



Trade Control and Sanctions

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April 26

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Introduction

You are working for a software company established in Ukraine.

The company is providing advanced facial recognition solutions that covers a lot of facial recognition needs, such as spoof detection, multi-face detection, age detection and gender detection.

You have received orders from drone manufacturing companies established in:

- Iran
- Sweden
- Kazakhstan

How are you considering such requests, are you providing the software?

Elements to consider are

Items : facial recognition software

→ Scope

End-use: internal repression (?)

→ Objectives

End-user: Iran, Sweden, Kazakhstan or intermediary (?)

→ Risks

Main elements of trade control

Trade control is the discipline dedicated to the process of answering those questions

Trade: *the business of buying and selling or bartering commodities*
usually see as the promotion of trade (State commercial policy)

Control: *exercise restraining or directing influence over something or someone* to counter weapons proliferation risks

Trade control: allowing (facilitate) legitimate trade of sensitive/strategic items and technology

Trade control intends to rule international movements of goods and technologies for **non economic** reasons

To understand the system you have to consider

- Two categories of **documents**: Hardlaw and softlaws
- Three levels of **constraints**: international, regional, national
- Two level of **authorities**: international and national (and sometimes regional)
- More than three scientific **disciplines**: law, economy, political science,



International trade control regimes

A concept in constant evolution

The gaz station syndrome :

Phase I: 1910/20: Distribution via Gasoline container



Phase II: 1930



Phase III: 1960



Phase IV: 1970



Phase V: 2000



The scope of trade control has followed a similar evolution

1. 1978: adoption by the NSG of the first dedicated nuclear **especially designed** list of items: from A to F

Annex

CLARIFICATIONS OF ITEMS ON THE TRIGGER LIST

A. Complete nuclear reactors
(Item 2. 1. 1 of the Trigger List)

1. A "nuclear reactor" basically includes the items within or attached directly to the reactor vessel, the equipment which controls the level of power in the core, and the components which normally contain or come in direct contact with or control the primary coolant of the reactor core.

2. The export of the whole set of major items within this boundary will take place only in accordance with the procedures of the Guidelines. Those individual items within this functionally defined boundary which will be exported only in accordance with the procedures of the Guidelines are listed in paragraphs 2. 1. 1 to 2. 1. 5.

The Government reserves to itself the right to apply the procedures of the Guidelines to other items within the functionally defined boundary.

3. It is not intended to exclude reactors which could reasonably be capable of modification to produce significantly more than 100 grams of plutonium per year. Reactors designed for sustained operation at significant power levels, regardless of their capacity for plutonium production, are not considered as "zero energy reactors".

B. Pressure vessels
(Item 2. 1. 2 of the Trigger List)

4. A top plate for a reactor pressure vessel is covered by item 2. 1. 1 as a major shop-fabricated part of a pressure vessel.

5. Reactor internals (e. g. support columns and plates for the core and other vessel internals, control rod guide tubes, thermal shields, baffles, core grid plates, diffuser plates, etc.) are normally supplied by the reactor supplier. In some cases, certain internal support components are included in the fabrication of the pressure vessel. These items are sufficiently critical to the safety and reliability of the operation of the reactor (and, therefore, to the guarantees and liability of the reactor supplier), so that their supply, outside the basic supply arrangement for the reactor itself, would not be common practice. Therefore, although the separate supply of these unique, especially designed and prepared, critical, large and expensive items would not necessarily be considered as falling outside the area of concern, such a mode of supply is considered unlikely.

But controlling especially designed items didn't prevent WMD proliferation

2. 1992: NSG nuclear related dual use items list (8 categories divided in numerous subcategories)

ANNEX CONTENTS

INDUSTRIAL EQUIPMENT

1.1.	Spin-forming and flow-forming machines	1-1
1.2.	“Numerical control” units ... machine tools	1-1
1.3.	Dimensional inspection systems	1-1
1.4.	Vacuum induction furnaces	1-3
1.5.	Isostatic presses	1-3
1.6.	Robots and end effectors	1-4
1.7.	Vibration test equipment	1-5
1.8.	Furnaces - arc remelt, electron beam, and plasma	1-5

2. MATERIALS

2.1.	Aluminum, high-strength	2-1
2.2.	Beryllium	2-1
2.3.	Bismuth (high purity)	2-1
2.4.	Boron (isotopically enriched in boron-10)	2-1
2.5.	Calcium (high purity)	2-1
2.6.	Chlorine trifluoride	2-1
2.7.	Crucibles made of materials resistant to liquid actinide metals	2-1
2.8.	Fibrous and filamentary materials	2-2
2.9.	Hafnium	2-2
2.10.	Lithium (isotopically enriched in lithium-6)	2-2
2.11.	Magnesium (high purity)	2-3
2.12.	Maraging steel, high-strength	2-3
2.13.	Radium	2-3
2.14.	Titanium alloys	2-3
2.15.	Tungsten	2-3
2.16.	Zirconium	2-3

