granted to one specific exporter in respect of a type or category of dual-use items which may be valid for exports to one or more specified end users and/or in one or more specified third countries. Compared to an individual authorisation, a global export authorisation is a substantial privilege that may only be granted to particularly reliable exporters. Companies that have been granted such a licence have a much higher responsibility than companies that apply for individual authorisations. In light of this, applications for global export authorisations may be subject to greater scrutiny; a well-functioning ICP is indispensable in that regard.

4) Certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence- related products within the Community

In principle this directive is only applicable for items covered by the EU military list (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:146:0001:0036:en:PDF) but serves as a model as well for dual-use items.

Directive 2009/43/EC aims to simplify the rules and procedures applicable to the intra-Community transfer (i.e. between EU Member States) of defence-related products in order to ensure the proper functioning of the European Common Market. According to article 5 paragraph 2 letter b of the Directive, a general transfer licence shall be published where the recipient is an undertaking certified in accordance with Article 9 of the Directive. Exporters may only make use of this general transfer licence if they have been certified in advance.

The certification shall establish the reliability of the recipient company, in particular as regards its capacity to observe export limitations of defence-related products. Reliability shall be assessed according to the following criteria:

(a) Proven experience in defence activities, taking into account in particular the undertaking's record of compliance with export restrictions, any court decisions on this matter, any authorisation to produce or commercialise defence-related products and the employment of experienced management staff
(b) Relevant industrial activity in defence-related products within the Community, in particular capacity for system/sub-system integration
(c) The appointment of a senior executive as the dedicated officer personally responsible for transfers and exports

(d) A written commitment of the undertaking, signed by the senior executive referred to in point (c),that the undertaking will take all necessary steps to observe and enforce all specific conditions related to the end-use and export of any specific component or product received

(e) A written commitment of the undertaking, signed by the senior executive referred to in point (c), to provide to the competent authorities, with due diligence, detailed information in response to requests and inquiries concerning the end-users or end-use of all products exported, transferred or received under a transfer licence from another EU Member State, and

(f) A description, countersigned by the senior executive referred to in point (c), of the internal compliance programme or transfer and export management system implemented in the undertaking. This description shall provide details of the organisational, human and technical resources allocated to the management of transfers and exports, the chain of responsibility within the undertaking, internal audit procedures, awareness-raising and staff training, physical and technical security arrangements, record-keeping and traceability of transfers and exports

For the establishment of an ICP and subsequent official assessment, questions and guidelines on the description of internal compliance programmes have been set out. Authorities shall take 6 core areas into consideration:

→ Organisational, human and technical resources allocated to the management of transfers and exports
→ Chain of responsibility
→ Internal audits
→ General awareness-raising, operating and organisational procedures, awareness raising and training of export control staff
→ Physical and technical security
→ Record-keeping and traceability of exports and transfers

III. Criteria for an ICP

It has been said above that there is no single, one-size-fits-all "model ICP" for companies to simply copy and paste. Depending on the size and the nature of the business, companies must develop a tailor-made solution that suits their needs, i.e. a set of criteria their individual ICP can fulfil. Only those parts of the business with an inherent risk of potentially contributing to the development of WMD need to be incorporated into an ICP. For a company such as for instance AREVA, on the one hand, the overwhelming majority of the products sold are listed dual-use items, therefore every export is, in principle, subject to authorisation. For e.g. Philips, on the other hand, most of the goods sold are ***not*** listed dual-use products, so the CECO's task is to identify those transactions that *are* by way of exception subject to authorisation. In addition, the business portfolio may change, so companies must watch out for new risks, and adjust their ICP accordingly if need arises.

When outlining ICP criteria, one has to differentiate between:

- Mandatory obligations
- Obligations using the word "should"
- Obligations that can be fulfilled in various ways

- Questions that government authorities may ask when assessing an ICP
- Guidelines with recommendations for an ICP that authorities may issue

As for mandatory obligations, companies must observe those provisions strictly in each and every case.

EXAMPLE
"Operating and organisational procedures should … provide instructions and guidelines on the following:
The overall export/transfer process from reception of an order, assessment of applicability of export/transfer regulations, compliance with relevant export/ transfer regulations and shipment or transmission (a final compliance check **must** be carried out before shipment or transmission), …"

The majority of provisions works with the word "should". This means that companies, as a general rule, have to observe those provisions and act accordingly. However, if corporate policy for once dictates otherwise, the company may disregard the obligation in question in order to adjust to that particular situation.

EXAMPLE
"The classification of products **should** be recorded in an electronic data processing system (only if in existence already)." (That means that in general, companies have to work with a computerised system that, amongst others, contains an electronic database of listed and non-listed products. If the company, however, has no IT system, it does not need to have an electronic database for the classification of products either).

Sometimes, mandatory obligations and provisions using the word "should" may be combined.

EXAMPLE
Question: "How frequent are internal audits?" Possible answer: "Ideally, once a year and, at least, every 3 years." (That means that internal audits must at any rate take place at three year intervals. Additionally, it is sensible and preferable to conduct internal audits at much shorter intervals, i.e. in general once a year. How long exactly the period between audits is, depends, inter alia, on the size of the business, and is up to the company to decide individually.)

Occasionally, provisions work with the words "can" or "could".

EXAMPLE
Question: "How are … records made available to the competent authorities?" Best practice recommendation: "It should be possible to make records available electronically … Records **can** also be available in hard copy and some of these **could** be scanned, for example for remote checks." (That means that the company has several options to choose from. They can either make records available electronically or in hard copy, which authorities must accept just the same.)

The following remarks indicate if a provision is mandatory, if an obligation should only be observed as a general rule, or if the company may choose from different options.

1) Human and technical resources

(1) Human resources

The company must carefully select export control personnel. Export control staff and all employees concerned by export controls should be properly trained at regular intervals. The company must ensure that all business units affected by export control are staffed with sufficient personnel that has the necessary expertise both legal and technical in order to ensure compliance with export control regulations. Employees must also be personally reliable.

Regarding human resources, various factors may play a role. The size of the company, the product portfolio, customers, personnel capacities, and export share in particular may be of importance.

There must be at least one person employed to deal with the management of exports. Depending on the average number of licence applications, this person may either be employed solely to deal with the management of exports or have responsibility for exports along with other tasks. To compensate cases of absence, e.g. holiday leave or sick-leave, there has to be a second person to stand in.

(2) Technical resources

There are no mandatory provisions prescribing what technical means need to be purchased in order to meet export control law obligations. It is recommended, for example, to work with an electronic database for the classification of goods; however, this only applies if a computerised system is available in the first place.

However, it is contrary to everyday reality to assume that these days a large number of companies work without an IT system. Given the growing complexity of export control law, and, in addition, the possibility (or: the necessity) in some EU Member States to file an electronic licence application, this is certainly not advisable. Government authorities therefore recommend or prescribe for companies to have an electronic system in place for the management of exports. Chambers of industry and commerce or other business associations in the EU Member States may provide information on the various software products available on the market.

Please note: In some EU Member States, for example in Germany, making use of privileged procedures is possible only if the exporter already has an electronic management system in place (e.g.: application for a global export authorisation). Before, for example, a German company can apply for a Global Export Authorisation (i.e. a type of licence that permits the export of a group of items to several consignees) to the licensing authority, it has to describe its internal computerised export control management programme and its features. The licensing authority assesses in particular how the company checks whether or not an export is subject to authorisation, how the products are rated technically, how the company verifies that no unauthorised exports take place, and how the company ensures that the product is shipped to the consignee mentioned in the licence form.

(3) Working tools / Compliance Manuals

The export control staff must at all times be able to take hold of the latest legal texts including the list of dual-use items and the list of persons, groups and entities subject

to EU sanctions. Legislation and Notices are published, for example, in the Official Journal of the European Union:

http://eur-lex.europa.eu/JOIndex.do?ihmlang=en

National legislation and notices are published in national journals or gazettes.

It is further recommended that commentaries on export control legislation as well as professional journals and magazines, where they exist, should also be made available to the export control staff.

The licensing authorities in the EU Member States may, in addition, publish legal texts, information on legal changes and updates, leaflets, forms, checklists etc. on their respective websites.

Moreover, compliance manuals for the use and guidance of export control staff should be available, at least in electronic version (for instance, on the company's intranet). Those manuals should contain the operating and organisational procedures to be followed by export control staff. Export control staff should be expeditiously informed of the amendments to the manual applying to their tasks as well as of their entry into force. It is recommended to update the compliance manual when changes are made to national and Union export control legislation and procedures, but at a minimum at least once every year. A compliance manual should at least cover the following topics:

- Written commitment of compliance with export control regulations and of adherence to any relevant end-use and export restrictions issued by the top management
- Guidelines on the overall export process from reception of an order, assessment of applicability of export regulations, compliance with relevant export regulations and shipment or transmission
- Guidelines on compliance with export control regulations; those guidelines need to include instructions on licensing requirements for non-listed products, the intangible transfer of technology (ITT) (e.g. email and access to the intranet from abroad), technical assistance, list of persons subject to EU (i.e. financial) restrictions
- Instructions on the monitoring of compliance with the terms and conditions of the licence
- Guidelines on the interaction with external parties, and in certain cases, with other interested departments within the company, such as the legal and sales department
- The coordination of all employees involved in or somehow concerned by export controls (e.g.: sales staff should be instructed to inform export control staff of any doubts, and should be informed that the processing of an order can only take place once it has been cleared by the export control staff)
- The coordination and possible exchange of information with the competent authorities (e.g.: possible reporting of suspect transaction orders, possible existence of a voluntary disclosure policy …)

It is recommended making those compliance manuals available not only to the export control staff, but also to all employees concerned by export controls at least in

electronic version (for instance, on the company's intranet). In particular, the written commitment of compliance with export control regulations issued by the top management should be communicated clearly and circulated repeatedly to all company employees in order to promote compliance with export control law.

2) Operating and organisational procedures

The overall responsibility for export control compliance should be set down in writing. The written support describing the chain of responsibility (such as records or organisation charts) should be kept up-to-date. The description should provide detail on delegations of responsibility and the adopted routines in situations when the CECO is absent.

Whether export control management is organised in each shipping unit, in the head office or as a separate export control department should depend on the size and the structure of the undertaking.

Companies, must, however, pay attention to the following: Export control staff should be as independent as possible. However, the smaller the number of employees the company has, the more difficult this can get. The focus should be on protecting export control staff as much as possible from conflicts of interest. The CECO, for example, should not be head of sales at the same time. Instead, it is advisable to have a separate export control department.

