

EU and US Export Control Regimes for Dual Use Goods: an Overview of Existing Frameworks

Hamed Alavi, Tatsiana Khamichonak¹

Abstract: *The systems of EU and US export controls of dual-use items have periods of shared history, where the regulatory efforts were directed at a common adversary and with regard to a common array of critical goods and technologies. Despite certain similarities, the current export control regimes warrant awareness of the mutual policies and procedures for EU and US companies engaged in export and re-export of sensitive items. The differing approaches EU Member States take in implementing export controls and the overall complexity of the US system, now bearing the results of the Export Control Reform, make it difficult to navigate one's way and not lose one's sight of the forest for the trees. The article seeks to draw the changing export control frameworks in both jurisdictions and evaluate their interactions from a business perspective.*

Keywords: *EU export controls, US export controls, dual-use goods, EU Regulation 428/2009, US Export Control Reform (ECR), Commerce Control List, Export Administration Regulations.*

Introduction

Export control is a trade instrument of upholding international security objectives in the framework of non-proliferation of weapons of mass destruction (WMD). With the emergence of various forms of terrorism and the efforts of state and non-state actors to acquire WMD and complementary technologies, the threats to security and safety are at their highest, and so it entails the necessity of maintaining an up-to-date and efficient system of export controls. Truly, "export control is political, multilateral, and event-driven"², which means that each

¹ **Hamed Alavi** is a seasoned academician and researcher in the field of International Business and International Business Law. With a diversified educational background, he is pursuing his PhD in Law at the Autonomous University of Barcelona, Spain. He has immense international research and teaching experience including work with different academic institutions in Georgia, Iran, Latvia, Estonia, Ukraine, Belgium, Czech Republic, France, Poland, Turkey, and Italy. His main areas of interest include international business law, international trade, and export regulations, finance of international trade and European Union political and legal framework. E-mail: hamed.alavi@tu.ee.

Tatsiana Khamichonak is LL.M. Candidate at Vrije Universiteit Amsterdam, The Netherlands. Pursuing her interest in International Law, she has focused on research and publishing in different areas of public and private international law. Her research has been published in renowned international legal journals. E-mail: tatsiana.khamichonak@hotmail.com.

² Aoi, T, 2016, "Historical Background of Export Control Development in Selected Countries and Regions", International Security Trade Control Department, Trade and Logistics Division Mitsui & Co., Ltd. Available at: http://www.cistec.or.jp/english/service/report/1605historical_background_export_control_development.pdf. [01.10.2016].

country responds to the changes in internal, regional and international security with its own interpretation of and its own needs-based set of export controls provisions.³ Understanding where a given export control system stems from and what rationale underlies its specific regulations helps understand it on a policy level as well as anticipate future challenges and changes. Moreover, living and legislating in the global village precludes governments and law-makers from designing a system of export controls based exclusively on a state's individual security interests: the global export controls regimes - Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group, among others, - to which a lot of states are party, impose common concerns pursuant to technological developments and availability of items on the international market, which are reflected in national regulations worldwide.

The paper makes a concise inquiry into the history of development of the export control systems in the EU and US, focusing primarily on the current regulation of and recent changes to the control of dual-use goods and technologies. Additionally, the interrelation between the two systems is addressed, emphasizing the major points where the assumptions of similarity may backfire, that is - where re-exports from a European Member State may be subject not only to EU export control provisions but also to the US laws, which applies to virtually all goods originating in the US. We do not intend to produce a comprehensive manual on the use and application of the export control provisions but to illustrate where the two regimes agree and how the current global scene is reflected in the reforms undertaken on each side.

To this end, the paper proceeds in the following manner: Part I is dedicated to an outline of the European export controls system, its evolution and status quo; Part II looks at the US export control regime in a similar fashion, including the existing regulation and the incentives and outcomes of the Export Control Reform Initiative; Part III gives a brief outline of the relation between the two and the questions where special attention is required on the part of businesses engaged in export activities.

Part I. Export controls of dual-use goods in the European Union

Dual-use goods are interpreted rather broadly to cover such industries as nuclear, biological, and chemical as well as computers, telecommunications, encryption and navigation and avionics, among others.⁴ As warranted by their very nature, dual-use goods are advance technological items that are not freely available on the global market and may be obtained from a limited number of exporters. In the EU, an estimated number of 5 000 businesses are engaged in the export of dual-use goods and technologies, allocating a share of 10% of all exports from the EU to dual-use exports.⁵

³ Aoi, T, 2016, "Historical Background of Export Control Development in Selected Countries and Regions", International Security Trade Control Department, Trade and Logistics Division Mitsui & Co., Ltd. p. 1. Available at: http://www.cistec.or.jp/english/service/report/1605historical_background_export_control_development.pdf. [01.10.2016].

⁴ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast), OJ L 134/1 29.5.2009.

⁵ European Commission Green Paper 'The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world', COM (2011) 393 final.