4 HEAVY WATER PRODUCTION PLANT RELATED EQUIPMENT (Other Than Trigger List Items)

4.1.	Specialized packings for water separation	4-1
4.2.	Pumps for potassium amide/liquid ammonia	4-1
4.3.	Water-hydrogen sulfide exchange my columns	4-1
4.4.	Hydrogen-cryogenic distillation columns	4-1
4.5.	Ammonia converters or synthesis reactors	4-2

5 IMPLOSION SYSTEMS DEVELOPMENT EQUIPMENT

5.1.	Flash x-ray equipment	5-1
5.2.	Multistage light gas guns/high-velocity guns	5-1
5.3.	Mechanical rotating mirror cameras	5-1
5.4.	Electronic streak and framing cameras and tubes	5-2
5.5.	Specialized instrumentation for hydrodynamic experiments	5-2

6 EXPLOSIVES AND RELATED EQUIPMENT

6.1.	Detonators and multipoint initiation svstems	6-1
6.2.	Electronic components for firing sets	6-1
6.2.1.	Switching devices	6-1
6.2.2.	Capacitors	6-2
6.3.	Firing sets and equivalent high-current pulsers (for controlled detonators)	6-2
6.4.	High explosives relevant to nuclear weapons	6-2

7 NUCLEAR TESTING EQUIPMENT AND COMPONENTS

7.1.	Oscilloscopes	7-1
7.2.	Photomultiplier tubes	7-1
7.3.	Pulse generators (high speed)	7-1

8 OTHER

8.1.	Neutron generator svstems	8-1
8.2.	General nuclear related equipment	8-1

But controlling listed items didn't prevent WMD proliferation: catch-all provisions

3. 2002: Australia Group

7. The Government will ensure that its regulations require the following:

- a. an authorisation for the transfer of **non-listed items** where the exporter is **informed** by the competent authorities of the Government in which it is established that the items in question may be intended, in their entirety or part, for use in connection with chemical or biological weapons activities;*
- b. that if the **exporter is aware** that non-listed items are intended to contribute to such activities it must notify the authorities referred to above, which will decide whether or not it is expedient to make the export concerned subject to authorisation.*

Analysis of the main elements of trade control regime/system

Strategic Trade Control ?

Risks assessment and constraints required by authorities to operators to allow exchanges of strategic goods and technology.

- How the transfer might contribute directly or indirectly to internal repression ?
- Do you consider differently Iran, Sweden or Kazakstan ?
- Assessment will be done, via the authorisation process, by considering states **political and legal commitments** (criteria)

Legal commitments :

- Treaty on the Non-Proliferation of Nuclear Weapons
- Chemical Weapons Convention
- UNSCR 1540,...

Political Commitments

- Nuclear Suppliers Group (NSG),
- Australia Group,
- Missile Technology Control Regime (MTCR),
- ...

Article III.2

State parties make a commitment **not to provide:**

(a) source ...

(b) equipment ...

to any non-nuclear-weapon State (NNWS) for peaceful purposes,

Non-proliferation Principle

*10. Notwithstanding other provisions of these Guidelines, suppliers should authorize transfer of items or related technology identified in the trigger list only when they **are satisfied** that the transfers would not contribute to the proliferation of nuclear weapons or other nuclear explosive devices or be diverted to acts of nuclear terrorism.*

(INFCIRC/254/Rev.12/Part.1)

Answers to our example

Answers will be defined in function of the assessment of country risks made by national authorities:

- Iran (as end-user or potential supplier)
- Sweden (as end-user or potential supplier)
- Kazakhstan (as end-user or potential supplier)

Strategic Trade Control ?

*Risks assessment and **constraints** required by authorities to operators to allow exchanges of Strategic goods and technology.*

After assessing the risks, authorities may decide to

- **Deny** the export if the risk of misuse is too high and could not be limited by requiring certain conditions;
- **Authorise** the transfer under certain **conditions**.

