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Catch-all controls

We need no longer deal with the question of whether catch-all controls are still required. Appropriate regulations have meanwhile been integrated into all export control regimes. On the European level we have catch-all clauses since the amendment of the EC-Dual-Use-REG at 2000. And already since 1991 there are national regulations for catch-all controls in Germany. The crucial question is how these regulations are implemented. In this context the exchange of experiences gained is of particular significance because this is the only way of improving existing control mechanisms and guaranteeing efficient export control.

What factors are important with a view to effective catch-all controls? To be able to answer this question one should first look into the special features of this control mechanism:

I. Characteristics of catch-all regulations

The catch-all system is an independent mainstay of the export control system. It supplements goods-related elements and allows the specific control of export procedures whose sensitivity is not due to the technical properties of the export goods but to their intended use and destination. Catch-all provisions cover exports of non-listed items to certain sensitive countries if such items are exported in connection with their utilisation for weapons of mass destruction, delivery systems for such weapons but also for conventional military equipment.

The structure of catch-all definitions is largely identical. A license is required if the items, in their entirety or in part, are or may be intended for certain uses (e.g. development, production of weapons of mass destruction, delivery systems for such weapons and military end-use) and a respective information was provided by the competent authority or by the exporter.

II. Important factors for an effective catch-all control system

The below-mentioned matters are based on European and German catch-all regulations and on long lasting German experiences with catch-all controls.

1. Information mechanism

Both European and national regulations for catch-all controls (EU: Article 4 of the EU Dual Use Regulation, Germany: Sections 5c and 5d of the Foreign Trade and Payments Regulation) are based on a common information mechanism.

a) Information procedure by the competent authority

This is a case-by-case procedure. The competent authority informs the exporter in an individual letter indicating an authorisation requirement pursuant to Art. 4 EU-Dual-Use-REG for an explicitly specified export project. It is particularly important here that the information be clear and comprehensible. The information should refer to the export of definite items to a definite consignee. It may also be addressed to one exporter only and not generally to an indefinite group of exporters. Otherwise, they would not be able to recognise the duty to file an application for lack of concrete address. Sufficient reference must be made in the substance of the information. Therefore, the information has a consequential effect only for intended exports of identical goods to the same consignee. Information only related to use or consignee is not sufficiently specified because a case-related attribution is not possible.

As the information involves consequential effects for comparable exports of identical goods to the same consignee, a time limitation is questionable. It must be kept in mind that the constitution of licensing requirement for the intended export continues to apply if the matter of facts, the objects of regulation, i.e. the goods and the consignee remain unchanged. It seems to be justified to assume a continuous effect even in case of a temporary waiver of the intended export or repeated approach of the potential customer to the exporter with regard to the same item.

b) Information by the exporter

At the same time, the catch-all system makes it mandatory for exporters to inform the competent authority themselves whenever they happen to know about export items being put to some use under catch-all clauses. In these cases the exporter must have positive knowledge of such a use. This knowledge is to be given a close interpretation meaning exclusively substantiated knowledge. But this does not mean that the export businesses are required to make investigations themselves. Needless to say that the exporter may not ignore pertinent knowl-

edge that may be available to him. And if he has “reasons to believe” that an use within catch-all clauses is possible, he has to examine this more closely. We have to speak about “positive knowledge” if - based on the information available to him – the exporter must come to the conclusion that a use within the meaning of catch-all clauses can be assumed.

The exporter must carefully consider what information to submit to the responsible authority. On the one hand, he may decide to report in full so as not to make a mistake. On the other, he may decide not to report anything because he feels there is no relevance. The main point is to attain an equilibrium between the two extreme possibilities.

2. Elements of use

Catch-all regulations are use-related elements. The authorisation requirement is primarily based on the use of the goods. An authorisation is required if “the items, in their entirety or in part, are or may be intended for certain uses ...”. Problems arise mainly in interpreting the phrase "may be intended". What is to be the scope of the interpretation? Should all goods be covered that, although they are not listed, may be included immediately "afterwards"? In this context so-called watch lists have repeatedly been discussed.

When interpreting this phrase in Germany both the technical and the subjective component play an important part. A purely goods-related definition of use elements is impossible due to the "spectrum of the elements". Therefore, it is necessary to assess all information and findings indicating whether or not an end-use under catch-all clauses is likely or unlikely. "May be intended" could be agreed to in an individual case if specific goods-related conditions are met and, in addition, relevant information on the recipient is available to the effect that he operates in the respective category of cases of end-use in the sense of catch-all controls and is likely to use the goods for this purpose.

3. Extent of catch-all controls

To define a scope of catch-all controls is a harmonised interpretation of terms very important. In this regard an exchange of information on different levels (e.g. Regime- or EU-Member States) is very helpful because it avoids in case of a failed procurement attempt in one Member State, that the company (or branch) of another Member State is successfully contacted.

As catch-all regulations do not cover a particular, specifically defined scope (e.g. a list of goods) it is especially important to define the extent of controls. Catch-all control system should not be interpreted as all-inclusive control, but as higher-quality control. In other words, it aims for better quality rather than more quantity.

4. Industry participation

An active involvement of the industry is indispensable for an effective catch-all control. On the one side an effective export control within company is an important element of catch-all system as a whole. Both the state and enterprises have a strong interest in effective controls within companies: Companies want to avoid negative reports in mass media, get important markets by good reputation and abide by the law. The state is reliant on the information from the exporter concerning a possible use of the goods under catch-all clauses. On the other hand the support by the state is very important. It is a crucial aspect of the practical implementation of catch-all regulations to raise the awareness of exporters. The competent authority should inform industry about typical sensitive transactions and critical end-users and any specific legal and procedural situation. In other words: there should be information programmes for industry which help to draw the attention of the exporter to procurement attempts and structures.

5. Exchange of experiences

As mentioned earlier, an exchange of experience on catch-all controls at regular intervals is particularly important. This is the only way to achieve effective control. This Export Control Conference also offers a valuable opportunity for discussing experiences in the field of catch-all controls and helping to improve this export control mechanism.