Export control staff should be empowered to stop a transaction. Alternatively, the export control staff must be empowered to report directly to the CECO if they need permission to stop a transaction.

3) Audits and inspection

The ICP and the daily operating procedures have to include control mechanisms. The solution could be introducing a two-man rule (aka four- eyes principle) or carrying out (unannounced) random checks.

In addition to inspecting the daily operating procedures, the company needs to regularly assess the concept, the adequacy as well as the effectiveness of the ICP, for example, by way of audits. Those audits should take place ideally once a year and at least every 3 years.

If the company decides to have internal audits, one of the following persons should be designated to carry out those checks:

- Someone senior in the chain of responsibility for export controls
- The quality manager
- The finance manager or accountant
- Anyone else of a middle management or higher position who is one step or more away from the day to day work of the export team

The company may also decide to have external audits carried out by properly qualified, external auditors, e.g. attorneys, management consultants, professionals providing auditing services.

Audits have to cover the entire internal export control management programme. This includes, inter alia, all relevant operating and organisational procedures, training, record-keeping and documentation.

The criteria for auditing should be spelt out in written form in advance. Depending on the number of exports, at least 1% and an expected maximum of 20% of the exports should be subject to checks. The ratio can vary each time an audit is undertaken. Audits should provide answers to the following questions:

- Are the export limitations put in place abided by?
- Are procedures in place and updated to ensure that all export and transfer regulations are complied with?
- Is regular awareness training undertaken?
- Are records readily available?
- Are the records comprehensive?
- Do the records cover all the relevant aspects of import, export and transfer, and products remaining within the EU Member State?
- Is information available on the whereabouts of relevant products from source to destination?

To ensure that a representative range of shipments is audited, at least one shipment per customer or destination should be audited, or at least one shipment for each project.

The company should clearly record any suspected occurrence of non-compliance identified by the internal audit, the measures recommended to correct such an occurrence and an assessment of the effectiveness of those corrective measures on compliance. The afore-mentioned corrective measures should be, if possible, submitted to the responsible authorities and recorded; the corresponding records should be kept for later reference.

Employees should find instructions on whom to address in case of suspected occurrences on non-compliance in the compliance manual.

4) Workflow / operational procedures and general awareness-raising

Internal operating and organisational procedures should be recorded in a compliance manual. The operating and organisational procedures should include a clear description of the export/transfer compliance process, from the reception of an order, the verification of compliance with relevant export regulations to the final shipment or transmission. Regarding details on the content, please refer to chapter 4 B II 1)1)(3) - Working tools / Compliance Manuals.

(1) The compliance must give answers to the following questions:

Core areas	Key questions	Best practice recommendations
4.1.1. Operating and organisational procedures: pre-licensing phase		

(a) Embargoes	How does the company take embargoes into account?	In cases of a shipment planed to be sent to an embargoed destination, rules should be in place to verify the relevant embargo regulations. Such verification should at least encompass: - The supply bans enacted by the embargo regulation - The classification of products to be shipped against the embargo's list of products - The additional licensing requirements for certain services, such as technical assistance
(b) Sanctions lists	How does the company take sanctions lists into account?	The names and identities of the legal and natural persons to be supplied should be checked against the relevant sanctions lists.
	When searching for an identity on the sanctions list, what level (or percentage) of certainty that a match has been found is required to consider it a match ('hit')? What procedures are followed when a match for a name has been found?	Procedural instructions should have been set down in writing on which detail is likely to match and 'hit' (for example, when a match has been found, it must be reported to the competent authority)
(c) Control of listed products (products subject to licensing because of their inclusion in an export/ transfer control list)	Questions on internal processes ensuring that a listed product is not exported or transferred without a licence:	
	(1) Is there an electronic data processing system in place to record the classification of products received or manufactured by the undertaking?	The classification of products should be recorded in an electronic data processing system (only if in existence already). Changes in the control lists should be immediately recorded into the system.

	(2)	How are all products subject to licensing requirements classified and recorded, and who is responsible for this? Which processes are in place to ensure that the classification of products is kept up to date, and how is this information documented?	The export/transfer control staff should be responsible for recording and classifying products, if necessary, in consultation with technical experts
	(3)	How is the end-use by and the reliability of the recipient assessed?	The export/transfer control staff should be responsible for verifying the reliability of the recipients, with special attention given to the end-use and risk of diversion. If export/transfer control staff are informed that the recipient has breached export/ transfer control regulations, they should inform the competent authority. A verification of the recipient's good faith is especially important in cases where the customer is new or where the customer's identity is unclear or when there are doubts about the declared end-use (e.g.: order in unusual quantities, special and unusual transit routes requested by the recipient).

(d) Intangible transfer of technology	How does the undertaking ensure compliance with intangible transfer of technology (ITT) requirements (e.g., e-mail and access to the intranet from abroad)?	The undertaking should have issued clear and written instructions in relation to ITT over e-mail, fax, intranet or Internet. The provision or transfer of technology should not occur until it is clear whether or not the respective good require a licence and if so, a licence has already been obtained to permit the transfer
(e) Technical assistance	How does the undertaking ensure compliance with technical assistance requirements?	A compliance procedure regarding technical assistance should be in place: - For foreign visitors/employees - For employees (e.g. technicians) abroad - For conferences, seminars with foreign participants or when organised abroad
4.1.2. Operating and organisational procedures: licensing phase	How does the undertaking ensure that it makes full and complete licence applications?	The undertaking should be equipped to fully comply with the licence application process and procedures in force in the EU Member State where it is established
4.1.3. Operating and organisational procedures: post licensing phase	What internal procedures ensure compliance with the conditions of the licence?	A final verification of the export/transfer control requirements should take place before final shipment to ensure that the terms and conditions of the licence have been complied with

(2) Selection of export control staff

The export control staff has to be knowledgeable about:

- Export control law
- Licensing application procedures
- Production, operating and organisational procedures

Staff needs to be properly trained for the job, e.g. by internal briefing, or if necessary by an external seminar on export control.

(3) Awareness raising and training of export control staff

The CECO has to regularly acquaint himself with his duties regarding export control compliance.

Export control staff's knowledge needs to be updated at least annually when changes are made to export control legislation and procedures. The annual general training may take place either in-house or externally.

In addition to annual general training updates, it is recommended that commentaries on export control legislation as well as professional journals and magazines, whenever they exist should also be made available.

The licensing authorities in the EU Member States may provide information on training events or information sessions on their respective websites.

All employees concerned with export controls shall be introduced to the company's ICP and given access to the organisational and operating procedures relating to export controls.

The export control staff or external service providers need to raise general awareness on export controls among personnel, taking into account, inter alia, warning notices issued by the competent authorities and internal risk profiles.

Knowledge of the chain of responsibility has to always be easily accessible. All employees involved in or somehow concerned by export controls need to know whom to address in case of questions related to export control (e.g.: sales staff should be instructed to inform export control staff of any doubts, and should be informed that the processing of an order can only take place once it has been cleared by the export control staff).

5) Physical and technical security

In some EU Member States, there may be additional requirements regarding physical and technical security of companies' premises.

Additionally, defence companies need to have security measures in place to secure export records and procedures. The premises should be entirely enclosed by fencing. The entrance should be secured and controlled. The premises should be under constant surveillance, even during non-working hours. There could be a separate entrance for deliveries and collections, away from the main production area.

There have to be security measures regarding software and technology, too. The IT system should be password protected and secured by a firewall. The company's network has to be secured against unauthorised access. There should also be a control of electronic devices (laptops, personal digital assistants, etc.) being taken offsite or overseas and of emails sent as part of a project and in any other circumstances.

6) Record-keeping and traceability of exports and transfers

What documents need to be retained for later reference, depends on national administrative law. In some EU Member States, all export-related documents from all phases of the application procedure (i.e. pre-licence, during the licence application itself, post-licence) must be kept. In addition, papers confirming that an employee has attended a training event, may have to be kept on file, too (e.g. in personal files).

Records must be available to the competent authorities, in general electronically – some may require a visit to the sites if access to secure intranets is necessary but some may be able to be transferred for remote checks. Records can also be available in hard copy and some of these could be scanned, for example for remote checks.

Throughout the entire project and the processing of a contract, measures taken need to be documented accurately. Particular attention should be paid on documents related to cases in which export control staff has come to the conclusion that the export in question is not subject to authorisation.

In this context, a particular person should be designated for managing the licences granted. Licences that have been granted but are ultimately not used for an export, must be returned in some EU Member States.

For maintaining records, companies should use one or more of the following:

- Electronic file or e-mail folder
- Folders based on projects
- Folders based on suppliers
- Separate folders for limitations
- An order management system

Export limitations should be related to subsequent exports by using one or more of the following:

- Electronic file or email folder containing import and subsequent movement information
- As part of a business management system
- Folders based on projects or suppliers where all information is kept together,
- A filing system similar to the folder system

IV. Detecting attempted procurement

For directions on how to spot potential procurement attempts, please refer to chapter 7.

V. Official assessment of ICP's

In certain cases, authorities may assess a company's ICP on their own motion:

1) Individual authorisation

Top management needs to take precautions and establish internal operating and organisational procedures in order to guarantee compliance with export control law. The CECO assumes personal responsibility for compliance with export control regulations.

In accordance with national administrative law and practice, authorities may check a company's export control management system, if they have sufficient reason to believe that the ICP is malfunctioning. In that case, authorities may conduct a reliability check. In general, the authority may request the applicant to explain the circumstances and to comment on the issue at hand. Pending licence applications may be temporarily suspended. If the allegations prove to be accurate, and there is indeed reason to assume that the exporter is not reliable, pending applications may be refused; licences that have already been granted may be revoked. The applicant may avert those consequences if he actively contributes to resolving the case, and takes the necessary operating and organisational measures. Those may include, for example, nominating a new CECO and replacing the export control staff, or re-organising the export control management system.

2) Global export authorisation

Compared to an individual authorisation, a global export authorisation is a substantial privilege that may only be granted to particularly reliable exporters. Companies that have been granted such a licence have a much higher responsibility than companies that apply for individual authorisations. In light of this, applications for global export authorisations may be subject to greater scrutiny; in this regard, a well-functioning ICP is indispensable.

3) Certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence- related products within the Community

Please refer to chapter 4 B IIII.4).

