This article from International Institute of Space Law is published by Eleven international publishing and made available to anonieme bezoeker

THE IMPLEMENTATION OF EXPORT CONTROLS IN THE EUROPEAN COMMUNITY – MAKING BALANCE BETWEEN SECURITY AND COMMERCIAL CONSIDERATIONS

Laurent Crapart[1]
Institute of space and telecommunications law (IDEST)
Paris, France
laurent.crapart@idest-paris.org

The issue of export controls in European countries became a Communitarian one in 1994, when the first binding text dealing with the export controls of sensitive items were adopted at a Community level. These texts only constituted a first step in the harmonisation process that has characterised, at least partly, export controls in the European Community since this time. It however contributed to make the issue of dual-use exports passing from the competence of European States to the competence of the European Community. After having briefly examined the major phases of the historical process having conducted to the current Community regime (I), this regime will be concretely examined, concerning both dual-use exports (II) and arms exports (III). The impact of such regulations on the space industry will also be emphasised, trying to distinguish between security-oriented provisions, and commercial-oriented provisions of this regime.

I. Historical background

a) 1957 - 1994

The history of export controls in the European Community can be divided into the three following phases. In a first period, running from the European Community origin to 1994, export controls remained in the sphere of States' competence. For security reasons, States would quasi-systematically consider that export control matters were part of their national sovereignty. This security-oriented approach was based on article 296 of the EC Treaty, according to which States parties to the treaty can adopt every measures they consider being essential for their security, or every measures concerning the production or business of arms and war materials. A very extensive interpretation of article 296 at State level resulted in the persistence of important divergences in European export control procedures (licensing, etc.), to the detriment of the constitution of an effective common market in the field of sensitive items. The European Community was consequently weakened, both economically and industrially, notably compared to its two major industrial competitors: United States and Japan, which both enjoyed internal homogenous markets. In Europe, security considerations were still largely predominating over commercial ones until 1994.

b) 1994 - 1998

In a second phase, two major events contributed to disturb this situation largely based on security concerns. First event, the Council Regulation No 3381/94 of 31 December 1994[i] happened to be the first European Union legislation in the field of dual-use export controls in 1994. It is very relevant to notice here that this regulation

[1] Copyright © 2003 by Laurent Crapart. Published by American Institute of Aeronautics and Astronautics, Inc, with permission. Released to AIAA in all forms

This article from International Institute of Space Law is published by Eleven international publishing and made available to anonieme bezoeker

was based on both article 113 (currently 133) of the EC Treaty and a Common Foreign Security Policy Joint Action 94/942/CFSP. Then, two major projections had been accomplished on the way of a Communitarian approach for export controls. First, dual-use export controls were partly based on article 113, which means on the Common commercial policy; second, the European authorities were consequently entitled to adopt a regulation concerning these dual-use export controls. That was done with the 1994 regulation.

The second event came from the European Court of Justice. On 17 October 1995, two judgements of the European jurisdiction[ii] confirmed that dual-use exports belonged to the sphere of the Common commercial policy (article 113 of the EC Treaty), and had therefore to be ruled at Community level. In both cases, German exporters had been confronted with national authorities in dual-use export processes. In the first case (*Leifer* case), they had exported items being considered as dual-use ones without having obtained the required licences. In the second case (*Werner* case), the exporters faced export licences delivery refusals from national authorities. Before national jurisdictions, they contested the right of these national authorities to rule dual-use exports, on the basis of article 113 of the EC Treaty. These jurisdictions consequently referenced to the European Court of Justice under article 177 of the treaty for preliminary rulings. The terms of ECJ judgements were exemplary. The Court firstly stated that the implementation of the common commercial policy, as foreseen by article 113: "*requires a non-restrictive interpretation of that concept, so as to avoid disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries*". The consequences of this were secondly clearly stated: "*Article 113 of the EC Treaty is to be interpreted as meaning that rules restricting export of dual-use goods to non-member countries fall within the scope of that article and that in this matter the Community has exclusive competence, which therefore excludes the competence of the Member States save where the Community grants them specific authorisation*".

Then, the Court of Justice had made a major step forward, by ruling that dual-use exports were falling within the scope of the Common commercial policy, and as a direct consequence in the scope of the Community competence. The commercial approach was gaining ground over security concerns. However, one should not conclude that these concerns were blindly moved aside by the European jurisdiction. Its position was actually shaded in order to take them into account in the eventuality of a threat to public security. The Court indeed considered that in such eventuality, "*which is a matter for the national court to consider, an obligation on the applicant to prove that the goods will be used exclusively for civil purposes or a refusal to issue a licence if the goods can objectively be used for military purposes can be consistent with the principle of proportionality*". The Court added that Common commercial policy does not preclude national provisions instituting licences on the ground that this is necessary in order to avoid "*the risk of a serious disturbance to [...] foreign relations which may affect the public security of a Member State.*" The Court thus recommended a balanced approach, where the place to be given to security concerns was regulated and proportionate to market considerations.