The European Member States have historically maintained national export systems and held membership in international non-proliferation agreements in order to harmonise their domestic export control regimes. During the Cold war era, export controls were motivated by preventing the Warsaw Pact⁶ countries from acquiring crucial Western technologies; the efforts were coordinated by the Coordinating Committee for Multilateral Strategic Export Controls (CoCom)⁷, which was created in 1949 at the initiative of the U.S. between the U.S., Japan and the NATO states except Iceland. To further its ends, CoCom with its headquarters in Paris, maintained three lists of items that were not to be exported to the USSR and its allies.⁸

The maintained by the EU Member States national export control regimes effectively precluded the European institutions from participation, which meant that no harmonised Community regime of export controls was ever established. The individual export control systems constituted barriers to internal trade and the four freedoms within the common market were jeopardised. In the long run, the situation adversely effected not only intra-European but external trade.⁹

The case *Aimé Richardt et Les Accessoires Scientifiques SNC* showcased that regarding dual-use goods and technology the internal market lacked effective integration and a harmonised system of export controls was required. The judgment triggered Commission review of the *status quo* of border controls between the Member States and a proposal for their elimination with regard to dual-use goods and technologies. The *Aimé Richardt* case dealt with the unlawful transit of certain goods without a license through the Grand Duchy of Luxembourg. Mr. Richardt, the director of *Les Accessoires Scientifiques*, established in France, prepared to deliver a ten-inch Veeco Microetch (used in production of bubble memory circuits) to Technopromimport, established in Moscow. After the necessary formalities were completed in France, the direct flight Paris-Moscow was cancelled and the item was transported by lorry to the Luxembourg airport, where it was seized. The item was claimed to be accompanied by 'inaccurate declarations in order to conceal its strategic nature and to permit its transit to the USSR', which was contrary to Luxembourg laws that required a special transit licence.¹⁰ Ruling on the matter, the *Court of Justice of the European Union* (CJEU) cited Article 36 of the EEC Treaty, whose purpose is to allow Member States to derogate from the principle of free movement of goods to secure the interests that Article 36 protects.¹¹ It provides that the measures that a Member State may employ shall serve the justified objective and shall not restrict the intra-Community trade more that absolutely necessary.¹² The security objective that was invoked to justify the authorisation requirement

⁶ The Warsaw Treaty Organisation, a.k.a. the Warsaw Pact, was a political and military alliance between the USSR, Albania, Poland, Czechoslovakia, Hungary, Bulgaria, Romania, and the German Democratic Republic, established in 1955 to counterbalance the NATO. The Pact was terminated in July 1991 with the collapse of the Soviet Union.

⁷ Micara, AG 2012, 'Current Features of the European union regime for Export Control of Dual-Use Goods', *Journal of Common Market Studies*, vol. 50, no. 4, pp 578-593.

⁸ Gregory, JE 1987, 'Controlling the Transfer of Military Significant Technology: COCOM After Toshiba', *Fordham International Law Journal*, vol. 11, no. 4, pp. 863-882.

⁹ Micara, AG 2012, p. 581.

¹⁰ *Ibid.*, §§ 3-5.

¹¹ *Ibid.*, §§ 19-20.

¹² Micara, AG 2012, § 20.

concerns, for the purposes of Article 36 EEC Treaty, a state's external and internal security. Having regard to the following and to the fact that transit and export of dual-use goods may affect a state's public security, the court decided that Luxembourg was in its right to require a special authorisation for the transit of the item in question and its subsequent confiscation.¹³

Reacting to the need of eliminating border controls between the Member States in order to bring dual-use items into the common market and strengthen the controls over exports to third countries, the Commission made a proposal in 1992 for a *Regulation on the control of exports of certain dual-use as well as nuclear goods and technologies*.¹⁴ The proposal indicated *five criteria* for eliminating border controls: the common list of dual-use goods subject to control; the common list of destination countries; common criteria for issuing export licenses for third-country exports; mechanism for coordination and enforcement of licenses; procedures for administrative cooperation between the licensing authorities and customs offices.¹⁵ The proposal led Council to adopt Regulation No. 3381/94, which was based on Article 113 of the EC Treaty and so became part of the EU Common Commercial Policy (CCP). Simultaneously, within the framework of the EU Common Foreign and Security Policy the Council adopted Decision 94/942/CFSP on the Joint Action. The two instruments regulated identical issues but coexisted in parallel because of their different legal basis and the separation of power. Whereas the Regulation set up a system of licenses applicable to dual-use goods and technologies, the Joint Action laid down the list of controlled items that was to be coordinated according to international commitments of the Member States. Regardless, the new system effectively addressed the problems highlighted in the *Richardt* case by establishing a framework of mutual recognition of licences between Member States.¹⁶ The novel issue that the system created was the peculiar interaction between the two underlying instruments, which were meant to operate as an 'integrated system'¹⁷ but suffered from conflicting interests, especially in the area of decision-making. Article 113 prescribed decision-making on certain sensitive issues to be carried out by Qualified Majority Voting (QMV), which Member States were reluctant to rely on.¹⁸ Whereas the Commission favoured a single European strategy in the area of export controls of dual-use goods, the Member States did not wish to sacrifice their competence in deciding on the controlled goods and export guidelines.