5. Internal Compliance Programme – industry perspective: Example provided by Philips

A. Company Profile

Royal Philips Electronics of the Netherlands is a diversified Health and Well-being company. Headquartered in the Netherlands, Philips employs over 122,000 employees with sales and services in more than 100 countries worldwide. With sales of EUR 22.6 billion in 2011, the company is a market leader in cardiac care, acute care and home healthcare, energy efficient lighting solutions and new lighting applications, as well as lifestyle products for personal well-being and pleasure with strong leadership positions in male shaving and grooming, portable entertainment and oral healthcare.

B. Introduction

Effective export controls can only be achieved through a combined effort between governments and companies.

Even though having an ICP is not directly required under the EU dual-use export controls regulation, the implementing EU Member States do require exporters to establish proper controls that ensure compliance with relevant and applicable regulations.

Philips fully realises the need for a secure environment to prevent Philips goods, intellectual property, technology and innovations being used for proliferation or development of weapons of mass destruction.

Philips sees the ICP as a way to document internal business rules to comply with the applicable export control laws and regulations. The main purpose of these rules is to prevent unintentional but illegal exports and should be embedded in all relevant business processes to ensure effectiveness.

C. Export Controls Compliance Framework

For Philips compliance with export controls and sanctions regulatory requirements is an important part of the way business is done in general. This is naturally a question of respect for laws and regulations, but also a matter of ethics, image and reputation in the framework of the values of a company as a whole.

To this end Philips decided to set up an Export Control programme which applies to all products and business transactions in all countries where the group operates. Export Controls is a real culture in the company and a daily practice in respect of national and international regulation and the group value charter and general business principles.

The export control compliance framework in Philips is built on 5 pillars of compliance.

I. Culture of Compliance

One of the most important elements of a compliance framework is building a culture of compliance in the organisation that is endorsed by management at all levels starting with the board of management. This is mostly recognised as being the right "tone at the top".

A compliance programme can only be effective if it enjoys active management support from the board and senior management. The commitment of the Philips Executive Committee (the "*ExCo*") to legal compliance is clearly laid down in the Company Manual and the Philips General Business Principles (GBP). The Philips GBP guides the entire Philips business and provides the organisation with a clear message that compliance is part of Philips way of doing business. There is a zero tolerance policy for violations of the GBP.

1) One Global Policy

Considering the diversity of the group's activities and offices, combined with the challenges involved in maintaining an exemplary standard, Philips found it was necessary to specify and harmonise the export control rules and practices applicable to the whole group worldwide, complying with all applicable international, European and specific national laws in place in each operating country.

Philips Policy on Export Controls is integral part of our Philips General Business Principles Directives as approved by the Philips Executive Committee and reads as follows:

General Policy Statement
Goods, software, technologies and services cannot be transferred, sold or purchased without due observance of the export controls and sanctions laws and regulations.

These laws and regulations impose legal obligations on Philips with regard to trade embargoes, economic sanctions, controlled goods and technologies, items that could materially contribute to weapons of mass destruction and customers/parties considered sensitive.

Philips shall comply with all applicable export controls and sanctions rules, laws and regulations issued by, among others, the United Nations Security Council, the Organization for Security and Co-operation in Europe, the European Union and the United States.

Non-compliance may cause significant damage to Philips: denial or suspension of export privileges, fines, criminal and civil penalties and/or unwanted publicity.

Philips System on Export Controls
Compliance with export controls is the responsibility of the operating units and legal entities of the Sectors/ Business Groups.

Philips operates a uniform and company-wide mandatory system on export controls. Corporate Export Controls provides specific expertise on export-controlled products, relevant export controls and sanctions laws and policies.

When entering into any business relationship, it is mandatory to perform compliance checks on embargoed/ sanctioned countries and follow the party check procedure using the information and governmental lists published on the website of Corporate Export Controls.

2) Implementation and deployment: Philips Export Controls Officers Network

For Philips, responsibility and accountability for compliance rests principally with the management of each business. Every sector, country organisation and each main production site and operational unit has an export control officer appointed by the management. Confirmation of compliance with the GBP which includes export controls compliance is an integral part of the annual Statement on Business Controls that the managements of each business unit are required to issue.

For Philips, the **Corporate Export Controls** administers the Philips System on Export Controls and is mainly accountable for maintaining the compliance framework in Philips providing expert support to all Philips units to enable their compliance. To be able to manage and implement export control the Philips Export Control Officers (ECO) Network has been establish to cover all Philips organisations at sector, country and operational unit level.

The Philips **Sector management** is responsible for the full compliance of their organisations with all applicable export control laws and regulations in accordance with the Philips System on Export Controls. This includes active implementation and deployment of export controls in the sector. To do so a management team member is appointed as Sector Export Control Officer.

Country Management plays an important role in export controls compliance being mainly accountable to provide support to all operating units of Philips in a country. Country manager must appoint a Country Export Control Officer to perform this function. The Country ECO maintains relevant contact with the national authorities and is involved in the licence process for all Philips Units in the country as required. The Country ECO is also providing Philips Corporate Export Controls with all information on the laws and regulations (including national product control criteria) in their country and on licence facilities available, as well as with information on proscribed/sensitive countries/customers published by the government of their country or other sources.

The **operating units of Sector/Business Groups** are accountable for the implementation of export control compliance within a unit. Units have to make optimal use of the support offered by Sector ECOs, country ECOs and Philips Corporate Export Controls. The operating units are responsible for the full implementation of the Philips System on Export Controls.

The management is responsible for appointing an Export Control Officer for the Unit, with the authority to block transactions (exports, re-exports, transfers, financial transactions) for export control check and release transactions upon confirming export controls compliance. The Unit ECO must develop and implement a Unit Internal Control Programme fully tailored to the business activities of the respective Unit. The Unit Internal Control Programme is built on the corporate compliance pillars making use and embedding the mandatory corporate tools, directives and instructions in daily business operating procedures. On an annual basis, the Unit

Export Control Office is reporting the compliance and implementation status of his unit via the Self-Assessment tool. The Unit management approves and signs the results of the assessment and is responsible to ensure that the identified gaps are properly addressed.

II. Assess Compliance Risk

At Philips we believe that a proper ICP can only be effective if it is tailored and built around a specific process of the company or business unit, covering the risk of the business activities that are subject to controls under the applicable export controls laws.

So, in Philips we have developed a so called status of involvement questionnaire to recognise the high risk business areas (fully involved in export controls) versus the lower risk business areas (potentially involved in export controls) with regards to export control legal requirements. In Philips export controls compliance is part of the daily business activities of each department and not a standalone, separate process. Only those departments that are instrumental to activities with critical export controls exposure are to be burdened with additional controls, reporting and procedures. At Philips the compliance risk of an operational unit is assessed based on: product portfolio and its classification, actual and expected export/import activities, research and development activities, presence or business in or with sensitive countries, involvement in activities in sensitive markets or sectors. Depending on the level of involvement, each operational Unit must implement a full compliance programme or just a reduced compliance programme.

The assessment of the compliance risk is conducted by each operational unit on an annual basis and it is signed, confirmed and reported by the management through the annual self-assessment programme described further under the *Monitoring* part.

III. Establish Control Activities

Controls should be simple but effective and in line with the identified risk and applicable legal requirements.

In order to enable the Philips organisation to comply in full with all applicable laws and regulations on Export Controls and Sanctions, Philips has created the Philips System on Export Controls, mandatory for everyone in the company as administered by Corporate Export Controls.

The Philips System on Export Controls (including the use of its expert advice system PROTECT) provides for a uniform, company-wide system on export controls with instructions for compliance with all applicable export controls and sanctions laws and regulations and it is mandatory for every operating unit of a Sector/Business Group within Philips worldwide.

Certain transactions (exports, re-exports, transfers, order desk activity, transit, brokering, information exchange, financial transactions) can be subject to the UN, EU, US and also local export control laws and regulations containing the lists of controlled items, trade embargoes and sanctions, lists of proscribed/sensitive customers and other (inter)national ways of implementation. The aim of these regulations is to prevent the unauthorised supply of items (goods, software,

technology and services) to countries/parties that are considered a threat according to international and national laws. Every transaction subject to export control compliance must be checked and a decision on whether an export authorisation (licence) from the applicable government is required.

Philips fully realises the need for a secure environment to prevent Philips goods, intellectual property, technology and innovations being used for proliferation or development of weapons of mass destruction. Philips also recognises the obligation of export control compliance. Consequently, the Phillips System on Export Controls also covers transactions in or from countries without national export control regulations (Philips Controls).

The Philips System on Export Control contains two sets of compliance tools: mandatory and supportive tools. These tools have been developed as a dynamic framework to enable the Philips organisation to comply with all international and national export controls and sanction requirements as well as to facilitate and streamline compliance efforts worldwide.

The next part covers in short a couple of examples of the mandatory tools in use in Philips to give an idea of the operation of the Philips System on Export Controls.

1) PROTECT: Philips Expert Advice System

PROTECT is a Java computer programme mandatory to be used throughout Philips. PROTECT contains contact details of all Philips Export Control Officers in all Sectors around the world as well as the export controls and sanctions regulations applicable to Philips. PROTECT contains a lot of various governmental sanctioned/embargoed countries and parties with which Philips is restricted in doing business with. With the help of the order simulation process, PROTECT provides concrete instructions/advice on how to act in export control matters once a flag is raised in order handling systems “Data from PROTECT is embedded and used in various ERP systems in use at Philips.

2) Know your Product Programme

In export controls everything starts with knowing what is it that you want to sell or transfer, download, upload or even purchase or make available to everybody by placing the information on Intranet or Internet. Everything starts with the classification of those items. Export control classification is the linchpin of export compliance. Not only is incorrect classification a violation itself, but it leads to non-compliance in practically all other areas of export controls having an impact on Philips compliance as a whole but possibly also on the compliance of our customers and suppliers.

For this reason, export control classification within Philips is mandatory for all items (goods, software and technology) manufactured, purchased or downloaded. In order to enable the Philips organisation to comply with the various classification systems around the world it is mandatory that all items are classified using two data elements: 1) export control classification number (ECCN) and 2) strategic goods indicator (SGI)

All units that manufacture, purchase, source, download, export or import items must ensure that a specific process is put in place and that these two data elements are assigned to all items and communicated to all departments for import and export

activities. All ERP systems and master data management systems must be set up to contain and records these data elements as mandatory fields for all items. All items that are subject to export controls must be reported to Corporate Export Controls for publication in PROTECT. Using this system of classification and tagging with specific data elements makes sure that the order handling "raises a flag" once a controlled items and/or a proscribed/sensitive country and/or customer is involved. Once a flag is raised, PROTECT must be consulted for further information and instructions.

