



Aware of ... Grounds for suspecting ...

Continuation of our Series on Catch-all: Part 2

2 - If you are aware of, or have grounds for suspecting, ...



There are three triggers for the implementation of the catch-all provisions.

The first is an information notified by the Government that the export, brokering services or technical assistance in relation with non-listed dual-use items or military equipment shall be subject to a license. Such an information may be directed towards a specific exporter or operator, but may also take the form of a collective decision. The operator shall, well understood, have to comply with such a license requirement.

The two other triggers reside on the side of the exporter or operator. There is a general responsibility for all exporters to assess the possible diversion of their products towards a WMD programme or the occurrence of any of the other catch-all cases mentioned here before. If during this assessment which must be recurrent, the exporter gets awareness or grounds of suspecting of the catch-all event, then he must act.

The exporter is "aware" of ...

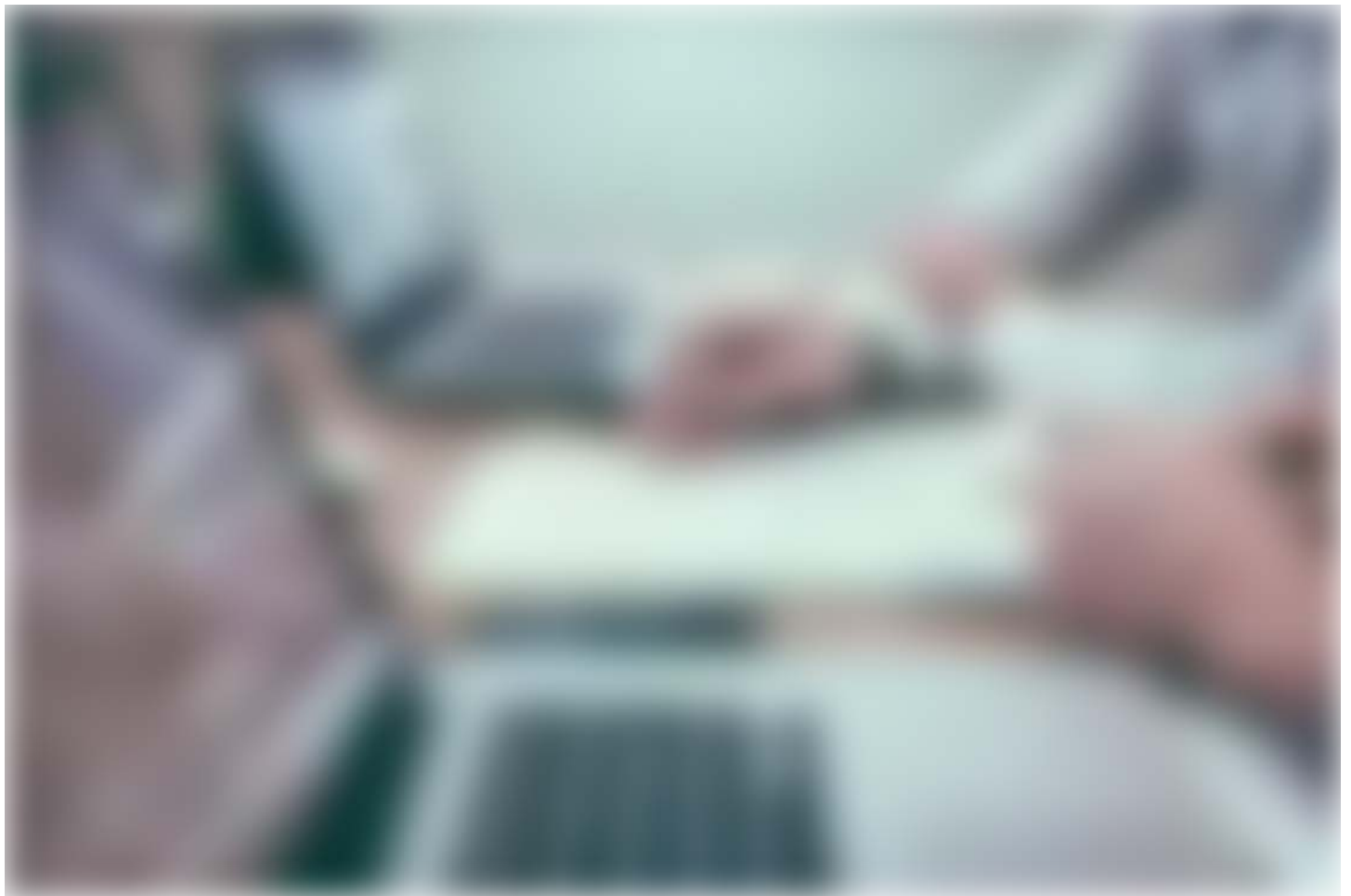
The wording "aware of" is not defined, neither in the EU Regulation, nor in Luxembourg law. The French

versions of the text use the wording "*a connaissance*", the German ones "*ist dem Ausführer bekannt*".

It is generally admitted that awareness results from evidences based on information received directly or indirectly by the exporter. This requires positive knowledge (direct intent). The German authorities, for example, are of the opinion that such awareness also exists when the exporter is acquainted with sufficient sources from which he can acquire the knowledge in a reasonable way and without special effort. The exporter may not deliberately ignore apparent indications, nor completely fail to perform due diligence.

"To deem possible" (exporter's indirect intent, negligent ignorance) is however not sufficient to constitute awareness.

The existence of awareness is assessed throughout the exporter's different departments. Employees who are aware will render the whole company aware.



The exporter has "grounds for suspecting"

As for "awareness" mentioned here before, the wording "grounds for suspecting" are not further defined in the EU or Luxembourg export control regulations.

In French, the authors have used the wording "*soupçon*", in German "*Grund zur Annahme*". One may note that the German translation seems not be in accordance with the English and French versions, as "suspecting" or "*soupçon*" are words which be assimilated in German language to "*Verdacht*" or "*Vermutung*", more than to "*Grund zur Annahme*", the latter having higher requirements to the information at hand.

An exporter who is aware of, or has grounds of suspecting that his product or service will end up with a critical end-user or end-use, must abandon passivity and take positive action in order to avoid any liability. The type of action is dependent of the type or product and the operation.



(Part 3 to follow)