The two-tier export controls approach was reconsidered after the CJEU passed judgment in its two hallmark decisions of *Leifer*¹⁹ and *Werner*²⁰. The Court decided that exports of dual-use goods and technologies must be included exclusively under the scope of CCP and so treated as trade measures because of their nature instead of measures having security and

¹³ *Ibid.*, §§ 22-23.

¹⁴ Proposal for a Council Regulation (EEC) on the control of exports of certain dual-use goods and technologies and of certain nuclear products and technologies. COM (92) 317 final, 31 August 1992.

¹⁵ Leslie, BJ 1994, 'Dual Use Goods and the European Community: Problems and Prospects in Eliminating Internal Border Controls on Sensitive Products', *Boston College International and Comparative Law Review*, vol. 17, no. 1, pp. 193-211.

¹⁶ Micara, AG 2012, p. 582.

¹⁷ *Ibid.*

¹⁸ Suzuki, K 2007, 'Between Trade and Security: EU's Export Control Regime and Its Global Role', Paper for EUSA Tenth Biennial International Conference, May 17-May 19, 2007, Montreal, Canada.

¹⁹ Case C-83/94 *Leifer and Others* [1995] ECR I-3231.

²⁰ Case C-70/94 *Werner* [1995] ECR I-3189.

foreign policy objectives.²¹ The CCP being an exclusive competence of the EU, the Member States became effectively excluded from acting in the area save with a special authorisation.²² The Commission borrowed the reasoning of the CJEU and argued for the necessity of an EU-wide export control regime. It cited the following reasons: firstly, a harmonised export controls system will further the completion of the common market and form strong boundaries on its frontiers, and secondly, it will provide greater legal certainty and reduce the burden on exporters as well as establish a level playing field.²³ The decision to amend the cross-pillar system was made also accounting for the practical difficulties it raised. For example, the lack of harmonisation and of standardised licence forms undermined the effective application of the principle of mutual recognition. In the case of general licences the lists of products and destination countries differed among the Member States. Global licenses were a novelty in some Member States and therefore were at time not completely understood and correctly applied.²⁴

In 2000, the Council Decision on Joint Action was repealed and the Regulation 1334/2000 was adopted exclusively under Article 113 EC Treaty, which unified the former two-tier system of rules in one instrument. In as much as a common EU export controls regime was established, the important limitations remained. For example, now that the lists of controlled items are included into the Regulation's text, they are implemented uniformly by the Member States and can be amended as part of Commission proposals to amend the Regulation. However, the proposed amendments to the controlled goods are done on the basis of the respective agreements of the Member States within the international export control regimes. This limits the Commission's powers as it only participates in the Australia Group in its own right. Along the same line of reasoning, with the EU enlargements in 2004 and 2007, the unequal membership of international regimes by the acceding states posed further concerns with regard to export controls and the free circulation of controlled items within the internal market.²⁵

On 18 December 2006, the Commission submitted a proposal for the amendment and recast of Regulation 1334/2000.²⁶ The proposal followed the 2004 peer review of the Regulation's implementation by the Member States, which was conducted in conformity with the Thessaloniki WMD Strategy and Action Plan in order to meet the standards of the UNSC Resolution 1540. The proposal meant to strengthen the EU dual-use export control regime, provide more clarity and reduce regulatory burdens in implementing export control requirements by EU exporters. Overall, the proposal sought to balance the objectives of the EU WMD Strategy in the framework of international non-proliferation commitments with promoting competitiveness of EU industry and 'creating the EU of high technology jobs'.²⁷

²¹ Micara, AG 2012, p. 583.

²² Craig, P & Búrca, G 2011, *EU Law: Text, Cases and Materials*, 5th edn., Oxford University Press, Oxford, UK.

²³ Suzuki, K 2007, p. 4.

²⁴ Shmitt, B 2001, 'A Common European Export policy for Defense and Dual Use Items?', *Occasional Papers No. 25*, The Institute for Security Studies Western European Union.

²⁵ Micara, AG 2012, p. 584-585.

²⁶ Proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology, COM(2006) 829 final, Brussels, 18.12.2006.

²⁷ Communication from the Commission on the Review of the EC Regime of Controls of Exports of Dual-Use Items and Technology, Brussels, 18.12.2006, COM(2006) 828 final.

The major five proposed items that go beyond technical revision of the Regulation were referred to as follows: adoption of 'comitology' procedure for the amendment of annexes; replacement of authorisation requirement for Annex V items with a pre-notification procedure; introduction of appropriate civil and criminal penalties to be applied by the Member States for violation of the Regulation's provisions; legal security for the export of dual use items, particularly in respect to third-country legislations; and lastly, introduction of a negotiation mechanism with third-countries concerning such issues as re-export requirements.²⁸ Even though the mentioned comitology procedure would have resulted in an accelerated process of updating lists of controlled items in conformity with the export control regimes, the proposed provision was blocked by the Council and did not find its way in the recast.²⁹

The recast Regulation 428/2009 entered into force in August 2009. It reinforced the Community General Export Authorisation (CGEA) for non-EU transfers of certain items, the list of which is set out in Annex II.³⁰ Article 9(2) and Annex III provide that for all other exports that are subject to an authorisation requirement exporting companies shall obtain a licence, which is meant to prevent them from cherry-picking and exporting from a Member State with less stringent requirements.³¹