3) Know your Customer Programme: Philips Customer Check Procedure

As a global company Philips does business with lots of customers and business partners all over the world. New customers and business partners are contacted every day by our sales and marketing organisations, logistics or purchasing department and millions of shipments are flowing from Philips' premises to those customers. At the same time, people, organisations, companies and institutes which try to harm our society can also be found all over the world. They are collecting all kinds of materials to do this. In collecting these materials they try to be as smart and inventive as possible. The transactions related to these activities are illegal and violate export controls as well as other laws and regulations. These activities are mostly referred by regulators as proliferation, circumvention or illicit trade.

Philips does not want to be part of such activities and takes necessary steps to prevent deliveries to such parties or even engaging in any business activity through its export controls and sanctions compliance framework. As part of this framework the customer check procedure is a mandatory tool and it is the responsibility of all Philips units to use it prior to engaging in any transaction with any business partner. This is implemented to safeguard the company from doing unauthorised business with sensitive customers. New or doubtful Customers or business partners must always be checked in PROTECT before any activity with this entity can take place. Existing customers/suppliers must be checked against PROTECT on regular basis.

Corporate Export Controls (CEC) collects information from various sources about Parties (companies and individuals) that have been sanctioned by governments or have been identified as being involved in particular activities. CEC creates a master of Controlled Party Lists maintained in PROTECT.

4) Know your Destination Programme: Sanctions, embargoes and listed/sanctioned parties

Sanctions or restrictive measures have been frequently imposed by the United Nations, the European Union, the United States etc, as an instrument of a diplomatic or economic nature. These measures seek to bring about a change in activities or policies such as violations of international law (a. o. export control laws) or human rights, or policies that do not respect the rule of law or democratic principles.

Restrictive measures can target governments of third countries, or non-state entities and individuals (such as terrorist groups and terrorists). They may comprise arms embargoes, other specific or general trade restrictions (import and export bans), financial restrictions, restrictions on admission (visa or travel bans), or other measures, as appropriate.

Prior to engaging in any business transactions checks need to be done to ensure that the engagement is lawful, in compliance with existing export controls and sanctions laws or if this engagement might require a governmental approval. In some cases even negotiating an agreement can trigger a governmental approval

Relevant ERP systems are set up to recognise and when required block transactions with sanctioned countries or parties. Philips Units must use PROTECT simulations to ensure that relevant licences are filed with relevant export control agencies and various countries or that orders are denied when such licences or authorisations are not available or denied.

5) Other administrative guidelines, instructions and directives

Other various administrative instructions guidelines and directives cover working procedures for business contacts within sanctioned countries, Catch-all Controls, intangible controls, capital equipment, purchasing activities, deemed exports and hiring instructions, record keeping procedures, licensing programme, etc.

IV. Communicate and train

Communication and training programme is tailored to the specifically identified risk areas and organisational levels to ensure both awareness and in depth knowledge of export controls requirements.

In export controls compliance it is important to create a training programme that is simple and practical, tailored to the daily activities for various employees involved.

Within Philips, the Corporate Export Control Office offers a range of both general and in-depth, online and in-person training programmes to all Philips businesses.

For example, our training programme covers, among others, the following types of training:

- The general awareness eLearning module is mandatory for all Philips employees involved directly or indirectly with export controls and sanctions. An exam is part of the module to ensure basic understanding of the materials.Only those employees who pass the test are registered as having completed the training. All others are required to take the course all over again. This module is linked to our performance appraisal process and personal annual review
- Classification training programme dealing with classification determinations or validations, ERP implementations
- Screening training programme featuring customer check procedure, due diligence, PROTECT usage and validation of findings
- Internal audit training programme
- Self-assessment training programme and local ICP implementations
- Various other training modules to cover specific compliance requirements

Training records are maintained at corporate level for the corporate initiatives as well as local business level. Unit management is responsible to ensure that their

organisation and the people involved in export control activities are properly trained both internally as well as externally with respect to their professional needs.

Within Philips we maintain an internal compliance website at corporate level and each business is further required to maintain a local ICP with evidence of implementation and documentation of processes and procedures applicable for the business structure and activities. Furthermore, Corporate Export Controls communicates and disseminates relevant regulatory and compliance updates using the local network of Export Control Officers throughout the Philips organisation. Various communication channels are used including direct email alerts, website postings, SharePoint postings etc.

V. Create a monitoring programme

Within Philips we have implemented a Self-Assessment programme and an Export Controls Audit System as our main monitoring tools specifically focused only on export controls compliance. As mentioned before compliance with export controls is a matter of complying with Philips GBP commitments. This means that there are also other tools in use in Philips that monitors and reports the total legal compliance and GBP compliance of Philips. The two specific export controls monitoring programmes are part of this whole process of compliance in Philips.

1) Self-Assessment Programme

As mentioned before, the Philips Sectors and operating units are differently involved in Export Controls. A web based self-assessment tool has been created to analyse the compliance of the Philips organisation with export controls and sanctions laws and regulations. This tool helps CEC, Sector Management teams and units within the organisation to estimate the level of compliance with the Philips System on Export Controls and provide necessary improvement measures.

The Self-Assessment Programme within Philips is built as a risk based approach where we define two types of units: fully involved and potentially involved units. The decision regarding the level of involvement must be made by each Unit in Philips and should be based on a thorough analysis of their product portfolio, customer portfolio and direct and/or indirect business contacts. This determination of the level of involvement is required to be done annually and is reported by Unit Management via the Self-Assessment tool. This ensures that changes, internally in the business of the units, as well as externally in the regulations, are captured and addressed through action plans.

Completing this questionnaire annually is mandatory for every Philips operating business unit and third Party suppliers if necessary.

The compliance results per sector are reported to the Philips Executive Committee as part of the GBP Review Committee annual compliance report.

Units having a compliance level of 95 % or more based on the result of their Export Control Self-Assessments can consider themselves to be compliant in the Philips General Business Principles Questionnaire/Self-Assessment. In case compliance is lower than 95 % the necessary explanations and improvement plans shall be presented by the units to become compliant with Philips General Business Principles.

All improvement or action plans must be made available and uploaded in the Self-Assessment tool to enable management to monitor compliance status and progress.

2) Philips Export Control Audit System

To meet business objectives, Philips' entities are responsible to find the right balance between opportunity and risk. The Executive Committee (ExCo) looks to Internal Audit for re-assurance that Philips' entities have adequate business controls in place and therefore are not exposed to undesired risks and losses, including damage to the Philips brand.

Within Philips, Internal Audit reviews compliance with Philips Export Control requirements for the specific activities of the business unit using the self-assessments performed by the organisation as the primary source of information. Reports and action plans are issued to relevant business management responsible for compliance process in the Unit. A copy is always sent to Corporate Export Controls. Additionally an executive summary with the results and the findings is sent to the Philips Executive Committee and annually reported to the Management via the GBP Review Committee together with the annual self-assessment compliance results.

D. Conclusion

Independent of the compliance methodology or model that can be used to build an export control framework an ICP needs to be developed to be effective and embedded in day to day business activities. The effectiveness and the implementation of a Corporate ICP needs to be monitored and adapted to fit the business activities and risk. There is no "one size fits all" ICP, but one can use the 5 pillars of compliance to create a consistent compliance framework and programme to enable the organisations to be effective in their efforts to comply with all applicable export controls and sanctions laws and regulations.

At a minimum any effective ICP should at least achieve the following:

- Confirm and reinforce senior management commitment to compliance with export control and sanctions laws and regulations to everybody within the organisation
- Provide management structure and organisation for the deployment and implementation of the ICP
- Enhance accountability for export control tasks by identifying who is responsible for performing each part of the process and who is responsible for overall effectiveness of the compliance programme
- Provide compliance safeguards throughout a company's supply chain to ensure order processing due diligence checks and screenings to enable consistent decisions
- Provide written instructions for employees to integrate into their daily business responsibilities to check business transactions and be able to recognise red flags and prohibited end-uses or end-users
- Provide respective personnel with tools to help them ensure they are performing their export control functions accurately and consistently in all identified key compliance areas

- Identify catch all transactions that could normally be exported without a licence, but might require a licence or governmental approval because of the end-use or end-user
- Establish a process for regular internal audits and compliance monitoring practices
- Establish a process for handling and resolving compliance problems and possible violations
- Streamline the process and reduce time spent on compliance activities whenever written instructions, tools and ongoing training are available to respective personnel
- Protect employees from unknowingly violating export control and sanctions laws and regulation through training and awareness raising programmes.

In conclusion, it is good to remember that management commitment to export controls compliance is the single, most important aspect of an effective compliance programme.

Commitment from management is necessary for a company to develop and implement an effective, “best practice” internal compliance programme.

6. Internal Compliance Programme – industry perspective: Example provided by AREVA

A. Company Profile

AREVA supplies solutions for power generation with less carbon. Its expertise and unwavering insistence on safety, security, transparency and ethics are setting the standard, and its responsible development is anchored in a process of continuous improvement.

Ranked first in the global nuclear power industry, AREVA's unique integrated offering to utilities covers every stage of the fuel cycle, nuclear reactor design and construction, and related services. The group is also expanding its operations to renewable energies – wind, solar, bioenergies, hydrogen and storage – to be one of the leaders in this sector worldwide.

With these two major offers, AREVA's 48,000 employees are helping to supply ever safer, cleaner and more economical energy to the greatest number of people.

B. AREVA Internal Compliance Programme (ICP)

Diversion of components, raw materials and nuclear technologies for illegal purposes is the major cause susceptible to slow down the nuclear programme in the world. In addition, terrorism and the proliferation of weapons of mass destruction threaten the revival and the peaceful development of the nuclear energy.

In the past, after the dramatic experiences of Hiroshima and Nagasaki, nuclear technology was considered to be excluded from exports and today, although the civil nuclear industry remains strictly regulated, the development of civil applications is already possible.

The majority of AREVA products are dual-use and, therefore, an export licence is needed for the quasi-totality of the exports of the Group.

Dual-use products and their related technology designed for civil use but also susceptible to be used for military goals, are the category of concern. We have to make sure that they will only be used for civil purposes and that they will not be re-exported without our preliminary agreement. This is naturally a question of respect for the regulation, but also matter of ethics, image and reputation in the frame of the values of the group.

