

Updates to the EU export control regime

IOE&IT Export Control Profession webinar

26 May 2021



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Today's speaker

Spencer Chilvers – Head of Export Control Policy, Rolls Royce

- › Joined Rolls-Royce in June 2010 as part of the corporate export control team with special responsibility for export control policy and relations with governments and the EU on export control issues
- › Currently chair of the executive committee of the UK Export Group for Aerospace, Defence & Dual-Use and a member of the Aero Space and Defence Industries Association of Europe (ASD) Export Control Committee
- › Member of the International Institute for Strategic Studies
- › Previously worked 14 years for the Export Control Organisation



New EU dual-use items regulation

Spencer Chilvers

26 May 2021



Contents

- » **History and context**
- » What the regulation covers
- » Updates to the regulation
- » Non-listed and cybersurveillance items
- » Internal Compliance Programme
- » Union General Export Authorisations
- » Awareness raising
- » Third countries

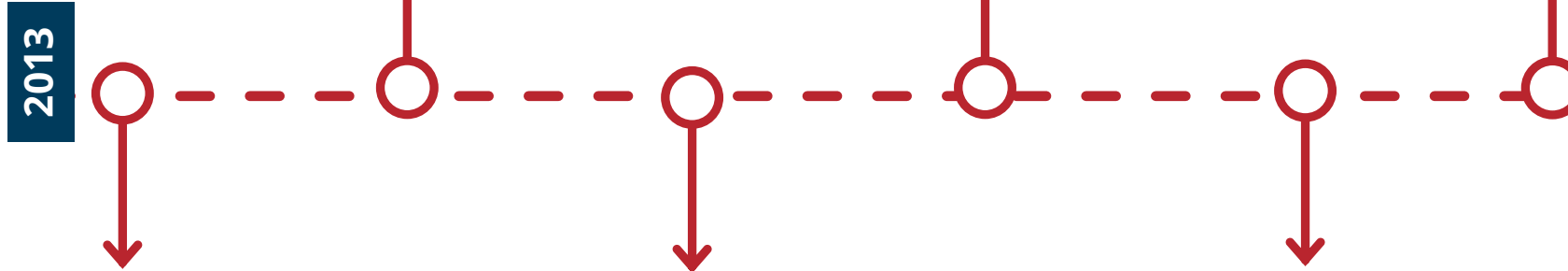


New regulation in the making

2014: Commission communication sets out options to review the export control system