Therefore, there are four types of licences under the EU export control regime:

1) The CGEA allows to export certain dual-use items to certain destinations under certain conditions. There are currently six CGEAs: exports to Australia, Canada, Japan, New Zealand, Norway, Switzerland, Liechtenstein and the U.S.; exports of some type of dual-use items to identified destinations; export after repair or replacement; temporary export for exhibition or fair; telecommunications; chemicals.³²

2) National General Export Authorisations (NGEA) shall be issued by Member States to exporters established or resident in the authorising State if they do not overlap with items listed in part 2 of Annex II, meet the requirements set out in the Regulation and national legislation.³³ Currently, NGEAs are applied in France, Germany, Greece, Italy, Sweden, the Netherlands and the UK.³⁴ The Commission shall be notified of any NGEA issued or modified by a Member State.

3) Global Export Authorisations cover several items in several countries of destination or several end-users.

4) Individual licences are granted by national authorities to an exporter to cover exports of one or more dual-use items to one end-user in a non-EU country. All

²⁸ Communication from the Commission on the Review of the EC Regime of Controls of Exports of Dual-Use Items and Technology, Brussels, 18.12.2006, COM(2006) 828 final, p. 8.

²⁹ Micara, AG 2012, p. 588.

³⁰ Regulation 428/2009, Article 9.

³¹ Fiott, D & Prizeman, K 2013, p. 16.

³² European Commission Factsheet on The EU Dual Use Export Control Regime, 07/02/2014. Available at: <http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/>. [13.12.2015].

³³ Article 9(4).

³⁴ Commission factsheet, *supra* note 32.

four types of licenses are granted or denied by the Member State authorities, whereas it is required to notify the Commission of export licence refusals.³⁵

Furthermore, Article 4 read in conjunction with Article 8 of the recast Regulation introduces a so-called 'catch-all' clause, which allows Member States impose a restriction on exports of dual-use items that are not covered by Annexes I and IV for national security and public policy reasons. In particular, Article 4(1) reads that an authorisation for unlisted items may be required if the exporter has information that the items may be intended for production and development of chemical, biological or nuclear weapons or other nuclear explosive devices or missiles capable of delivering such weapons. Also, authorisation shall be required if unlisted items are meant to be transferred to a country subject to an arms embargo and when the exporter has information that the items are intended for 'military end-use'.

At present, the EU regime of export control of dual-use items comprises of the Regulation (EC) No. 428/2009 and the Council Joint Action 2000/401/CFSP³⁶. EU export controls is claimed to be 'the closest thing there is to a unified export control regime'.³⁷ The Regulation is binding and directly applicable in the Member States whereas the Joint Action is an intergovernmental cooperation instrument, which was adopted under the TEU provisions and which has to be transposed into the Member States national legislations.³⁸ The Regulation has been subsequently substantially amended by Council Regulation (EC) No. 1232/2011 and items listed in Annex I of the Regulation were amended by Council Regulation (EC) No. 388/2012 after the review of the control lists of the Wassenaar Arrangement, Australia Group, Missile Technology Control Regime and the Nuclear Suppliers Group during 2009-2010.

Since the adoption of the WMD Strategy in 2003 the EU has grown from 15 to now 28 Member States. The enlargement changed the inner dynamics in the EU and the effectiveness of the system of export controls in the larger Europe came into question.³⁹ Whereas the Strategy made the enhancement of EU export control policies a priority, many of the newcomers did not have effective export controls and were not members of the four export control regimes.⁴⁰ The implications were such that their accession would provide access to the EU common market, where the free movement of dual-use goods was established, which will create a proliferation threat.⁴¹ Resolution of this issue was a high priority in 2005-2006, when the provided in the WMD Strategy peer review of export controls in current and acceding countries was completed.⁴²

³⁵ Fiott, D & Prizeman, K 2013, p. 16.

³⁶ Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses, 2000/401/CFSP, L 159/216.

³⁷ Chapman, B, *Export Controls: A Contemporary History*, University Press of America, Inc.

³⁸ Michel, Q 2014, *The European Union Dual-Use Items Control Regime*, Comment of the Legislation article-by-article, ESU Non-Proliferation, January 2014.

³⁹ Anthony, I & Grip, L 2013, 'Strengthening the European Union's Future Approach to WMD non-proliferation', SIPRI Policy Paper No. 37.

⁴⁰ *Ibid.*, p. 17.

⁴¹ Jones, S 2003, 'EU Enlargement: Implications for EU and Multilateral Export Controls', *Nonproliferation Review*, vol. 6, no. 10, pp. 80-89.

⁴² Anthony, I & Grip, L 2013, *supra* note 47, p. 18.

