lisakucher3 Jan 26, 2021 3 min read

Dual-Use Regulation 428/2009 - Series (4) - Non-listed dual-use items

Even if a dual-use item is not listed in Annex I or Annex IV, the so-called "catch-all" provisions shall apply. The future text will remain substantially the same as in the 2009 version.

An authorisation shall be required for the **export** of such non listed dual-use items I if the exporter has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part:

1. for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons;
2. for a military end-use if the purchasing country or country of destination is subject to an arms embargo.
3. for use as parts or components of military items listed in the national military list that have been exported from the territory of a Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State.

The definition of "military end-use" will not change neither. The wording will include: (i) incorporation into military items listed in the military list of Member States; (ii) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the above mentioned list; or (iii) use of any unfinished products in a plant for the production of military items listed in the above mentioned list.

If an exporter is aware that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of these uses, he will be obliged to notify the competent authority, which shall decide whether or not it is expedient to make the export concerned subject to authorisation.

EU Member States will be able to continue, as was the situation under the current version of the Regulation, to prohibit or impose an authorization requirement on the export of dual-use items not listed in Annex I for reasons of public security or human right considerations. The new text adds that public security also includes the prevention of acts of terrorism.

Entirely new will be a provision that requires an authorisation in case another Member State requires an export authorization on the basis of a national control list of items adopted by that Member State and published by the European Commission. The condition herefore will be that the competent

authority has informed that the not-listed items at stake are or may be intended for uses of concern with respect to public security or human rights.

For the **brokering** of non-listed items, no change neither. The new text leaves it to the EU Member States to require an authorization for brokering services if the items at stake are or may be intended for any the above mentioned uses.

The same rule (authorization requirement only by the way of national legislation left to the appreciation of Member States) will continue to apply to the **transit** of non-EU dual-items which are not listed in Annex I.

The new Regulation will extend the same rule to **technical assistance**, a field not yet covered by the current text.

Note: This contribution is based on the full provisional agreement reached on 9 November 2020 on a final compromise text to amend the EU Dual-Regulation 428/2009 of 5 May 2009. The entry into force of this text is still subject to an approval by the Council and the Parliament and a publication in the EU Official Journal.