



9TH INTERNATIONAL EXPORT CONTROL CONFERENCE

End Use and End-User Controls

Introduction

The export control system faces increasing challenges in an environment of globalisation, technological progress and continued threats posed by proliferation and terrorism. UNSCR 1540 includes a broad catalogue of elements in order to secure effective export controls also beyond the member states of export control regimes. Aside from the need for an up-to-date export control legislation, great importance must be attached to the practical implementation of export control rules and regulations. The question of “end-use” and “end user controls” is of central importance in the licensing procedure itself and to the whole system of export control.

In practice the process of end-use control starts already a long time before the export itself, even before the licensing procedure. If the necessary information was only gathered in the actual licensing procedure and by the licensing authority alone we would rarely get a satisfactory result. Above all, it would be difficult to stick to an acceptable time frame for deciding whether a licence will be granted or denied.

Talking about the time factor also means to clearly emphasise that the licensing procedure for dual use items leads to a forecasting decision in terms of end-use, it is in fact the attempt to predict the future. A 100 % guarantee can never be expected and achieved, particularly in case of dual-use products. Therefore, we should aim at finding the best principle possible for gathering appropriate information and - on this basis - to come to a rational risk assessment.

End-use control as an overall system

All elements of the end-use and end user control process need to be put together to form a coherent system. A flexible system is necessary, which is based on a differentiated approach, especially with regard to

1. the reliability of the persons involved in the transactions and the tasks of the applicant **(parties involved)**,
2. be able to properly evaluate each individual case and the different sensitivity levels of consignee states concerned **(risk management)**,
3. the principle that sensitive cases/items need more efforts than cases of less sensitivity **(basic and optional elements)**,
4. a distinction between the different phases of the procedure and the instruments available for end-use control is necessary **(three phases approach)**.

Re 1. Parties involved

The motivation behind a clear assignment of responsibility and a transparent co-operation, combined with an awareness raising programme is the belief that control performed exclusively by the state - without the participation of industry - is no optimum basis for a well-functioning export control. Self-control of the exporting industry is an important and indispensable element of export control as a whole. Awareness on the part of industry, research institutes and academics about the end use of an item and the end user has a key role to play. Export control can only be effective when all parties involved (manufacturers, exporters, engineers, scientists etc.) support such control and e. g. fulfil their duties of providing information about the end-use and the end user.

Guidance and relevant information for the industry is an indispensable element. This includes mainly information on the necessity and the possibilities of end-use safeguards and the requirements in the licensing procedure; e.g. in Germany there are a number of check lists referring to insufficient documents and Information Leaflets on the issue of end-use including the publication of specimen of End-User Statements to be presented in the licensing procedure.

Furthermore, a close co-operation between licensing and customs authorities, company auditors at relevant export enterprises as well as efficient and adequate penal provisions should not be neglected in the overall system.

While analysing the end use and the parties involved the question arises if direct verifications of the end users can be effected by the licencing authority and if yes, which kind . The legal questions often linked to the keyword „post shipment control“ are various. At least in Germany I see legal problems if we tried to expand our export controls beyond the German territory. From my point of view problems might arise if German authorities checked the potential end users on their own authority, preliminarily or afterwards. I think, such a check wouldn't provide much insight anyway in case a merchant or processed exported goods are concerned .

Another interesting legal questions arises concerning the idea of certifying the end user or concerning the notion "validated end user". At least in Germany there is the basic principle that the exporter is responsible for his exports and thus, for the export control. It would shift the paradigm if the exporter and, where required, the licencing authorities, no longer had to verify preliminarily the risk of misuse, but one could or had to rely solely on the right behaviour, respectively on the certified end user.

From my point of view some questions still remain unanswered, if we shift from checking an individual case of a certain export risk on a case by case basis to solely checking the „secure supply chain“.

Re 2. Risk management

It seems to be possible to combine different elements depending on the potential risk in order to safeguard the end-use. The underlying principle is that sensitive cases should be subject to a higher degree of scrutiny than less sensitive cases.

The decision to focus the resources for export controls on sensitive cases is indispensable for the smooth functioning of the administration, looking at the growing number of German exports and, as a result, the increasing number of licence applications.

Only a differentiated processing even in the field of end-use controls makes it possible to solve the contradiction between "security" and "promptness". A comprehensive and, thus, often very time-consuming screening to reach 100 % safety - which is never possible for a prognosis - is sometimes hardly compatible with the demand for a speedy and transparent processing which is indispensable for the exporter. That is why we have to concentrate on the essential, on the really sensitive cases.