In 2008 the Council adopted the 'Conclusions and new lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems', in which it reflects on the efforts and outcomes of the implementation of the WMD Strategy and seeks to strengthen it further.⁴³ Inter alia, it reaffirms that WMD that are misappropriated by terrorists or non-state actors constitute 'one of the greatest security challenges which Europeans may ever faced'.⁴⁴ Indeed, it is characteristic of the current system of export controls regimes to be state-focused. That is, the provisions of multilateral treaties on the manufacture and possession of dual-use goods and technologies are addressed to state actors, whereas it is up to the state parties to institute a proper system of control as regards their citizens and businesses.⁴⁵

Part II. Export Controls of dual-use goods in the US

"The main goal of export controls is to keep certain states or non-state actors from developing or acquiring military capabilities that could threaten important [national] U.S. security interests".⁴⁶ This stays true in relation to export controls of both dual-use and military items. An effective system of export controls, thus, allows the US manage the access of such state and non-state actors to critical technology and equipment.⁴⁷

The current US system of export controls takes root in the Cold War era. The expansive acquisition by the Soviet Union of Western technology ignited a concern among the US and its allies that 'as Lenin had predicted, the Capitalist West would sell the Communist East the rope with which to hang it',⁴⁸ following which the CoCom was created with the view to create a multilateral system of control of exports and imports of certain commodities and technologies that could affect national security of the CoCom member countries.⁴⁹ It is commonly recognised that the current system has failed to adapt to the new realities of the defence technology industry, which has undergone significant change since the Cold War order.⁵⁰ Firstly, whereas during the Cold War the threat was posed mainly by the proliferation of arms technologies to the Eastern bloc countries, major threats to the US national security currently also involve arms proliferation to non-state actors such as international terrorist organisations.⁵¹ Secondly, during the Cold War the development of military and defence-

⁴³ Council Conclusions 17172/08, Brussels, 17 December 2008.

⁴⁴ *Ibid.*, p. 3.

⁴⁵ Joyner DH in *Non-Proliferation Export Controls: Origins, Challenges and Proposals for Strengthening*, edited by Daniel Joyner, Ashgate, UK.

⁴⁶ Ileana Ros-Lehtinen, Chairman of the House Foreign Affairs Committee in Long, C, 2013, "An Imperfect Balance: ITAR Exemptions, National Security, and U.S. Competitiveness", *National Security Law Journal*, vol. 1, no. 2, pp. 43-64, p. 43.

⁴⁷ *Ibid.*, p. 43.

⁴⁸ Christopher F. Corr in Pyetrunker, I 2015, "An Umbrella in a Hurricane: Cyber Technology and the December 2013 Amendment to the Wassenaar Arrangement", *Northwestern Journal of Technology and Intellectual Property*, vol. 13, no. 2, pp. 153-180, p. 159.

⁴⁹ *Ibid.*, p. 159. See also *supra* p. 2.

⁵⁰ Fitzgerald DR, 2014, "Leaving the Back Door Open: How Export Control Reform's Deregulation May Harm America's Security", *North Carolina Journal of Law and Technology*, vol. 15, pp. 65-99, p. 68. See also, Jones, J 2013, "Export Controls for the 21st Century", *Wall Street Journal*. Available online at: <http://www.wsj.com/articles/SB10001424052748703959704575454313481209990> [27.09.2016].

⁵¹ Fitzgerald DR, 2014, *supra* note 43, p. 68.

related technologies was carried out primarily by the US government. Overtime, the focus has shifted to the private sector, with companies developing said technologies for commercial purposes.⁵² The so-called ‘off-the-shelf’ procurement of military technology is beneficial in several ways, including cutting research and development costs by delegating it to private investment and keeping the R&D up-to-date with market trends.⁵³ The trade-off for these advantages is that in order to survive in the competitive marketplace, private firms must diversify their risks through trade with and exports to parties other than the US Department of Defence (DoD). Indeed, a lot of the specialised technologies developed by the private sector are dependent on the scale to be profitable. And whereas in mid-1980s up to 50% of the research investments were allocated to the US government, today it is less than a tenth of that and the DoD can no longer catch up with the financial incentives of wide commercial applications.⁵⁴ In order for the privately developed technologies to not get into the wrong hands, the law imposes limitations on where the technologies can be exported, which undermines the companies’ competitiveness internationally.⁵⁵ It is crucial to create a system of export controls that furthers the competitiveness of the US industry and not impairs it.⁵⁶

Regulation and Administration

Motivated by the need to restrict exports of privately developed technologies that could jeopardise US national security, the law-maker has adopted numerous regulations that paid little attention to the distinction between low-tech and widely available items and advanced proprietary technologies, which led to the creation of a system of export controls characterised as ‘fundamentally broken’⁵⁷ as well as ‘too rigorous, insufficiently rigorous, cumbersome, obsolete, inefficient, or any combination of these’.⁵⁸

Often cited as a source of confusion among exporters, manufacturers and other interested parties is the fact that the US government maintains two sets of export control regulations and the corresponding two sets of control lists. This disparity creates a situation where it is unclear which is the set of applicable rules, which license is required and from which authority it shall be sought. That said, the two primary sets of legislation are the Export Administration Regulations (“EAR”), which regulates exports of dual-use items, and the International Traffic in Arms Regulations (“ITAR”), which regulates items and services specifically developed for military purposes.⁵⁹ Respectively, the items and services that are subject to restrictions under the two sets of instruments are laid down in the Commerce Control List (“CCL”), administered by the Department of Commerce, and the Munitions List (“USML”), administered by the State Department.⁶⁰

⁵² Jones, J 2013, *supra* note 43.

