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Export Control Update

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09:45-10:15



The background of the slide is the European Union flag, featuring a blue field with twelve gold stars arranged in a circle. A horizontal red bar is positioned across the lower portion of the slide, containing the title text.

EU Export Controls Update

Recap

EU Dual-Use Regime

- EU Regulation 428/2009
 - Direct application in 28 (current) Member States
 - National licensing and enforcement (varying approaches)
- Exports of Annex I items to outside EU require export licence (Annex IV within EU)
- Intra-EU record-keeping and paperwork requirements
- “Exports” include physical and intangible transfers – broad application
- Key concept of “exporter”
- EU dual-use licences valid throughout the EU
- Brokering controls, limited to problematic end-uses (ML, WMD)
- No re-export or “deemed” export controls (in the US sense; though beware licence conditions)



EU

Proposals to amend Dual-Use Regulation

- Commission proposals for amendment of 28 September 2016; aiming to modernise controls, increase harmonisation and transparency, reduce burden on businesses
- European Parliament agreed amendments on 17 January 2018
- Proposals now with European Council (leaked papers suggest varying views across EU Member States, with strong resistance to certain key changes)
- European Parliament and Council will need to agree before legislation adopted; unclear when and in what form this may occur
- For official updates, check the European Parliament Legislative Observatory:
[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0295\(COD\)&I=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0295(COD)&I=en)



Proposed human rights end-use control

- European Parliament amendments watered down to cyber-surveillance items as follows:
 - "specially designed to enable the covert intrusion into information and telecommunications systems and/or the monitoring, exfiltrating, collecting and analysing of data and/or incapacitating or damaging the targeted system without the specific, informed and unambiguous authorisation of the owner of the data..."
- Restrictions would apply if the exporter has been informed or becomes aware "while exercising due diligence" that such items are or may be intended:
 - "for use by natural or legal persons in connection with violations of international human rights law or international humanitarian law in countries where serious violations of human rights have been identified by the competent bodies of the UN, the Council of Europe, the Union, or national competent authorities, and there is reason to suspect that this or similar items may be used for the purpose of directing or implementing such violations by the proposed end-user"
- Leaked paper suggests a number of Member States remain opposed to this control; preference for use by individual Member States of Article 8
- Terrorism-related end-use control proposal dropped

Proposed new autonomous Category 10 list

- Proposal for a unilateral EU category 10 control list
- Initial focus on surveillance systems, equipment and components, related software and technology as follows:
 - Lawful interception monitoring centres
 - Event data retention systems and devices
- Carve outs where items specially designed for certain legitimate purposes (e.g. authorised testing or protection of information security systems)
- Leaked paper suggests a number of Member States oppose this addition; concerns this will create an unfair playing field for EU business, and stifle technology development



Other key proposed amendments

- New circumvention control
- Broad controls on "technical assistance" and "brokering" (including to impact subsidiaries/JVs of EU companies) through broadening of definitions
- New definitions of "export" and "exporter", designed to facilitate cloud computing
 - Export to "legal and natural persons ..." outside the EU, not "destinations"
- Broadening of available licences:
 - EU 007: Low value shipments (€5k or less)
 - EU 008: Inter-company transmission of software and technology
 - EU 009: Encryption
 - Availability of large project authorisations (generally up to 4 years)
 - Individual licenses up to 2 years; global licenses up to 4 years (subject to ICP)
- Focus on Internal Compliance Programmes and due diligence

European Commission Consultation on ICPs

- EU draft guidance (non-binding) published on core essential elements of Internal Compliance Programmes (ICPs):
http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157336.pdf
- Consultation open until 15 November:
http://trade.ec.europa.eu/consultations/index.cfm?consul_id=257
- 7 core elements (non-exhaustive “cornerstones” for a company’s tailored ICP):
 1. Top-level management commitment to compliance
 2. Organisation structure, responsibilities and resources
 3. Training and awareness raising
 4. Transaction screening process and procedures
 5. Performance review, audits, reporting and corrective actions
 6. Recordkeeping and documentation
 7. Physical and information security



Potential Implications of Brexit

UK guidance issued in August 2018 on export control implications of a no-deal Brexit

Key issues include:

- EU Dual-Use Regulation likely to be transposed to UK law on date of Brexit
- The movement of dual-use items from the UK to the EU would require an export licence, and vice versa
- Extant export licences issued in the UK would no longer be valid for exporting dual-use items from EU member states, and vice-versa
- UK likely to issue an OGEL to cover dual-use exports to EU Member States
- UK no longer bound by EU dual-use list (but will remain participant to numerous international export control regimes)
- UK will no longer be part of EU regime governing intra-EU transfers of military items (but military exports likely to remain largely unaffected)





US Export Controls Update

US Export Controls: Brief Recap

- Apply to items subject to the Export Administration Regulations (EAR)
- “Items” = goods, software, technology
- “subject to the EAR”:
 - Exported from the United States, or
 - Reexported from abroad and
 - US origin
 - Non-US origin but with greater than *de minimis* levels of controlled US content
 - Foreign direct product of certain kinds of controlled US technology (relatively rare)

US Export Control Reform Act of 2018 (1)

- Part of FY19 National Defense Authorization Act signed into law on August 13, 2018
- First comprehensive export control legislation since 2001
- Mandates the creation of a list of “emerging and foundational technologies” essential to U.S. national security
 - Technologies and related products currently classified under the default category of EAR99
 - Licenses will likely be required for exports to specific countries (China, Russia, etc.)
 - Notice of proposed rulemaking requesting comments on proposed list of such “emerging technologies” currently being prepared by BIS

Export Control Reform Act of 2018 (2)

- Identifies new policy factors for consideration of export license applications
 - Risk of significant interference with or disruption of critical infrastructure
 - Protection of human rights and democracy
 - Preservation of qualitative U.S. military superiority
 - Negative impact on U.S. defense industrial base
- Provides statutory authority for U.S. anti-boycott regulations
- Raises the civil penalty level for violations of the U.S. export controls to US \$300,000, or 2x the value of the items exported



Other Developments

- Additions to Unverified List, Entity List
- BIS may impose restrictions on Chinese entities who have provided surveillance equipment and equipment used for human rights violations against Chinese Uighurs
 - May add Chinese entities to the Entity List
 - May be considering whether to add or update ECCNs

ZTE Settlement

- *March 2016* – ZTE Corporation, ZTE Kangxun, two other entities added to the BIS Entity List; temporary general licenses mitigated the effect
- *March 2017* - \$1.19 billion civil and criminal settlement with BIS, OFAC, and DOJ; 7-year suspended denial order; removed from Entity List
- *April 2018*: BIS activated the denial order based on false statements regarding discipline of ZTE employees; ZTE stops most operations
- *May 2018*: President Trump tweeted "too many jobs in China lost"
- *June 2018*: Superseding Settlement Agreement – removal of denial order; more monetary penalties; external compliance coordinator

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