2016: Commission proposal to update the regulation published in September

2019: Member states (the Council) reached a position in June

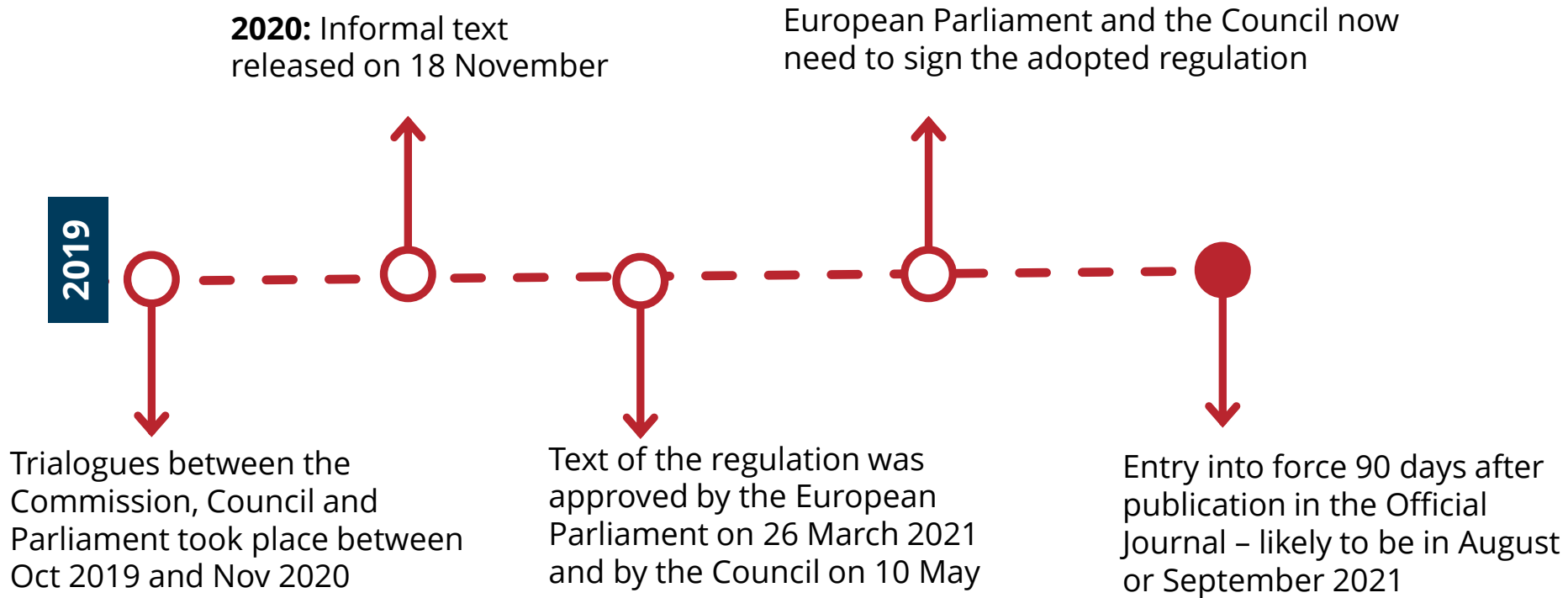


2013: Commission concludes in report to the Council and Parliament, that the EU should upgrade its export control system to face new challenges

2014: Impact assessment produced

2018: European Parliament reached a position on the Commission draft in January

New regulation in the making



The regulation covers

- ◆ Main body of the regulation covers export control provisions, the roles and responsibilities of Member States, the Commission and exporters
- ◆ **Annex I:** list of controlled dual-use items [as updated on 7 October 2020 for export control regime changes made to February 2020 - see Regulation 2020/1749 which will be repealed?]
- ◆ **Annex II:** Union General Export Authorisations (UGEAs)
- ◆ **Annex III:** model licence forms



The regulation covers

- ◆ **Annex IV:** List of dual-use items licensable for transfers within the EU
- ◆ **Annex V:** Repealed regulations
- ◆ **Annex VI:** Correlation table – highlights changes made to 428/2009 to achieve a new regulation



Updates to the dual-use items regulation

- ◇ Updates to:
 - ◇ definitions and control parameters
 - ◇ harmonisation, simplification and digitalisation of licensing
 - ◇ enhanced information sharing and co-operation with third countries
- ◇ New rules on transparency, enforcement, industry outreach and EU training programme
- ◇ Introduction of a basis for EU autonomous controls
 - ◇ Allows the EU to make its own decisions on human rights controls on cyber-surveillance technologies
 - ◇ And for coordination of national controls on emerging technologies

Updated definitions:

Export

- ◊ Transmission of software or technology by electronic media – including by fax, telephone, electronic mail or any other electronic means – **to a destination outside the customs territory of the Union**
- ◊ **Includes making available in an electronic form such software and technology** to natural or legal persons or to partnerships outside **the customs territory of the Union**
- ◊ Also includes **the oral transmission of technology when the technology is described over a voice transmission medium**

Updated definitions: Exporter

- ◇ **Any natural or legal person or any partnership** that decides to transmit software or technology by electronic media
 - ◇ including by fax, telephone, electronic mail or by any other electronic means to **a destination** outside the **customs territory of the Union**
 - ◇ **or to make available in electronic form such software and technology to natural or legal persons or to partnerships outside the customs territory of the Union**

Updated definitions: 'Provider of technical assistance'