⁵³ Fitzgerald DR, 2014, *supra* note 43, p. 69.

⁵⁴ Sender, H 2016, “US Defence: Losing its edge in technology?”, Financial Times. Available at: <http://www.ft.com/cms/s/0/a7203ec2-6ea4-11e6-9ac1-1055824ca907.html?siteedition=intl#axzz4LRyKYE87>. [27.09.2016].

⁵⁵ Fitzgerald DR, 2014, *supra* note 43, p. 71.

⁵⁶ Jones, J 2013, *supra* note 43.

⁵⁷ *Ibid.*, p. 70.

⁵⁸ Fergusson, IF and Kerr, PK, 2014, “The U.S. Export Control System and the President’s Reform Initiative”, Congressional Research Service 7-5700, p. 1.

⁵⁹ See more at <http://www.state.gov/strategictrade/overview/>.

⁶⁰ *Ibid.*

The EAR implement the Export Administration Act (“EAA”) of 1979, which is the basis of the Department of Commerce’s authority to regulate the export and re-export of dual-use goods, software, and technology, which originate from the US. The EAA was adopted in furtherance of the Congress’ attempts of protecting national security and promoting United States international trade in advanced goods and technologies, which at the time was undermined by the foreign availability of the said items to the communist countries.⁶¹ The EAA authorises the President to control exports for national security, foreign policy and short supply purposes⁶² and allocates the power to exercise national security controls to the Department of Commerce to the exclusion of the Secretaries of Defence and State, whose role is limited to adversarial, unless otherwise provided in the Act.⁶³ The EAA is now expired but the export licensing authority thereunder established has been extended by a presidential declaration of national emergency ever since.^{64&65} Thus, upon EEA’s expiration in 1994 President Bill Clinton invoked the International Emergency Economic Powers Act (IEEPA)⁶⁶ in the Executive Order No. 12923, stating that “the unrestricted access of foreign parties to U.S. goods, technology, and technical data and the existence of certain boycott practices of foreign nations [...] constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and hereby declare a national emergency with respect to that threat”.⁶⁷

Since 1985, the Department of Commerce’ Bureau of Industry and Security (BIS) is charged with implementing and enforcing the EAR and regulating exports and re-exports of dual-use items.⁶⁸ As defined by the EAR, dual-use are those items that have both civil as well as terrorism, military or WMD-related applications.⁶⁹ A closer look at §734.3 demonstrates that EAR applies not only to dual-use items but to any item that warrants control and that is not excluded from the scope of the EAR in §734.3(b). Thus, all items in the United States, including in US Foreign Trade Zones (FTZ) and in transit; all US origin items wherever located; foreign-made commodities, software and technology that incorporate controlled US-origin items; certain foreign-made direct products of US origin technology or software

⁶¹ Dvorin, SM, 1980, “The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies”, *Northwestern Journal of International Law & Business*, vol. 2, no. 1, pp. 179-199, p. 179.

⁶² Fergusson, IF and Kerr, PK, *supra note 51*, p. 2.

⁶³ Dvorin, SM, *supra note 54*, p. 194.

⁶⁴ Fergusson, IF and Kerr, PK, *supra note 51*, p. 2.

⁶⁵ The EAA was reauthorized in 2000 and lapsed again on August 20, 2001, after which the EAR continued in effect by virtue of the Executive Order no.13222 of August 17, 2001.

⁶⁶ IEEPA empowers the President of the United States to “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States”. 2 US Code Title 50 (War and National Defence), Chapter 35, § 1702 (B).

⁶⁷ White House Press Release, Continuation of Export Control Regulations, Executive Order no. 12923, June 30, 1994. Available at: <http://fas.org/irp/offdocs/eo12923.htm>. [27.09.2016].

⁶⁸ In 1985, it was separated from the International Trade Administration of the Department of Commerce in order to detach the former from the trade promotion functions of the latter. (Fergusson, IF and Kerr, PK, *supra note 51*, p. 3).

⁶⁹ CFR/EAR §730.3 “Dual-use’ and other types of items subject to the EAR.”.

and certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of US origin technology or software, are subject to the EAR according to §734.3. It is possible that the items that are subject to the EAR also fall within the scope of regulatory programs of other agencies, which means that users may be required to comply with overlapping rules.^{70, 71} Besides, the fact that a certain item is subject to the EAR does not automatically impose on it a licensing or other requirement, which shall instead be sought in the other parts of the EAR.⁷² This means that a person may undertake transactions that are subject to the EAR without a license or authorisation, unless there's an affirmative statement to the contrary in the General Prohibitions or License Exceptions parts of the EAR.⁷³

Regarding the general prohibitions, an exporter's behaviour is largely conditional on the following considerations: classification of the item, destination, end-user, end-use and conduct.⁷⁴ Depending on these, §736.2(b) lists the ten general prohibitions⁷⁵, in which an exporter may not engage unless they have obtained a BIS license or qualify for a license exception from each of the general prohibitions.⁷⁶