c) Since 1998

The third phase of this historical process brought this evolution to a successful conclusion, with the adoption of the Council Regulation No 1334/2000 setting up a Community regime for the control of

This article from International Institute of Space Law is published by Eleven international publishing and made available to anonieme bezoeker

exports of dual-use items and technology of 22 June 2000[iii]. This regulation, which replaced the 1994 text, was indeed completely based on article 113 (previously 133) of the Treaty, relating to Common commercial policy. It is also very relevant that the preamble of this regulation expressly stated that: "*The existence of a common control system and harmonised policies for enforcement and monitoring in all Member States is a prerequisite for establishing the free movement of dual-use items in the Community*" (Point 3). The purpose of the regulation was therefore clearly presented as being the completion of the Internal Market, by creating an efficient common external "fence" for extra Community exports, recognising notably that some countries of destination may enjoy simplified controls. For such purpose, the Council Regulation established the following rules.

II. The Community regime for the control of exports of dual-use items and technology

The Regulation No 1334/2000 (as amended) tends to make balance between the legitimate security concerns of EC Member States and the need to avoid unnecessary burden on European exporters, to promote a competitive environment and the completion of the Internal Market. For such purpose, the main features of this text are briefly described hereafter.

a) A common list of dual-use items subject to control

The regulation of 2000 partly lends to the 1994 one, by establishing, in its Annex I, a list of dual-use items for the export of which an authorisation shall be required by EC Member States. This list is drawn up in conformity with the obligations and commitments that each of them has accepted as a member of the different existing international regimes - MTCR, Wassenaar Arrangement, Nuclear Suppliers' Group, Australia Group. It is periodically updated and amended on the Commission proposition, due to the Article 133 basis of the Regulation. Therefore, all EC Member States will control the same items, which tends to harmonise the European regime.

Nevertheless, and in order to take their security concerns into account, Article 4 of the Regulation provides for a "catch-all clause", which permits States to control the exports of more items than those listed in Annex I, when these items are exported to destinations under an arm embargo, and are or may be intended for use in connection with mass-destruction weapons or conventional arms. Therefore, EC Member States are able to keep a certain control over the exports involving security concerns.

b) A Community General Export Authorisation

On the contrary, a Community General Export Authorisation (CGEA) is instituted by the 2000 Regulation for numerous items (almost all figuring in Annex I), as soon as they are exported in one of the listed Community trading partners - namely: Australia, Canada, Czech Republic, Hungary, Japan, New Zealand, Norway, Poland, Switzerland, and the USA. This CGEA liberalises most of the trade of dual-use items with these countries, thus facilitating legitimate trade for the industry.

c) The enhanced mutual recognition of licences

For all other exports (than those falling under the CGEA) for which an authorisation is required, national authorities of the State where the exporter is established remain competent for granting export licences. The subsequent

This article from International Institute of Space Law is published by Eleven international publishing and made available to anonieme bezoeker

intra-community transfers necessary for the item to reach its final destination outside the Community are not subject to additional controls from the EC Member States concerned, unless expressly provided by the Regulation. The regulation indeed permits an enhanced mutual recognition of licences between Member States, by laying down rules for mutual information and consultation. A "Coordinating group", chaired by the Commission and at which every Member State is represented, is also set up in order to examine issues arising from the Regulation application. Nevertheless, an exception is made for most sensitive dual-use items of Annex I, the exports of which are submitted to an authorisation, even for intra-Community transfers.

While the Community regime thus tries to strike a balance between security and commercial concerns governing the export of dual-use items, the legal regime applicable to arms exports inside the European Community remains largely dominated by security considerations, as described hereafter.

III. The European Code of conduct for arms exports

a) Current regime

Every sensitive good/item which is not figuring on the lists annexed to the EC Regulation of 2000 may nevertheless be subject to control, as soon as European States qualify it as an "arm", according to its national regulation. Belonging to the security and defense sphere, this qualification is of the competence of Member States. Some disparities consequently remain in the European export control regime, as far as these goods are concerned.

In order to overcome these disparities, the European Union has adopted on 8 June 1998 a European Union Code of Conduct on Arms Exports. This text builds up common criteria for arms exports, denial notifications, as well as consultation mechanisms, and shall as such be regarded as a new stage in the development of a common approach for European export controls. It is however only indicative for EC Member States, which are not bound by this text which has no legal value.

b) Consequences for the space industry

The consequence of this for the European industry is that concerned companies are not able to benefit a common approach, notably for intra-Community transfers, as soon as the goods transferred are regarded as "arms" under national legislation. Practically speaking, this means that unless European States have concluded special arrangements for such matters, European exporters will have to obtain an export licence from every State territorially concerned by the export. To conclude with, the European export control regime has only partly become a Communitarian one, arms transfer still belonging to the competence of States under the current system.

---

[i] Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, *Official Journal* L 367, 31/12/1994 p. 0001 – 0007 (no longer in force).
[ii] ECJ, 17 October 1995, C-83/94, *Leifer case*; C-70/94, *Werner case*.
[iii] Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, *Official Journal* L 159, 30/06/2000 P. 0001 – 0215, as amended.