- ◇ (a) any natural or legal person or any partnership providing technical assistance from the **customs territory of the Union** into the territory of a third country
- ◇ (b) any natural or legal person or any partnership resident or established in a Member State providing technical assistance within the territory of a third country
- ◇ (c) any natural or legal person or any partnership resident or established in a MS that provides technical assistance to a resident of a third country temporarily present in the customs territory of the Union
- ◇ Controls only apply to WMD or arms embargoed destinations

Updated definitions: Brokering

- ◇ Any natural or legal person or any partnership providing brokering services from the **customs territory of the Union** into the territory of a third country
- ◇ **MS may extend application of paragraph 1 to non-listed dual-use items**
- ◇ **MS may adopt or maintain national legislation imposing an authorisation requirement on the provision of brokering services of dual-use items**
 - ◇ **If the broker has grounds for suspecting that those items are or may be intended for any of the uses referred to in Article 4(1)**
- ◇ Controls only apply to WMD or arms embargoed destinations

Non-listed items

- ◇ MS may prohibit or impose authorisation requirement on export of dual-use items not listed in Annex I for reasons of public security
 - ◇ **including the prevention of acts of terrorism** or for human rights considerations
- ◇ MS shall notify Commission and other MS of any measures adopted pursuant to paragraph 1 **without delay** and indicate the precise reasons for the measures
- ◇ **If the measure is the establishment of a national control list, MS shall also inform the Commission and the other MS of the description of the controlled items**

Cyber-surveillance items

- ◊ Dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems
- ◊ **Catch-all prohibition:** authorisation required for non-listed items when an exporter informed they may be intended:
 - ◊ for use in connection with internal repression
 - ◊ and/or the commission of serious violations of human rights and international humanitarian law
- ◊ Where an exporter is aware that the non-listed items are intended for such uses, they need to notify the competent authority

Cyber-surveillance items

- ◇ EU-level coordination mechanism providing for notification to other MS when one MS decides to impose a licensing requirement
- ◇ Commission to prepare and publish annual report detailing for each MS information about applications received for each cyber-surveillance item, the destinations involved, and the granting or denial of applications
- ◇ Civil society groups have called this new transparency rule:
 - ◇ *“landmark development which will allow the public, civil society, journalists, and parliamentarians to scrutinise licensing decisions to ensure they are in accordance with law and provide an invaluable insight into the EU trade in surveillance technology”*

**What relevance
do the new dual-
use rules have for
your business?**



Internal Compliance Programme (ICP)

- ◇ **Ongoing effective**, appropriate and proportionate **policies** and procedures adopted by exporters to **facilitate** compliance with provisions **and objectives of this regulation**
 - ◇ With the terms and conditions of the authorisations **implemented under** this regulation
 - ◇ **Including due diligence measures assessing risks related to export of items to end-users and end-uses**
- ◇ **Reporting and ICP requirements relating to the use of global export authorisations shall be defined by MS**



Internal Compliance Programme (ICP)

- ◆ Guidelines for ICPs should be introduced to contribute to achieving a level-playing field between exporters and to enhance effective application of controls
- ◆ Guidelines should take into account:
 - ◆ differences in sizes, resources, fields of activity and other features
 - ◆ conditions of exporters and their subsidiaries such as intra-group compliance structures and standards
- ◆ To avoid a 'one model for all' approach and help each exporter to find its own solutions for compliance and competitiveness



Internal Compliance Programme (ICP)

- ◆ Exporters using global licences should implement an ICP
- ◆ Unless the competent authority considers it unnecessary due to other circumstances it has taken into account when processing the application for a global licence submitted by the exporter
- ◆ *Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes*



Union General Export Authorisations (UGEAs)

- ◇ Annex I and some Annex IV items to Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland, UK and the US – EU001
- ◇ Certain dual-use items to certain destinations; items from Cats 1-3 to Argentina, South Africa, South Korea and Turkey – EU002
- ◇ Export after repair/replacement – EU003
- ◇ Temporary export for exhibition – EU004
- ◇ Telecommunications – EU005
- ◇ Chemicals – EU006
- ◇ **Intra-Group Transfers of Software and Technology - EU007**
- ◇ **Encryption - EU008**