Article III.2:

State parties make a commitment **not to provide ... *unless***
the source or special fissionable material shall be subject
*to the **safeguards** required by this Article*

Politically binding conditions example: Australia Group

*In accordance with the Group's agreed procedures, a license for an export that is essentially identical to one denied by another AG participant will only be granted **after consultations** with that participant, provided it has not expired or been rescinded.*

(Guidelines for Transfers of Sensitive Chemical or Biological Items – No Undercut Policy June 2015)

Answers to our example

Conditions will be defined in function of internationals, regionals and nationals commitments of Ukraine.

- Iran: maybe no
- Sweden: maybe yes
- Kazakhstan maybe yes

Strategic Trade Control ?

*Risks assessment and constraints required by authorities to operators to allow exchanges of nuclear **goods and technology**.*

To be control goods and technology have to be

- Listed or
- Unlisted but potentially control via a Catch-all clause included

In legally or politically binding documents

1. Items listed by Treaties/Regimes

NPT article III.2 : Especially designed

NPT Parties make a commitment **not to provide:**

- (a) source or special fissionable material, or*
 - (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material,*
- to any non-nuclear-weapon State (NNWS)*

Which items fall under this definition ?

NPT has not adopted lists of items

Two lists almost identical have been adopted by two **softlaw instruments**:

- **Zangger Committee (1974)**, a common a list of materials and equipment (INFCIRC/209)
- **Nuclear Suppliers Group (NSG) (1976)**, two lists of items (one especially designed and one dual-use)

2. Unlisted items: Catch-all clause

Three levels:

- Exporter has been informed,
- Exporter knows,
- Exporter has grounds for suspecting

Catch-all clause example: NSG

7. *The Government will ensure that its regulations require the following:*
- a. *an authorisation for the transfer of non-listed items where the exporter **is informed** by the competent authorities of the Government in which it is established that the items in question may be intended, in their entirety or part, for use in connection with chemical or biological weapons activities;*
 - b. *that if the exporter **is aware** that non-listed items are intended to contribute to such activities it must notify the authorities referred to above, which will decide whether or not it is expedient to make the export concerned subject to authorisation.*

(Guidelines for Transfers of Sensitive Chemical or Biological Items – June 2015)

EU Dual use Regulation example

*4.3. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter **has grounds for suspecting** that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1 of this Article.*

(EU Regulation 2021/821 of 20 May 2021)

Strategic Trade Control ?

*Risks assessment and constraints required by authorities to operators to allow **exchanges** of nuclear goods and technology.*

Two categories of exchanges/operations

- Tangible transactions (physical movements)
Export, import, transshipment, transit, financing, shipping
- Intangible transactions (virtual movements)
Export, import, financing, brokering

Article III.2 NPT

Parties make a commitment not to **provide**:

(a) source ...

(b) equipment or material especially designed ...

to any non-nuclear-weapon State (NNWS)

UN Resolution 1540 example

*Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to **control export, transit, trans-shipment and re-export and controls on providing funds and services** related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, ...*

Exchanges

In our example, the operation is an export of an software in a tangible/intangible form.

Export control vs sanctions

...sounds like synonyms but...

Export Control

- Fighting WMD, conventional weapons, ... proliferation
- Mostly politically binding implemented nationally (Wassenaar Arrangement, NSG, Australia group)
- Assessing the end use/end users to avoid potential misuses
- Scope :
 - Dual use
 - Diamonds, conflict minerals,...
- Permanent provision

Sanctions

- Formally restoring, enforcing or maintaining peace and security
- Essentially legally binding instruments (UN, EU, Nationals)
- Exercice pressure on a third State authority to change/adjust a national policy
- Scope:
 - Nuclear, chemical conventional,...
 - Individuals, groups
 - Any goods
 - Funds frozen
- In principle temporary

Export control vs sanctions (EU)

...sounds like synonyms but...

Export Control

- Promoting trade
- Common commercial policy instrument
- Co-decision** Parliament and Council (qualified majority)
- Scope :
 - Dual-use (Regulation 2021/821)
 - Torture related items (Regulation 2019/125)
 - Minerals (Regulation 2017/821)
 - Diamonds (Regulation 2368/2002)
-  Weapons exception (TFUE 346, Common Position 2008/944/CFSP, 2003/468/CFSP)

Sanctions

- Intergovernmental policy
- Common Foreign and Security Policy (21, Title V, chapter 2 TEU)
- Unanimity** within the Council: MS shall *conform* their national policies
- Implementing restrictive measures (215 TFEU):
 - Regulation adopted exclusively by Council **qualified** majority (Parliament is informed)

Sanctions: trade control condition

EU Example: EU (Dual-Use) Regulation 2021/821's objective:

*“This Regulation aims to ensure that in the area of dual-use items, the Union and its Member States fully take into account all **relevant considerations**”.*

*“ Relevant considerations include international obligations and commitments, obligations under **relevant sanctions**, considerations of national foreign and security policy ... “.*

Article 15

*In deciding whether or not to grant an **authorisation** ...Member States shall take into account all relevant considerations, including [...]:*

*b. Their obligations under **sanctions** imposed by a decision or a common position adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations*

EU sanctions
(based on article 21,
29 TUE and 215 TFEU)

SCOPE

OSCE and UN

EU Member States ?

