



Dual-Use Regulation 428/2009 – Series (1) – Definitions

More than 4 years after the EU Commission submitted its proposal, the European lawmakers reached on 9 November 2020 a full provisional agreement on a final compromise text to amend the EU Dual-Regulation 428/2009 of 5 May 2009.

In a new series of contributions, we will check what will stay from the export control regime on dual-use items, but more importantly, what will change once the text will be approved and published in the EU Official Journal.

In the first part, let us concentrate on the definitions, contained in Article 2 of Regulation 428/2009 which sets up a EU regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items. We will however only focus on definitions for which amendments are substantial, and not only formal.

Export. The definition of this important wording will, in the future, include the outward processing procedure, where EU goods may be temporarily exported from the EU customs territory in order to undergo processing operations. Regarding export of software and technology, oral transmission will occur not only by telephone, but in the future also by any voice transmission medium (video call for example).

Re-export. Re-exports are until now not including items in transit. In the new definition, it will be specified that a re-export also occurs if, during a transit through the EU customs territory, an exit summary declaration has to be lodged because the final destination of the items has been changed.

Exporter. The new definition is not referring anymore to the person on whose behalf an export declaration is “made”, but to the person who, at the time when the export (or re-export, or exit summary) declaration is “accepted”, is holding the contract with the consignee in the third country and has the power for determining the sending of the items out of the EU customs territory. If this case is not applicable, and that we are not, as well, in the situation of a transmission of software or technology, then the natural person carrying the dual-use in his(her) personal baggage will be considered as an exporter.

Broker. The new definition will not anymore refer to the place of residence or establishment in a EU Member State of the broker, meaning that also brokers resident or established outside the EU will be

included in that definition as soon as they carry out brokering services from the EU customs territory into a third country.

Technical assistance. Technical assistance will be defined as any technical support related to repairs, development, manufacture, assembly, testing, maintenance or any other technical services, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services. This new definition will include assistance by electronic means, by telephone or any other verbal form. Will be considered as a supplier not only any person supplying such technical assistance from the EU to a third country, but also EU residents supplying technical assistance within the territory of a third country, or towards a third country resident temporarily present in the EU.

Transit. The new definition is going further in the explanation of goods in transit, by including (1) goods placed under an external transit procedure and only passing through the EU, (2) goods trans-shipped within, or directly ex-exported, from a free zone, (3) goods directly re-exported from a temporary storage facility, or (4) goods brought into the EU territory on the same vessel or aircraft that will take them out of that territory without unloading.

Cyber-surveillance items. These items are newly defined as being 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.

Internal compliance programme. The ICP finds its way to the definition section of the Regulation. It will mean ongoing effective, appropriate and proportionate policies and procedures adopted by exporters to facilitate compliance with the Regulation and includes due diligence measures assessing risks related to the export of the items to end users and end uses.

Essentially identical transaction. This wording (used in relation with communications between EU Member States) will mean a transaction concerning items with essentially identical parameters or technical characteristics to the same end user or consignee as another transaction.