Union General Export Authorisation - EU001

- ◆ United Kingdom (without prejudice to the application of this Regulation to and in the United Kingdom in respect of Northern Ireland, in accordance with point 47 of Annex 2 to the Protocol on Ireland/Northern Ireland (the 'Protocol') annexed to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community²⁴, listing the provisions of Union law referred to in Article 5(4) of the Protocol)



**Does your business
have an Internal
Compliance
Programme in
place?**



Awareness raising

- ◇ Various people can be involved in the export of dual-use items
 - ◇ including service providers, researchers, consultants and persons transmitting dual-use items electronically
- ◇ Essential all such persons are aware of the risks associated with the export and provision of technical assistance regarding sensitive items
- ◇ In particular, academic and research institutions face distinct challenges in export control due to:
 - ◇ general commitment to the free exchange of ideas
 - ◇ fact that their research work often involves cutting-edge technologies
 - ◇ their organisational structures
 - ◇ international nature of their scientific exchanges



Awareness raising

- ◇ MS and the Commission should raise awareness among the academic and research community and provide them with tailored guidance to address those distinct challenges
- ◇ In alignment with multilateral export control regimes, the implementation of controls should provide for a common approach with respect to certain provisions
 - ◇ In particular regarding academia-related de-control notes 'basic scientific research' and 'public domain'



Awareness raising

- ◇ Important to ensure exporters, brokers, providers of technical assistance and other relevant stakeholders concerned by this regulation are consulted by the Dual-Use Coordination Group and the technical expert groups
 - ◇ Including industry and civil society organisations
- ◇ Commission, in close consultation with MS and stakeholders, should develop guidelines and/or recommendations for best practices to support practical application of controls
- ◇ When preparing the guidelines and/or recommendations, the Commission should have due regard to the information needs of SMEs



Awareness raising

- ◇ Commission and Council shall make available guidelines and/or recommendations for best practices for the subjects referred to in this regulation
 - ◇ To ensure the efficiency of the Union export control regime and the consistency of its implementation
- ◇ Provision of guidelines and/or recommendations for best practices to exporters, brokers and providers of technical assistance shall be the responsibility of the MS where they are resident or established
- ◇ In those guidelines, information needs of SMEs should taken into account



Commission statement: capacity-building programme for control of dual-use exports

- ◇ Commission recognises importance of a common licensing and enforcement capacity building and training programme for an effective EU export control system
- ◇ In consultation with the Dual-Use Coordination Group, the Commission undertakes to explore the human and financial resource implications such a programme may entail
 - ◇ With a view to identifying options for the design, modalities and deployment of a capacity-building and training programme

Third countries

- ◇ MS and the Commission should enhance their contribution to the activities of multilateral export control regimes
- ◇ MS and the Commission should support those regimes in developing robust export controls as a global basis and model for international best practice, and an important tool for ensuring international peace and stability
- ◇ Contributions should be made when a new risk has been identified by all MS in the field of cyber-surveillance items in order to ensure a multilateral level playing field

Third countries

- ◇ Dialogues may support regular and reciprocal cooperation with third countries
 - ◇ including exchange of information and best practices, as well as capacity-building and outreach to third countries
- ◇ Dialogues may also encourage the adherence of third countries to robust export controls developed by multilateral export control regimes as a model for international best practice

**Do you export
controlled goods to
Northern Ireland?**



Questions?



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- ◊ Consultancy



SME Brexit Support Package

- ◆ New package of training and support from the IOE&IT
- ◆ Supports firms adjusting to new rules for EU trade
- ◆ Includes in-house options and creation of 'action plan' bespoke to business
- ◆ Fundable by new government grants:
 - ◆ SME Brexit Support Fund
 - ◆ Grants up to £2000 towards training and/or professional advice
- ◆ <https://www.export.org.uk/SMEBrexitSupport>



Thank you

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