

2002-09-13

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Catch-all - a flexible tool for the future

The Catch-all mechanism – what's in a name?

Generally speaking a catch-all mechanism is a tool that can be used in trying to prevent the proliferation of what is deemed a sensitive product to a destination that the exporting country considers to be unsuitable. The definition itself does not reveal much - countries tend to use different names, but the general idea is basically the same. Without wanting to get trapped in a quagmire of malapropism in trying to sort out the vast range of definitions and names; catch-all, catch more, goods for certain uses, etc - the following can be said about the system that is in use within EU - using Sweden as a specific example.

The EU framework – the judicial structure

The European Union had a catch-all mechanism long before the new EC Regulation 1334/2000 came into force. The previous Council Regulation on the control of dual-use items, Council Regulation (EC) No 3381/94, included a catch-all clause in Article 4 concerning goods not listed in Annex I. An authorisation is required for non-listed products if the intended use can be connected/related to weapons of mass destruction and the exporter has been informed by appropriate authorities or are aware of such use through his or hers own account.

In 1998 Sweden introduced a national catch-all clause regarding not listed items intended for use as parts or components of military items that had been exported without an authorisation or in violation of an authorisation. This was in national terms a way of avoiding exports of supporting items to a weapon-system, to which an export normally would not been authorised, or if the original export was in breach of such an authorisation. This specific export-situation should not be mistaken for an ordinary export of spare parts, instead it should be seen as an attempt to close a potential door to

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involuntarily support of a weapon-system that would not initially have been authorised for export.

When the negotiations of the new EC regulation started in the Council Ad Hoc Working Party on dual use goods back in 1998, Sweden suggested that the specific Swedish catch-all clause on components should be included in the new regulation. The Commission, seeing the benefits of adopting such a clause, later included it in its own proposal. The end result became article 4:3.

Art. 4 para 3 An authorisation shall also be required for the export of dual use items not listed in Annex I if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part for use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State.

The EU catch-all mechanism developed further during the negotiations that led to the adoption of 1334/2000 in June 2000. Beside the two catch-all clauses already mentioned, there was another proposed catch-all clause regarding not listed items intended for export to destinations subject to an arms embargo imposed by the EU, the OSCE or the UN Security Council. This catch-all clause was also adopted; hence the Council Regulation (EC) 1334/2000 contains three different catch-all clauses.

Art. 4 para 2: An authorisation shall also be required for the export of dual-use items not listed in Annex I if the purchasing country or country of destination is subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the OSCE or an arms embargo imposed by a binding resolution of the Security Council of the United Nations and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for a military end-use. For the purposes of this paragraph, military end use shall mean:

- (a) incorporation into military items listed in the military list of Member States;*
- (b) use of production-, test-, or analytical equipment and components therefore, for the development, production or maintenance of military items in the abovementioned list;*
- (c) use of any unfinished products in a plant for the production of military items listed in the abovementioned list.*

Catch-all as a mechanism

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The EU Member States are legally bound by the EC regulation 1334/2000, but the implementation of the regulation, and quite naturally the catch-all system, relies on national administration and includes an amount of flexibility. The Member States have the freedom of implementing stronger national measures if they deem it necessary. It is also up to the Member States to choose how the export destination should be validated. Sweden has a case-by-case structure in place, but other methods are possible. The Member States are also strongly encouraged to share information on denials made under the catch-all article – an exercise in the interest of transparency. The mechanism itself relies on two legs: **information** and **awareness** – without either of them the system falters.

Art. 4 para 1: An authorization shall be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the competent authorities of the Member State in which he is established that the items in questions are or may be intended, in their entirety or in part, 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.

Art. 4 para 4: 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 uses referred to in paragraph 1, 2, 3 he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorization.

Impact on industry

The catch-all mechanism has been discussed at length in a vast variety of export control fora during the last decade and even more intensely during the last couple of years. One concern, which has been raised at several occasions, is what kind of impact the adoption of such a system has on industry. Controlling dual-use products is difficult per definition. Not all companies are aware that their specific product may be intended for an entirely different purpose and the overall majority of the companies act in good faith. The control-lists developed in the different export control regimes as well as nationally are vital tools to facilitate the control – the next step is to inform industry and make them aware of these lists.

So what are you supposed to do without lists? How can you control or be aware that certain non-listed items sometimes fall under the export control

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laws if you don't know which products they are? The key words here are **information** and **vigilance**. Information is an important factor in the daily work of the authorities, as well as an amount of vigilance is equally important on behalf of the exporter.

The National Inspectorate for Strategic Products – the licensing authority in Sweden, has a very good relationship with our industry in this sense. Maybe it is one of the benefits of being a small country with a small administration, but in the dialogue between the Swedish industry and the licensing authority many questions and concerns are cleared out. The Inspectorate arranges a whole collection of information campaigns and seminars aimed at our industry to bring out the message of the legal structure and the requirements Sweden has to secure a safe and sound export of items that do not have a legitimate civilian use. The Inspectorate has also the possibility of making so-called "house-calls" and the companies know that information from the Inspectorate is only a phone-call away.

We do not want to impose impossible rules and regulations on our industry – but an equally high priority is to promote as secure a market as possible. In this sense another keyword is **trust** - the dialogue between authority and company supports also this purpose.

Black lists or white

Another favourite topic for discussion is how the destinations should be validated – certified. Other countries outside the EU framework as well as within use a land-list approach. Sweden has instead a case-by-case approach in use. We believe that all cases should be taken into careful consideration individually as the conditions can change quite rapidly. A case-by-case approach gives us the flexibility of reacting to change quickly – for better or worse. However, a complicating factor of having a case-by-case approach is that the industry does not know beforehand if a country or a destination is considered an inappropriate end-user. Apart from the embargoed countries referred to in article 4 para 2 in 1334/2000, there is no obvious "black-list" of countries. The Swedish industry therefore has to consult with the authorities - an activity that in itself gives good spin-off effects.

So, a catch-all mechanism does not automatically result in a black-list system, but on the other hand it does not close the door for implementing such a system either. Both systems have merit and both can be used within the EU judicial framework

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Catch it all?

Can we really catch it all? That question has become considerably more important during the last couple of years. We believe that a more solidified international use of the catch-all mechanism can promote our non-proliferation policy on sensitive technologies and also make it more effective. In many export countries the mechanism has now become a vital core of the national export control. It has a preventive character as well as it increases the level of awareness in the exporting business.

It can also become a flexible tool for improving the controllists. Negotiations targeted on changing the controllists in any of the international export control regimes, as well as on a national scale, usually takes a very long time – careful consideration has to be taken to every suggestion and proposal to accommodate all interests and strike the right balance between legitimate trade and security concerns. This makes national or international list-revisions an important, but slow moving process. The lists also tend to be quite long.

What the events in the United States last year showed us was that export control issues today are of increasing importance. We can also conclude that a matter of urgency has come into our work with the lists. The catch-all mechanism can in this case prove to be of paramount importance to get a dynamic control situation as possible – the lists can also be shortened on a general basis.

So maybe we won't be able to catch it all, but a catch-all mechanism is a good step along the way to a flexible and even more effective international export control system.