Although the free circulation of products in the European Union is assured, the nuclear products are the object of a stricter regulation (EU Dual-Use Regulation) and are subjected to export licence in intra-community "transfers" as well as in extra community "exports".

For the AREVA group, compromise between the safety of export and profitability is not an option. There will be no profitability without security (and safety).

To consolidate its image and its commercial activity while increasing the confidence of its customers and public opinion, the AREVA group takes this challenge on and engages its responsibility in order to continue mastering its exports safely.

New applications of nuclear energy regularly come to the mind of researchers, politicians and decision makers. Neutron sources, production of radioactive isotopes, characterisation of materials by new non-destructive nuclear methods, as well as the dismantling of installations, and the application to astrophysics, metrology, medicine and desalination of sea water for naval and spatial propulsion, arouse interest around the world.

The multiplication of nuclear applications produces new products and a wider scattering of nuclear technology and the list of controlled products regularly increases. Therefore, the dual-use list is constantly changing and regularly updated every year.

The growth of the nuclear market, new products and the appearance of new players, be they customer or partners, gives us the obligation to constantly adapt our export control system to make sure that it is increasingly effective and successful.

This sensitiveness results from the nature of the products and/or from the sensitivity of the country of destination and sometimes of both of these reasons. In certain cases, the transfer can be internal to the Group, between Germany and France for example, or between France and the United States. This is the case, for example, for the transfers of information necessary for the certification of the European Pressurized Reactor (EPR) by the US American Nuclear Regulatory Commission.

In this context, we wanted to set up an Export Control programme and an interactive e-learning training within the AREVA Group to make exports of sensitive products, raw materials and technologies more secure and comply with the applicable regulations.

Export control is a daily undertaking which concerns all stages of the nuclear cycle, from mining, nuclear fuel and reactor design to fuel reprocessing. In concrete terms, every sector in the group, both operational and functional, and every level of management must be made aware of the export control regulation and practice.

The subject is rather complex, the regulations are constantly evolving and, naturally, becoming familiar with them is a gradual process. However, it is a process of such importance, that regular training sessions are necessary.
The General Secretariat and the Export Control Department, which is in charge of implementing the export control procedure within the Group, have developed an e-learning programme in association with the AREVA University.

To confirm the long-lasting success of our international development, AREVA intends to implement this culture of the control in export with rigour and intelligence.

To this end, at the initiative of the Export Control Division, AREVA decided to set up an internal Export Control Programme which applies to all products in all countries in which the Group operates. Export Control is an integral part of the company’s daily

practice with respect to national and international regulations and the Group's value charter.

I. The Export Control Division

The Export Control Division (DEC) is part of the General Secretariat which reports directly to the CEO of the Group. It is under the responsibility of the Vice President, Chief Export Control Officer and intervenes in all activities of the Group and in all countries in which the Group operates.

The DEC imposes a strict control of the Group's exports, to contribute to the efforts at the international and intergovernmental level to combat the proliferation of weapons of mass destruction with the goal of avoiding a possible illicit use of its products, services, raw materials and technology.

In agreement with the commitments made by the signatory States to the Treaty on the Non-Proliferation of Nuclear Weapons, AREVA refuses to contribute to any nuclear weapons or other explosive devices programme through its exports of civil products.

To this end, and beyond the strict respect for regulations and national politics, AREVA adheres to the guidelines provided in the Directives of the Nuclear Suppliers Group (NSG) and those of the regulation establishing a community control of the exports including dual-use items and technologies (EU Dual-Use Regulation).

II. Mission

The mission of the DEC is implemented by the following actions: ·

1. Facilitate the obtaining of export licences and supplying the support necessary for offers and for the projects of the Businesses Groups (BG) and Business Units (BU) in accordance with the applicable regulations
2. Preparing policies at the corporate level and procedures applicable at the level of the BGs and BUs
3. Nomination of the Export Control Officers each in their field of expertise and responsibility
4. Leadership and coordination of the ECO's network by regular coordination meetings (2 in France and 1 alternately in the US and in Germany)
5. Organisation of various modules of Export Control training respectively for the Managers, for the exporters and for the Export Control Officers
6. Organisation of audits and self-assessments
7. Participation in national, European and international working groups for the regular update of the lists of control and regulations
8. Interface and negotiation with the national and international administrations and with partners
9. Regular monitoring, analysis and distribution of the new regulations
10. Lobbying institutions in charge of the regulations and their updates
11. Regular updating of the dedicated INTRANET web site
12. Preparing and issuing the quarterly NEWSLETTER, in order to share information, practices and experience between exporters and ECOs
13. Consolidation of the export licence data base.

III. Organisation and operation

The DEC is the responsibility of the AREVA Vice President, Chief Export Control Officer, who assisted by a multidisciplinary network of Export Control Officers.

The Export Control network consists of about fifty Export Control Officers, mainly engineers, integrated into the BGs and BUs and the different JVs and countries where the group operates. This network covers all the fields of activity and all the countries in which AREVA is represented.

For their ECO's duties and for all the export projects (components, materials, services, technical assistance, technology, computing), they report to the AREVA Chief Export Control Officer and for the "day-to-day" work, to their direct operational management. This dual integration in the operational entities and into the DEC allows the ECOs to have a good knowledge of their products (dual-use or not) and their business (sensitive countries, competitor, coordination in the Group, etc.) as well as of the regulations and the Export Control practices at the national, European and international levels.

The dialogue within this network is constant through trainings, coordination meetings, project meetings, the dedicated intranet site, NEWSLETTER and procedures. It allows an exchange of information and a project's coordination able to anticipate export control needs. This is indispensable to the business' compliance to the regulation and, therefore, contributes to its commercial activities' success.

The main responsibilities of the DEC are listed below. They also correspond to the main pillars of the deployment of the internal compliance programme. The implementation of export control in the Group can be divided between four fundamental activities:

- Policy and procedure
- Appointment and Network of Export Control Officers
- Training
- Audit and self-assessment

and four additional activities:

- Offers and contracts
- Public affairs relations
- Regulations
- Communication

1) Policy and procedures

The first action implemented by the DEC is to issue Policies at the Group level and applicative procedures at the operational levels of the Business Groups (BGs) and Business Units (BUs).

The Policy at Group level establishes rules which apply to the entire Group, to all types of expertise, to every managerial level, to all facilities in the world and to any situation.

(1) The Export Control Policy

The Export Control Policy recalls that all goods, products, raw materials, services and, generally, the technologies exported by the company under the direct or indirect control of the Group as well as all employees or agents of any cooperating company, will comply to the applicable legislation regarding export control and terrorism.

The AREVA Value Charter provides that AREVA and its affiliates only do business with companies from such countries that comply with international provisions on non-proliferation. As Export Control is a sensitive issue and is tightly associated with the political situation, it must be treated in the strict respect of the national and EU regulations as well as other international principles.

The Policy describes the roles and responsibilities of the AREVA Vice President Export Control Officer as well as the Export Control Officers by regions and by sectors.

In no case the legal requirements of the national regulations (French, German and US) shall be impaired by the policy.

(2) Aim and objectives of the Policy

Considering the diversity of the activities of the AREVA Group and the challenge involved in maintaining an exemplary standard, notably in the area of nuclear non-proliferation, it is necessary to specify and harmonise the export control rules and practices applicable to the whole Group (including Joint Ventures).

The aim of the export control policy is to:

- Guarantee compliance with all applicable regulations and policies in every export country
- Ensure that, whichever is the country of origin, AREVA complies with all national laws and regulations as well as all international conventions in force concerning non-proliferation, IAEA safeguards and export control
- Analyse potential business constraints and consequences of complying with non-proliferation laws, regulations and policies, including in the event of re-export as early as possible, whilst allowing for specific constraints from national authorities, bilateral agreements or specific contracts. Additionally, potential repercussions in other customer countries and/or sectors of activity are being assessed
- Facilitate relations with the administrations concerned.

(3) Principles and reference texts

In order to avoid any illicit use of its products and services and to contribute to the international and intergovernmental efforts made to prevent the proliferation of weapons of mass destruction, the AREVA Group has established very strict controls on its exports.

In compliance with the commitments undertaken by the States signatories of the Treaty on the Non-Proliferation of Nuclear Weapons, AREVA refuses to provide any support or contribution, by way of its exports, to any programme designed to develop nuclear weapons or any other explosive device containing nuclear material.

Therefore, in addition to fully complying with all national regulations and policies, AREVA also respects the export conditions laid down in the Directives of the Nuclear Suppliers' Group (NSG) and in the regulation establishing an EC body for controlling the export of dual-use items and technology (EU Dual-Use Regulation).

In compliance with the "catch-all" clause of the regulations, AREVA shall inform the relevant authorities of any request for cooperation or invitation to tender that may lead to illicit activities.

Subsidiaries and Joint Ventures authorised to sell equipment, comply with the national and international regulations and abide with the internal authorisation procedures.

In addition to the regulations, AREVA's Values Charter sets out the principles for ethical behaviour that must be followed in the Group's export decisions.

(4) Organisation

Every Group Division, subsidiary and joint venture must comply with the AREVA policies, produce their own export control procedures, ensure that subsidiaries and agents respect the same policy and that a nominated export control officer is in charge.

The policy must guarantee compliance with all of the aforementioned principles, right from the:

- Decision to authorise an offer or contract
- Decision to set up a joint venture involving technology transfers subject to export authorisation
- Decision to establish a procurement policy involving the transfer of dual-use technical specifications

Each subsidiary appoints an Export Control Officer, who is in charge of implementing the procedure and is consulted in the event of any uncertainty, interpretation difficulty, or difficulty in obtaining the necessary authorisations.

The ECO regularly organises dedicated trainings for the Unit.

2) Appointment and network of Export Control Officers

An Export Control Officer (ECO) network is in place in the Group in order to implement the policy and relevant procedures. The ECOs are mostly engineers with strong understanding of legal issues. They are integrated in their own business units and report to the operational management as well to the Export Control Organisation. This dual management is the guarantee that the ECO is regularly informed of any exports and technical developments and at the same time is knowledgeable about

the nature of the products and therefore able to judge whether or not an item can be classified as dual-use items.