Certain sanctions are switching off the export control procedure and will be aligned as well to the turn off procedure of the sanctions ones

"The ... export of all dual-use goods and technology ...for military use in Russia or for any military end-user in Russia ..., shall be prohibited whether originating or not in their territories" (article 3 of the Council Decision 2014/512/CFSP).

No consensus at the UN level

Several packages of sanctions adopted by the EU:

- First round in September 2014 (regularly renew)
- Second round in February 2022 (10 packages)
- Last one : Council Regulation 2023/427 of 25 February 2023

<https://sanctionsmap.eu/>

- Very large scope: weapons, dual use goods, financial measures, aviation, iron, luxury goods, oil, ...
- Third country entities: Iran over the supply of drones

List of sanctions

Sanctions adopted also against Crimea or Sevastopol and the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine

- Import prohibition into the EU of goods originating from those areas with the exception of goods having been granted a certificate of origin by the Government of Ukraine.
- Export prohibition almost similar to the Russian ones

Sanctions in return adopted by Russia against the EU

- 2014/15 : import ban of milk and dairy products, pork, poultry, beef, fish and crustaceans, vegetables, and fruits
- 2022 export prohibition of 200 products: telecoms, medical, vehicle, agricultural, and electrical equipment, as well as some forestry products such as timber.
- 2022: gas supply shut off to Poland and Bulgaria and potentially any other EU countries not paying in rubles

How sanctions might be turned off?

Council Decisions adopting sanctions against a third State include an **expiring** date. It may decide to renew or amend it before the deadline.

It is the case for the Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Article 9

1. *This Decision shall apply until 31 July 2015.*
2. *This Decision shall be kept under constant review. It shall be **renewed**, or amended as appropriate, **if** the Council deems that its **objectives** have not been met.*
3. *The restrictive measures laid down in this Decision shall be reviewed no later than 31 October 2014, in particular taking into account their effect and the measures adopted by third States.*

Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine has been:

- Amended
- Renewed

Example Council Decision 2015/CFSP/1764 - Recital

- On 31 July 2014, the Council adopted Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.*
- The Council considers that those restrictive measures **should not affect** the European space industry*
- Therefore, certain operations concerning specific pyrotechnics ..., should be permitted,*

Example Council Decision 2015/CFSP/2431 - Recital

- (3) The Minsk agreements will **not be completely implemented** by 31 December 2015. Decision 2014/512/CFSP should therefore be renewed for a further six months in order to enable the Council to further assess the implementation of those agreements*
- (4) Decision 2014/512/CFSP should therefore be amended accordingly,*

Certain measures are **switching off** the export control procedure and will be aligned to the turn off procedure of the sanctions ones

"The ... export of all dual-use goods and technology ...for military use in Russia or for any military end-user in Russia ..., shall be prohibited whether originating or not in their territories" (article 3 of the Council Decision 2014/512/CFSP).

Certain measures will not expire unless a new decision will be adopted

- Commission Decision (EU General Export Authorisation, Council Decision 2014/512/CFSP)
- Council Decision (WTO Most Favoured Nation)

Necessity to define sanctions objectives

Objectives of the 10 packages of sanctions **have not been defined**.

Article 8 of Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine has been amended :

1. *This Decision shall apply until 31 July 2022.*
2. *This Decision shall be kept under constant review. It shall be renewed, or amended as appropriate, if the Council deems that its **objectives** have not been met.*

What are those objectives back to 2014, before 2014, cease fire, ...?

Necessity to define sanctions objectives

Article 9 (1) of Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine has been amended by Council Decision 2023/191 of 27 January 2023:

*(3) As long as the illegal actions by the Russian Federation **continue to violate the prohibition on the use of force**, which is a peremptory rule of international law, it is appropriate to maintain in force all the measures imposed by the Union and to take additional measures, if necessary. Consequently, Decision 2014/512/CFSP should be renewed for a further 6 month*

...

1. *This Decision shall apply until **31 July 2023**.*

What are those objectives back to 2014, before 2014, cease fire, ...?



European Studies Unit



Thank you!