Besides laying down the licensing policy for certain goods and destinations and outlining the application process to be used by exporters, the EAR sets forth a Commerce Control List (CCL), which is a list of items - commodities, technologies and software - that is subject to the export licensing authority of BIS.⁷⁷ The CCL is divided into 10 categories (nuclear materials, facilities and equipment; materials, chemicals, microorganisms and toxins; materials processing; electronics; computers, telecommunications and information security; lasers and sensors; navigation and avionics; marine; aerospace and propulsion), which are further split into 5 groups each (equipment, assemblies and components; test, inspection and production equipment; materials; software; technology).⁷⁸ Within each group individual items are identified by the Export Control Classification Number (ECCN)^{79, 80}, which is complemented by an item description and the reason for control.⁸¹ Determining the ECCN is the first step towards establishing whether a license is required for the export of a certain

⁷⁰ §734.2(a)(2).

⁷¹ In case of an overlap, entries in the CCL contain a reference to the controls administered by other agencies.

⁷² §734.2(a)(3)

⁷³ §736.1.

⁷⁴ §736.2 (a).

⁷⁵ The ten general prohibitions are the following: 1) Export and reexport of controlled items to listed countries; 2) Reexport and export from abroad of foreign-made items incorporating more than a *de minimis* amount of controlled US content; 3) Reexport and export from abroad of the foreign-produced direct product of US technology and software; 4) Engaging in actions prohibited by a denial order; 5) Export or reexport to prohibited end-uses or end-users; 6) Export or reexport to embargoed destinations; 7) Support of Proliferation Activities; 8) In transit shipments and items to be unladen from vessels or aircraft; 9) Violation of any order, terms, and conditions; 10) Proceeding with transactions with knowledge that a violation has occurred or is about to occur. For a detailed guidance see §736.2 (b).

⁷⁶ §736.2 (b).

⁷⁷ Fergusson, IF and Kerr, PK, *supra note 51*, p. 3.

⁷⁸ § 738.2(a) and (b).

⁷⁹ §738.2(d).

⁸⁰ See BIS website for a detailed guide as to how to interpret the ECCN. <https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear>. [27.09.2016].

⁸¹ §738.2(d).

dual-use item, which is achieved by applying the CCL's ECCN and the Commerce Country Chart.⁸² As mentioned earlier, virtually all items that originate in the US are subject to the EAR; consequently, those items that are not on the CCL may be still restricted to a destination if it is meant to be used for a military end-use or an entity involved in proliferation.⁸³

The Export Controls Reform

Since 2009 the US system of export controls has been *en route* towards a clearer, streamlined and overall fundamentally restructured regulation, with over 170 pages of added and amended provisions published to date.⁸⁴ The reform was launched with the view to face the changed realities of the post-Cold War period. The current export controls rules and processes are not fit to deal with the challenges of the 21st century, such as preventing proliferation of crucial technology and equipment to terrorist groups and states seeking to advance their WMD arsenal.⁸⁵ Secretary Gates identified the flaws of the existing approach in that, *inter alia*, the current system is too overreaching to be effective because it offers a far too broad a definition of items subject to export control and classification, which overburdens the system with cases that could be excluded from regulation altogether⁸⁶ and takes the focus away from those items that pose true security concerns. A corollary to this is the second problem that the export control system has developed overtime, that is - the complicated and often overlapping bureaucratic apparatus. The resources in time, money and manpower that the US government spends on coordinating only the procedural aspects of export controls is a red flag for reform; besides, such intricate arrangement creates proliferation risks in that one item may be subject to jurisdiction of different agencies, whose policy determinations may repeat each other as well as be in conflict. On top of all, the onerous and complex provisions "impedes the effectiveness of our closest military allies, tests their patience and goodwill, and hinders their ability to cooperate with US forces".⁸⁷

For the said reasons, in August of 2009 President Obama directed the agencies involved in the US export controls to conduct a broad-based review of the system in order to identify the ways of strengthening the national security and the competitiveness of the core manufacturing and technology industries.⁸⁸ The review revealed the pitfalls of the current export controls system, which triggered the launch of the Export Control Reform Initiative (ECR Initiative), whose ambitious objective is to fundamentally reform the US system of export controls. The US Department of State described the objectives of the reform in the following way: "Export Control Reform will move less sensitive items that no longer merit

⁸² § 738.3.

⁸³ Fergusson, IF and Kerr, PK, *supra note* 51, p. 4.

⁸⁴ Pasco, B 2014, "The Case for Export Control Reform, and What it Means for America", *Harvard Law School National Security Journal*. Available at: <http://harvardnsj.org/2014/10/the-case-for-export-control-reform-and-what-it-means-for-america/>. [30.09.2016].

⁸⁵ Remarks of the Secretary of Defence Robert Gates to the Business Executives for National Security on the U.S. Export Control System, U.S. Department of Defence, April 20, 2010. Available at: <http://www.fas.org/sgp/news/2010/04/gates-export.html>. [01.10.2016].

⁸⁶ In his April 20, 2010 speech Secretary Gates said: "We were wasting our time and resources tracking technologies you could buy at Radio Shack".