(1) ECOs duties and responsibilities

- The Export Control Officer (ECO) is systematically kept informed of the evolving projects, projects in preparation and reported to the Bid Committee and that may require export authorisation, of plans to set up a joint venture involving transfer of technology, or of procurement contracts involving the transfer of technical specifications subject to export authorisation. The ECO gives his appraisal taking into account the following elements:

    - Nature of the export: equipment/service/raw materials, sensitive/non-sensitive
    - Provisional and/or final country of destination
    - End use certification and guarantees (country to country)
    - Existence of any policy (embargo) restricting exports to the beneficiary country or person
    - Concerning re-exports, any conditions there may be in the contract and any bilateral governmental agreements or note verbale

- The ECO is kept informed of the Bid Committee decisions on bids, joint ventures and procurement contracts. Where necessary he assesses the need to inform the relevant authorities of these issues before any export licence application is prepared. In this case, he informs the AREVA Chief Export Control Manager
- The Export Control Officer keeps an up-to-date list of on-going export licence or requests and reports regularly to the AREVA EC Manager
- Each BG or BU is then responsible for applying for a national export licence. In case of any difficulties in obtaining the licence, the AREVA Export Control Manager can directly intervene with the authorities.

3) Training

Training courses are regularly organised at corporate level and more specifically at BU level when needed. Participants become acquainted with relevant policies and export control procedures, the history, the stakes and the concern to have with respect to procedures and regulations. The training programme includes the ethics (Value Charter) of the Group, the Treaty on the Non-Proliferation of Nuclear Weapons, additional international regulations and, more particularly, those applicable in Europe (Germany and France) and the United States.

A part of the training is dedicated to the practical process for obtaining an export licence: the request, the process of approval at the ministerial level and the follow-up of the export licence and the needed documentation.

An e-learning programme was created to allow a larger number of persons to get quickly acquainted with export control in an interactive way.

Following an academic lesson, the e-learning programme allows everyone to test their own knowledge.

The training is set up at group level. It is addressed to everyone involved in the export process.

Every year a new training campaign is launched in the Group in order to evaluate emerging needs. Generally every 3 or 4 years, the AREVA employees feel the need to be retrained to refresh the knowledge and to learn the new or updated regulations and their evolution.

4) Audits and self-assessment

AUDITS have an important role in the export control. We consider three types of audits: external, internal and self-assessments.

The external audit can be requested by the national administration or eventually by the customs. The internal audit is a regular service requested by the Company General Managers and CEO or by the Corporate Export Control Management. The self-assessment is requested by the operational Unit.

(1) External AUDITS

The national administration in charge of the export control or the national customs can proceed with audits to determine if all regulations have been respected. Recently AREVA GmbH in Germany has been granted with the Authorised Economic Operator (AEO) label and the AREVA SAS in France is undergoing the same process. In order to obtain the AEO label, the national authority verifies “inter alia” the Internal Compliance Programme. Audits and verifications can also be launched at the occasion of an export of products or technology at the customs or at any of the company locations.

(2) Internal AUDITS

The AREVA Group has his own audit department. Every year a list of provisional internal audits is issued. The audit can be requested by the AREVA general managers for different reasons, as well as by the AREVA Export Control Manager. The final report is prepared to the attention of the requesting managers and is followed by deliverables and recommendations. A rigorous follow-up of the recommendations guaranties that all the procedures are updated and respected. Two different types of audit can be conducted: an audit for compliance with the procedures and an audit for quality performances. The audit for compliance with the procedures verifies that all the procedures are in place and are generally respected. The quality performance audit verifies that on the occasion of an export, all procedures are effectively applied.

(3) Self-assessment

Self-assessment is an intermediate tool between the most rigorous audit and training. It is requested by the unit which wants to be audited and is performed as a “peer review” by ECOs in charge of other business Units. It generally lasts for three days and export contracts, list of travellers, export licences and others are verified. ECOs experts will “teach” the general managers, project managers, logistic and legal department how to implement the procedures and respect the regulations. The final report will be produced by the ECOs experts at the intention of the business unit management. A follow up of the suggestions is assured.

In addition to the 4 previous main actions (Policy, ECOs, Training and AUDITS), the Export Control programme is implemented through the following 4 additional activities.

5) Offers and contracts

A good cooperation between the export control organisation, the commercial departments and the technical departments is a guarantee that all offers and contacts will tackle the export control issue and avoid engaging in any potentially dubious business. All offers to bids and all contracts will contain "ad hoc" wording concerning export control. The texts will contain specific wording which will condition the effectiveness of the offer or contract with respect to international export control regulations and the need of an export licence.
Generally, whenever a contract is ready to be signed, an analysis is performed in order to verify if there is an export and therefore need an export licence.

(1) Offers

A specific application form must be completed for every bid foreseen an export or transfer. If the bid is subject to export authorisation, these application forms shall include a section on export control.

This section of the application form is completed by the bid leader, if necessary after consultation with the Export Control Officer.

If appear divergent interests with other subsidiaries or Sectors, the AREVA Export Control Division will report to the AREVA's Executive Board in order to review the offer decision or validate the bid.

(2) Contracts

All contracts including an export must contain:

- Clauses on usage and re-export
- The constraints established by regulations and bilateral agreements for technology, equipment and material considered sensitive according to the NSG
- A clause providing for the consequences of not obtaining the necessary authorisations

6) Public affairs relations

The export licence is issued by the responsible national administration.
In order to obtain an export licence, a complete and exhaustive file including all necessary documents is presented to the administration. The application will generally contain:

- The request for an application form
- A text presenting the layout and industrial specifics of the whole order
- Parts of the contract including the scope and the beneficiaries of the export,
- end user statement
- Pro forma invoice

The Group establishes a continuous partnership with the national administrations involved in the analyses and delivery of export licences. All new projects are presented to the administration. This procedure prevents the administration to suddenly discover an export in a project.

7) Regulation

The EU Dual-Use Regulation is constantly evolving. The list of the controlled products is updated annually and the main core of the regulations approximately every 5 years. The Chief Export Control Officer is in charge to inform all ECOs on different updates with potential impacts on the exporting business. He is also responsible to lobby national, European and international institutions.

8) Communication

Different tools are in place to communicate changes in the regulation in order to update knowledge and share experiences and good practices. A NEWSLETTER is issued every two months, a FLASH INFO whenever necessary and the WEB site is regularly updated.

7. Warnings and "red flags" - how to recognise illegal procurement attempts?

A. Awareness in the company

The general strategic threat potential in the hands of critical states has increased considerably in the past years and has, in the mean time, taken on a new aspect. A swathe of countries remains interested in obtaining the production technology for the creation of weapons of mass destruction and missiles and/or in compiling an exceptional collection of conventional weapons. This is usually done with high logistical effort which is often very difficult to uncover.

It is in the interests of both the company and the licensing authority to ensure that sensitive goods are not inadvertently delivered for the use in such programmes.

Awareness on behalf of the industry plays a key role in achieving this goal. State export control can only be effective if all participants (producers, exporter, engineers, scientists, etc.) contribute to and support such controls. In this respect, the fight against the spread of weapons of mass destruction requires close cooperation among all actors. A corresponding awareness of the risks in dealing with sensitive goods and dangers of misuse is indispensable.

It is also a prerequisite of any responsible export control unit within the company that only business transactions on the basis of plausible facts be carried out.

It must also be in the interests of any reliable firm not to be associated with scandals or with the misuse of goods which it has produced or delivered. Thus, a corresponding awareness is not simply the responsibility of state export control alone, but must rather be of vital interest to every business.

The following information should help all actors, especially companies in judging whether there is a danger of being inadvertently involved in programmes for the development of weapons of mass destruction, and in which cases they should seek advice from the competent authorities of their EU Member States. The following trigger points do not necessarily lead to the need to apply for an export licence, however they should help companies in raising their own awareness and to carefully check and assess the given circumstances of any planned transaction.

B. Recognising procurement attempts

I. Procurement attempts relating to goods

Anyone who supplies dual-use items can inadvertently support the planning or execution of a programme for the production of weapons of mass destruction. Particular attentiveness is required in order to uncover attempts to acquire such goods.

Checklist

Suspicious behaviour

New customers make inquiries but their identity remains unclear, or they give evasive response to questions regarding their identity or do not provide convincing references.

The supposed customer does not seem to exist, is not known amongst industry guilds or organisations, is not listed in telephone or trade directories and is not present on websites or in other information sources.

The customer is not able to provide details about supposed former business partners.

The customer does not appear to have the appropriate equipment to process the ordered goods based on the quality/quantity, or the type of business does not seem to correspond to the order made.

The customer provides no answer or insufficient answers to questions regarding the intended use of the ordered goods or regarding the relevant business or technical aspects of the process.

The customer provides no answer or insufficient answers to questions relating to the destination of end-use.

The customer provides no answer or insufficient answers to questions of a business or technical nature, which would normally be posed during business negotiations.

The customer demands abnormal or excessive confidentiality regarding the final destination of the items or other details regarding the product, materials or parts to be supplied.

The customer demands security precautions/measures which are excessive with regard to the supposed use of the product. It has to be noted on the other hand that some companies give much consideration to their safety and security precautions as part of their corporate policy and best practice; thus careful examination is needed to determine the proper circumstances.

The customer obviously lacks knowledge regarding the usual security precautions for dealing with the ordered goods.

The contract partner is refused access to equipment areas/factories under apparently suspicious circumstances.

The customer splits the contract for equipment installation without satisfactory information about the full extent of the order and/or ultimate use of the equipment.

The customer requests the completion of a procedure which was partially completed by another company.

The country of destination is under suspicion of being involved in the proliferation of weapons of mass destruction or is not plausible due to the type of goods to be delivered.

Check List

Suspicious contracts

The description of the items is vague or meaningless or they appear to be unnecessarily highly specified or the ordered items are unusual and odd with the buyer’s line of business.

The contract itself is obscure, e.g. the amount or the quality of the ordered goods is considerably higher or lower – without satisfactory explanation - than is normal for the declared use.

The declared value of the items does not correspond to that of normal business practice.

An equipment system or piece of equipment in an existing or planned installation is required to be altered in such a way as to allow a possible production of chemical or biological weapons or their precursors.

The factory in which the system or equipment parts are to be installed is abnormal with regard to the type of equipment concerned.

The method of payment, the shipment route, or other conditions are abnormal to the usual business practices.

Checklist

Suspicious business environment

The business situation, in particular the participation of a mediator, are unusual and differ from normal business practice; e.g. the exporter is only one individual and the product amount leads to the assumption that the product will be used for production purposes.

The export documentation does not match the information regarding the recipient and/or the description or amount of goods to be delivered, or deviates from the company norms. The export documents are not in the usual format or contain spelling errors or other simple errors.

The packaging or parts thereof requested by the customer do not match the foreseen transport or the declared end application.

The customer requests abnormal labelling, marking or signage.

The packaging and handling types do not fit to the declared use and/or the ultimate destination of the goods or parts to be delivered.

Unusually advantageous payment conditions are offered, e.g. price and interest which far exceed the normal market values, a cash prepayment, bank documents that do not correspond to the usual standards.

The insurance amount which is paid for the transport does not equate to usual business dealings (either too high or too low).

II. Procurement attempts relating to know-how

Scientific cooperation is misused by some countries in order to obtain specialist knowledge which is then used for the development and production of weapons of mass destruction. Free access to universities and other scientific and technical institutions for scientists, students and technicians from countries that are under suspicion of carrying out programmes of weapon of mass destruction allows them to gain access to sound knowledge in the high-tech sector. The knowledge thus gained can be used not only for civil programmes, but also for WMD activities.

Know-how transfer can occur within the scope of national or international conferences, trade fairs, special exhibitions, workshops, meetings, symposiums, cooperative research as well as development projects and training programmes. These sorts of events also offer an opportunity to make personal contacts which allow expert knowledge to be gained on an informal basis, which generally does not arouse any suspicion.

One type of know-how transfer are scientific and academic exchange programmes between industrial countries and countries which are under suspicion of maintaining WMD programmes. Furthermore, private initiatives also offer enough opportunity for contacts and information exchange. Another form of gaining expert knowledge is directly contacting experts and/or personnel involved on a technical basis, e.g. in the installation or maintenance of production equipment.

The following parameters can be useful in estimating, whether the expert knowledge being requested could be used for WMD (in addition to the examples given under I.):

Checklist

Points of suspicion during know-how transfer

The individual requesting information is not able to exactly formulate the expert knowledge or training which is usually required for the construction or operation of facilities or parts of facilities.

The individual demanding information requests excessive or unusual confidentiality, e.g. hesitation in providing information about the location of the facility or the destination where the contracted services are to be carried out.

The individual requesting information asks for help and advice in a special sensitive technology sector.

Scientists, experts or employees of research institutes and laboratories pose questions that you would not normally expect from such individuals.

The individual requesting information does not provide any or sufficient reason for needing to transfer know-how or gain training.

Explanations pertaining to questions regarding relevant business or technical aspects of a process allow you to assume that the person requesting information does not have the required expert knowledge normally expected for this sort of project.

The individual requesting information demands measures which are, in the face of the know-how transfer to be made, excessive or which make you realise that the individual requesting information is obviously not used to the normal security requirements of the respective contract.

III. Procurement attempts in the context of terrorism

Misuse of dual-use items, in particular of chemicals, biological agents or production equipment for terrorist purposes is a danger which was recognised well before the terror attacks of 11th September 2001. The Sarin attacks in the Tokyo underground in 1995, or the Ricin experiments discovered in London in 2003 are just a few examples of the attempts of individuals or terrorist groups to damage people and their health.

The UN Security Council has taken a number of specific measures in a series of resolutions with the aim of fighting terrorist activities being carried out by specific individuals and organisations. The European Union has turned these resolutions into generally binding and directly applicable legal obligations for both companies and individuals linked to the EU. Restrictions affect the provision of certain goods (e.g.. arms) and related services (special technical knowledge or financial services, including asset freeze) to natural or legal persons listed in the appropriate UN Security Council resolutions.

Alongside the considerations listed above regarding the export of goods and potential know-how transfer, the following additional factors should be taken into account regarding the prevention of terrorism:

Checklist

Points of suspicion for terrorist background

Individuals make inquiries:

- Whose identity remains unclear as the letterhead is unclear or has been photocopied onto the letter
- Who are only able to be reached by mobile phone or post office box
- Whose statements regarding transport routes are geographically or economically illogical
- Who give no plausible explanation of the whereabouts of products delivered to date
- Who quite obviously do not know or ignore the technically required security precautions when handling or transporting the ordered goods
- Who clearly do not have the know-how or facilities which are necessary or recommended for safe storage and use of the product

Practical Tip
Producers and suppliers should attempt to collect extensive information on their customer before entering into contractual obligations for the delivery of goods and/or technology which could be used in the production of weapons of mass destruction or for terrorist activities. This principle is summarised simply as "know your customer" and fits the general view that exporters are the "first line of defence" in export controls.

C. Outreach to exporters

Licensing authorities of the Member States of the European Union are keen to help their exporters in their foreign trade activities. Governments are typically in possession of different information (from different sources) than the exporters and vice versa. It is of vital interest to both sides to exchange relevant information in line with their obligations to cooperate with each other. Some authorities choose to organise dedicated events (such as special seminars, general information events, etc.), or hold bilateral consultations to inform the exporters on the potential or concrete dangers of their activities, on red flagged countries and entities.

Governments of some EU Member States publish thematic lists of red flagged entities (where a strong presumption of denial prevails), others regularly release early notification letters to inform business about nations carrying out programmes for weapons of mass destruction. Along with general information, they also contain the names of foreign companies involved in procurement activities.

8. Sanctions Restrictive measures of the United Nations and the European Union

For an introduction concerning export restriction see above chapter 1 G and H.

A. United Nations sanctions

The Security Council of the United Nations has primary responsibility, under the UN Charter, for the maintenance of international peace and security. In doing so the Security Council may decide on enforcement measures, economic sanctions (such as trade embargoes) or collective military action.

United Nations Security Council Resolutions (UNSCR) must be implemented according to Article 25 of the Charter of the United Nations. According to Article 41, the Security Council may decide on imposing specific measures – restrictive measures (sanctions, embargoes), not involving the use of armed force – to give effect to its decisions for the sake of maintaining or restoring international peace and security.

General trade embargoes effect a given country's total population. Since the 1990's the wider use of targeted sanctions aim only to affect those entities or persons who are responsible for endangering or breaching international peace and security or otherwise for their actions contravening international law.

In the last two decades United Nation's Security Council adopted restrictive measures against: Afghanistan. Angola, South-Africa, Zimbabwe, Ethiopia, Eritrea, Cote d'Ivorie, Haiti, Iraq, Iran, Lebanon, Liberia, Libya, Democratic Republic of Congo, Korean Peoples Republic, Rwanda, Sierra Leone, Somalia, Sudan and former Yugoslavia.

Furthermore, the Security Council adopted sanctions against the Al-Quaida group and the Taliban and the persons and entities in connection with them. On 17th June 2011, a decision was adopted to separate the two sanctions regime: UNSCRs No 1989 (2011) against the Al-Quaida and No 1988 (2011) against the Taliban. In its Resolution No 1373 (2001) the Security Council of the UN imposed generally sanctions against terrorists and terrorist organisations.
Updated information on the persons, entities under sanctions adopted by UN Security Council, moreover on committees set up for implementing the sanctions may be found under www.un.org/sc/committees.

Subjects of UN sanctions are the states and not the persons, entities. These sanctions should be implemented by all states, thus UN sanctions are implemented in all EU Member States by EU legislation which are thus binding for all persons and directly applicable.

B. European Union sanctions

Restrictive measures against third countries, individuals or entities are an essential foreign policy tool of the European Union in pursuing its objectives in accordance with the principles of its Common Foreign and Security Policy. In general terms,

restrictive measures are imposed to bring about a change in policy or activity by the targeted country, part of a country, government, entities or individuals. They aim to be preventive, non-punitive instruments which should allow the EU to respond swiftly to political challenges and developments. The measures imposed target the policies and the means to conduct them and those identified as responsible for the policies or actions (European External Action Service: Recommendations for working methods for EU autonomous or EU additions to UN sanctions; Council of the EU)

The EU decides on sanctions (embargoes, restrictive measures) in the framework of the EU Common Foreign and Security Policy (CFSP). They aim to implement the UN Security Council Resolutions in a common framework on the one hand and invigorate the Union's foreign policy on the other (autonomous sanctions).

As a first step, the Council of the European Union adopts a decision on a particular matter of a geographical or thematic nature based on article 29 of the Treaty on European Union, which is binding for EU Member States. This decision of the Council does not have direct effect thus they need to be implemented through national laws by the EU Member States.

If the restrictive measures cover areas of EU competence, such as trade, or financial restrictive measures based on articles 75 and 215 of the Treaty on European Union, the Council of the European Union adopts a regulation which is directly applicable (no national transposition needed) and binding in all EU Member States.

The following websites of the European Union contain the decisions and regulations on restrictive measures in force:
http://www.eeas.europa.eu/cfsp/sanctions/index_en.htm

Or in the official journal of the European Union:
http://eur-lex.europa.eu/en/index.htm

Sanctions in force thus principally have the following structure and may be found in the above link such as:

- EU Regulation on restrictive measures against a particular country
- Implementing or modifying EU Regulation on restrictive measures against a particular country (a recast of the EU regulation or updating the Annexes)
- Decisions in the framework of the Common Foreign and Security Policy (CFSP)
- Other (e.g. former Regulations that are left published for information purposes)

Besides the points mentioned above, a reference text which provides an overview of each sanction made for each restrictive measure in force can be found. The European External Action Service constantly reviews the text to keep it updated.

It has to be noted that some EU sanctions have extraterritorial effect.

I. Types of restrictive measures

One may group the sanctions according to the scope and magnitude of the restrictive measures: full embargo (basically all relations are disrupted) or partial embargoes

which are the most frequent, as the principle of proportionality prevails. Considering the content one may distinguish the following types of measures:

- Suspension of cooperation with a third country
- Trade sanctions (general or specific trade sanctions, arms embargoes)
- Financial sanctions (freezing of funds or economic resources, prohibition on financial transactions, restrictions on export credits or investment)
- Restrictions on admission
- Flight bans
- Diplomatic sanctions (expulsion of diplomats, severing of diplomatic ties, suspension of official visits)
- Boycotts of sport or cultural events

The EU, like the UN Security Council, has predominantly applied restrictive measures in the form of arms embargoes and, in several cases, trade and financial restrictions in recent years. Most commonly embargoes are decided against states and the above listed types of restrictive measures are combined or introduced gradually to exert pressure against the given third country. There are two regulations serving the fight against terrorism and due to their trans-national nature they form a unique group of sanctions (see below)

The most relevant types of sanctions applied are discussed below.