⁸⁷ *Ibid.*

⁸⁸ See more at www.export.gov.

controls under the USML, such as certain parts and components, to the CCL, to allow for more flexible licensing authorisations to allies and partners while increasing the number of enforcement officials available to safeguard against illicit attempts to procure sensitive defence technologies".⁸⁹

The ECR is to be implemented in three phases (reconciling the definitions, regulations and policies pertaining to export controls, and eventually creating a single control list, single licensing agency, unified information technology system and enforcement coordination system), with the first and second phases being complete by 2015.⁹⁰ The first stages of the reform were concerned with relocating thousands of items from USML to CCL, in order maintain under the USML scope only those items that "provide at least a significant military or intelligence applicability".⁹¹ This migration of items from a State-regulated to a Commerce list has triggered the creation of a new 600 series ECCNs, which became effective on January 6th 2014 and refer to, among others, military vehicles, vessels of war, submersible vessels, and related items.⁹²

Whereas the ultimate result pursued by the reform is to create a refined and simplified structure with harmonised definitions and eliminate overlap and confusion as to the agencies' jurisdictions, some criticise this ambition as erring on the side of deregulation.⁹³ There is, thus, no certainty that the current approach will be equally effective in not only improving the position of technology manufacturers but also comprehensively answering the security concerns.

In the light of new political developments in the US and taking the office by Donald J. Trump as a 45th president of the United States of America the destiny of reform process is completely blurred. Despite the fact that it is too soon to speculate about the final outcome of ECR, hardliner attitude of new administration leans toward further regulation of exporting dual use items and technologies from the US rather than having hope for any sort of deregulation such activities. Holding strong position against particular nations and imposition of ban on followers of very distinctive faith to enter the United States among first executive orders issued by president Trump might be interpreted as signal for furtherance of imposing tougher conditions for issuing export licenses as well as improvement of enforcement procedure and imposition of sanctions against violations of Export Control regulations for export of dual use items during his tenure. From one hand, such outcome would be in sharp contract with achievements of first and second phase of ECR Initiative during the Obama administration and on the other hand by imposing restriction on access of American dual use technology producers to international market, it will be against promises of president Trump during his campaign for improving trade and creating job for American citizens. This way or the other, it is not unexpected to witness further developments in American Export Control Regulations during Trump administration.

⁸⁹ See more at www.state.gov.

⁹⁰ *Ibid.*

⁹¹ Rosanelli, R 2014, US Export Control Regulations Explained to the European Exporter: A Handbook, European Studies Unit. Available at: http://local.droit.ulg.ac.be/jcms/service/file/20140108134656_Handbook-RR-0801.pdf. [05.10.2016].

⁹² *Ibid.*, pp. 35-36.

⁹³ Fitzgerald DR, 2014, *supra note* 43.

Concluding Remarks

US and EU export control regimes are the products of the historic, political and economic development of the region. The one uniform issue that they have in common is that both engage in a balancing exercise to date in order to coordinate the economic and security interests within a state and the internal market, as well as vis-a-vis other states against whom controlled items may be used. Governments are tasked to reconcile those interests at a national level as well as internationally. Overall, export controls are believed to distort market prices and impose net-welfare losses on a domestic economy that makes use of them.⁹⁴

The mechanisms that states employ to restrict exports of sensitive items bear serious effect on the sustainability of national economic actors and affected industries. Thus, imposing an export ban, tax quota and restrictive licensing on dual-use goods and technologies shall be introduced as a policy tool when assessed against the background of the global dual-use goods market. For example, an export tax or ban may reduce the competitiveness of a domestic producer, which will not achieve the ultimate objective of limiting the access to a target item internationally if the item could alternatively be acquired from elsewhere. The US engaged in the practice of establishing unilateral restrictions and control practices during the Cold War era, which had a negative impact on the economy because none of its then allies and partners followed.⁹⁵ It is thus argued that unilateral features shall be excluded from export controls regimes save for the instances when there is a prospect that other states' positions could be expected to be altered within a short time.⁹⁶ National industries could also be put under unnecessary strain if the operating control lists are over-inclusive. This has been the case in the US until the 2009 reform initiative, which has undertaken to create a common control list and reduce the number of controlled items.

Regardless of the form that export control regulations take, it is inevitable that exporters are tasked with familiarising themselves with the attaching compliance obligations, the respective export controls regulations in the state of the client, and setting up effective compliance programs.⁹⁷ The complexity of respective systems of export controls goes both ways: US exporters ought to locate and keep in mind the applicable European Regulations and the laws of the partner-Member States, whereas the European exporter will need to catch up with the ongoing restructuring of the US export control system, which may prove to become rather burdensome and costly in the initial periods.

⁹⁴ Bonarriva, J, Koscielski, M & Wilson, E 2009, 'Export Controls: An Overview of Their Use, Economic Effects, and Treatment in the Global Trading System', Office of Industries Working Paper No. ID-23, U.S. International Trade Commission.

⁹⁵ Panel on the Future Design and Implementation of U.S. National Security Export Controls et al 1991, *Finding Common Ground: U.S. Export Controls in a Changed Global Environment*, National Academies Press.

⁹⁶ *Ibid.*

⁹⁷ Rosanelli, R 2014, *supra note 88*, p. 39-40.

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