1) Arms embargoes

Arms embargoes are applied to stop the flow of arms and military equipment to conflict areas or to regimes that are likely to use them for internal repression or aggression against a foreign country. In this perspective, EU's Common Foreign and Security Policy legal instruments imposing an arms embargo generally comprise:

- A prohibition on the sale, supply, transfer and/or export of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts
- A prohibition on the provision of financing as well as financial and technical assistance, brokering services and other services related to military activities and to the provision, manufacture, maintenance and use of arms and related material of all types

Arms embargoes apply at a minimum to the items found in the EU's Common Military List, last updated on 27 February 2012:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:085:0001:0036:EN:PDF

They are usually accompanied by a ban on the provision of related financing and financial and technical assistance.

Where internal repression is a concern, a prohibition on equipment which may be used for internal repression may be used.

There are normally also certain limited exemptions to these prohibitions, in particular for non-lethal equipment, for end-uses which may include:

- Humanitarian or protective use
- Institution building programmes and/or crisis management operations (typically those of the UN and the EU, but also those of any relevant regional and sub-regional organisations such as the African Union)
- De-mining operations

Such exemptions are typically subject to either prior approval by or notification to a competent authority (and, in the case of UN arms embargoes, the relevant Sanctions Committee of the Security Council).

There is often an exemption for protective equipment, including flak jackets and military helmets, temporarily exported by United Nations personnel, personnel of the EU or its Member States, representatives of the media and humanitarian and development workers and associated personnel for their personal use only.

The provision of lethal equipment and related financial or technical assistance may also be permitted in some cases, subject to appropriate safeguards and conditions.

2) Economic and financial sanctions

In view of the economic significance of the EU, the application of economic and financial sanctions can be a powerful tool. However, broad economic or financial restrictions may result in unduly high economic and humanitarian costs.

Such sanctions could consist of export and/or import restrictions or bans. Trade with specific items may thus be limited to licensing obligations or totally banned by clear-cut prohibitions. Items falling under explicit licensing obligations or prohibitions are explicitly listed in the implementing regulations in thematic annexes. Due to the different targets that trade sanctions wish to achieve, items contained in the annexes may considerably vary and encompass:

- Natural resources such as oil, gas, timber, etc. (sources of revenue)
- Key equipment for the exploitation of natural resources, infrastructural projects, power plants, etc.
- Items used for internal repression, such as telecommunications items, chemicals and related equipment typically where human rights are violated
- Items that are not (yet) explicitly controlled by the international export control regimes or international agreements, but could contribute to an activity which is contrary to the decision of the international community or runs against the interests of the EU; these lists are also called watch-lists and are introduced against countries that are brought in connection with the development, production, use, stockpiling, etc. of WMD
- Trade ban on items that are controlled (listed) by the international export control regimes: Australia Group, Nuclear Suppliers Group, Missile Technology Control Regime and possibly the Wassenaar Arrangement

As these restrictions may concern legitimate civil end-use and may suspend or terminate the fulfilment of existing, often very complex and long term contracts with a high value, transition periods are often introduced in the regulations and specific procedures for exemptions under the bans.

Frequent checks on the sanctions regulations in force and close co-operation with the licensing authorities may help companies in their future plans and help minimise economic losses.

As export control regulations of dual-use items (e.g. in the EU Dual-Use Regulation) have an *erga omnes* scope (against everyone (general scope)), sanctions in the contrary are strictly limited and applied against a *specific* state or individuals or groups. Restrictive measures, including trade restrictions therefore are regulated with specific aims and logic (*lex specialis*) and thus have priority over the general scope of other export relevant legislation (*lex generalis*). If, however, the planned transaction remains outside of the sanctions regime (e.g. item is not on the controlled list for licensing or prohibition) the general rules for exports (or imports) still apply. For example if the sanction regime lays down specific measures for the exports to a particular third country and impose specific measures; in the background the general scope of the EU Dual-Use Regulation still applies and must be abided by, even if the specific rules do not effect the given transaction. In this context, trade with embargoed countries require careful attention as the catch-all clause might be invoked.

Trade restrictions may also include bans on the provision of specific services (brokering, financial services, technical assistance), flight bans, prohibitions on investment, payments and capital movements, or the withdrawal of tariff preferences.

Careful attention is needed to screen the planned transactions with embargo countries as special clauses such as the ban of *direct or indirect* trade or provision of services implies that no matter how complex, manifold or long a transaction may become, if there is knowledge of the exporter that the planned transaction is in breach of the sanctions he is liable for it. This implies that transactions that may be directed to third countries (not under embargo) need careful examination so that no linkage is found to any sanctioned country, person or entity.

Most EU Export Licensing Authorities provide a screening service, whereby the licensing authority checks the details of the transaction and provides an opinion on the planned transaction. This opinion is usually limited strictly to the information provided by the company, so this does not exempt the exporter from administrative or criminal liability, if relevant information was concealed. The opinion or decision of the authority could be a note of clearance (does not fall under restrictions), an official certificate, that the transaction does not fall under restrictions (“zero” or “empty” licence) or a (formal) decision on a catch-all (licence obligation or immediate denial), a (formal) decision on a licence obligation or a (formal) decision on the ban of the transaction (denial).

3) Targeted (or smart) financial sanctions

Economic and financial restrictive measures, including targeted financial sanctions, have to be applied by all persons and entities doing business in the EU, including nationals of Non-EU countries, and also by EU nationals and entities incorporated or constituted under the law of an EU Member State when doing business outside the EU.

The EU has often imposed targeted financial sanctions, which can be designed to target specific persons, groups and entities responsible for the objectionable policies or behaviour. Such sanctions comprise both an obligation to freeze all funds and economic resources of the targeted persons and entities and a prohibition on making funds or economic resources available directly or indirectly to or for the benefit of these persons and entities.

Exemptions are available under specific conditions and procedures (e.g. funds necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment).

The EU has developed and updated a paper entitled EU Best Practices for the Effective Implementation of Restrictive Measures giving practical guidance and recommendations on issues arising in the implementation of financial sanctions.

Attention must be paid to the fact that even though the transfer of an item may not fall under restrictive measures, the financial transaction and the persons or entities involved related to the transfer of the item may very well fall under restrictions and thus the whole transaction may fail.

4) Restrictions on admission (Visa or travel ban)

Third country nationals can be subjected to a ban on admission into the EU, in accordance with the objectives described above. As a general rule, the legal instrument imposing such restrictions will allow for exemptions from the visa or travel ban on humanitarian and other grounds, or in order to comply with obligations of an EU Member State under international law.

II. 3 EU targeted sanctions as tools against terrorism

Restrictive measures against particular persons or groups of persons and specific organisations were adopted which are principally not country based. These measures based on UN Security Council Resolutions 1267 and 1373 and are used as a tool in the fight against terrorism; they impose embargoes on arms and related services, restrict financial measures, etc. These financial measures cover EU competence thus they are regulated in regulations which have direct effect and applicability in all EU Member States.

The EU applies measures against individuals and groups designated in the so-called ‘l**ist of designated terrorist organisations**.

These restrictions may be grouped as follows:

1. Restrictions against the Al-Qaida Network Regulation (EC) No. 881/2002

2. Restrictions against certain persons and entities associated the Taliban in Afghanistan Regulation (EU) No. 753/2011)
3. Restrictions against other persons Regulation (EC) No. 2580/2001

Practical tips for abiding by the sanctions regimes

Some sanctions, especially their annexes, which contain the controlled items, listed persons as well as entities are updated quite frequently, therefore, special attention is needed each time a transaction is planned to prove the legal situation. Member States of the EU have designated national authorities with the right to decide on particular exemptions; furthermore they may provide a service to the exporters, in which they screen the planned transaction against the sanctions in force. Nevertheless, a good functioning ICP may shorten the decision making process in the company and may help save time and resources.

Although there may be considerable similarities among the restrictive measures, each pursues particular aims, thus they may considerably differ in the nature and magnitude of restrictions or bans due to the set foreign policy and security objectives. Imposed sanctions do not necessarily only cover exports and related services, but may very well cover the imports of specific items, financial services and other related services which may considerably effect, if not terminate existing agreements, or the fulfilment of (private) contracts. All embargo regulations contain a non-liability clause, should they restrict and disrupt trade relations in such a manner. For these reasons, it is advised to carefully check the planned transactions against the regulations in force.

9. Penalties - The consequences of illegal exports - the risk potential for companies and employees

UN Security Council 1540/2004 declares that proliferation of WMD and their means of delivery constitute a threat to international peace and security. This resolution obliges all states to exercise effective export controls on those items and in accordance with their national procedures, should adopt and enforce appropriate effective laws which prohibit any activity in relation with WMD and their means of delivery, besides establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.

The addressees of this international norm are the states. Therefore, all states are obliged to impose appropriate criminal or civil penalties for violations of export control laws and regulations. Member States of the EU are thus bound by this Security Council resolution, and – although the Common Commercial Policy includes the area of export controls of dual-use items – the enforcement of the EU Dual-Use Regulation on the export of dual-use items and the sanctions for violations remain in EU Member States' competence. The Regulation merely states:

Each EU Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation.

A frame is set though: those penalties must be *effective, proportionate* and *dissuasive*.

The *proper enforcement of all the provisions* of the EU Dual-Use Regulation implies that not only criminal law, but other areas such as administrative law (procedural), legal-administrative (inter-agency) co-operation, institutional framework and back-up in a broader sense, customs and enforcement authorities, must also support and invigorate this norm.

As quoted above, enforcement measures should be *proportionate*. Abiding this principle, most EU Member States differentiate between administrative or in other words regulatory penalties (measures), and criminal penalties (measures), the latter for serious and usually deliberate offences.

Penalties should also be effective. EU Member States use a variety of administrative and criminal sanctions in order to fulfil the criteria of being effective and dissuasive. For the latter, some criminal penalties can be very severe, especially in qualified cases. A list of penalties, both administrative and criminal and applied by EU Member States, can be found in the following paragraph.

Administrative Offences: forfeiture, seizure, limited or unlimited fines, ban of activity, loss of privileges, withdrawal of licence, company's activity partly disrupted or total closure.

Criminal penalties: imprisonment (up to 15 years in qualified cases), fine, forfeiture, seizure, fee for restoring seized goods, loss of the right of being granted an export licence, deprivation of the right to engage in entrepreneurial activity, obligation to pay the procedural costs, the expenses deriving from the destruction of evidence.

"The European Union is made up of 28 Member States who have decided to gradually link together their know-how, resources and destinies. Together, during a period of enlargement of 50 years, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms.

The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders".

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