The evaluation of the degree of sensitivity remains entirely within national responsibility. But it is necessary to establish a system of risk analysis, especially for the area of end-use control. This is the only way for the licensing authority to recognize in the course of the processing procedure the potential misuse in a certain country on which it must concentrate in the individual case. Such a concerted security/risk analysis of end-use is, on the other hand, also indispensable for the legitimization of the licensing authority's work. Only an intelligent risk management makes a transparent evaluation possible and guarantees an equal treatment of comparable cases through legal precedence. At the same time the authority can protect itself against the reproach of arbitrariness.

Re 3. Basic and optional elements

We can distinguish between core and optional elements or, in other words, combines basic and additional elements depending on the risk assessment.

When - based on a risk management - selecting different core or optional elements, Germany took into account

- ◆ that in case of the export of armaments and dual-use items different questions will partially arise in connection with end-use safeguards.

Normally, in case of military items the question of the plausibility of use is not given priority.

Mainly, it is a military use. If the government of the country of destination is the end user, then it is a predominantly political assessment whether to deliver these goods or not.

In case of dual-use goods the question of military or civilian end use is essential and with this, the question whether the statements given by the applicant and potential recipient are plausible or not.

There are a number of core elements and optional elements which can be taken as a basis when verifying an export.

- ◆ The assessment of non-listed goods, which may be subject to a catch all clause, is particularly difficult. In this case the end use, respectively the proofs of a misuse establish the duty to obtain a licence. It is a real challenge for all involved parties, in particular the licencing authorities, to glean the relevant information and to evaluate it properly.
- ◆ When embedding all measures of end-use safeguards in one system, both preventive and repressive elements have to be considered.
- ◆ that end-use certificates are an element of end-use controls. Effective end-use control can, however, not only be achieved with the instrument of end-use certificates. End-Use Certificates cannot substitute a responsible export control to be exercised by both, the authorities and the companies.

Re 4. Three phases approach

Germany distinguishes between three phases of an export when dealing with end-use control:

- A. the pre-licence phase,
- B. the application procedure and
- C. the post-licence phase.

Within these three phases the different elements can be taken into consideration which, in part, have an interrelation beyond the individual phases. In general, basic elements should always be applied. In case of some optional elements, the major benefit may be to gather experience for future procedures.

A. Pre-Licence Phase

End-use control starts already in the run-up to an application procedure. The awareness of industry plays an important role to achieve the objectives. The exporters must be aware of the legal requirements and their share in the responsibility. That is why the exporting company should have an efficient and transparent Internal Compliance Programme (ICP) for which a responsible person should be nominated. In addition, an indispensable element is the proper information of the companies by the controlling authorities in order to raise their awareness of the existing legal provisions.

B. Application procedure

The licensing procedure itself covers all the measures taken in connection with a specific application for an export licence in order to verify the data provided by the exporter with a view to end-use control. The result of this investigation shows that an application is plausible if the data given by the applicant are substantiated / conclusive and that there is no further information available which may cause reasonable doubt with respect to the applicant's data. The decision about a plausible application is based on end-use control and end-user screening.

C. Post-Licence Phase

This phase is to confirm the findings on which the granting of an export licence was based, in particular through the information exchange among the authorities and services involved as well as through the

exporters' checks. An additional option is e. g. to obtain governmental or private delivery verification certificates and the compliance with other requirements resulting from the licence.

From the licensing authority's point of view, I only like to underline many exporters tend to make a lot of promises as soon as the export licence has been granted, but later on in the next case they do not want to be nailed down to them.

An interesting legal question is in how far findings in the post licence phase which are only gained after granting the licence can be used for the decision on the imminent export transaction. In other words, what kind of requirement can be connected to a licence and how far reaching should it be. Should e.g. a company which exports technology be bound to a requirement to notify the authority of all the goods that are produced by this technology in the country of destination or to notify of further consignees? Can one make the licencing decision dependent on this? And can one gain really new knowledge for future comparable cases in the long term. It seems to me that a number of legal questions are not exhaustively discussed yet.

Summary

End-use and end user controls control in connection with dual use items is a look to the future, we should never forget that we are talking about a “forecasting judgement”; a prediction of what will come on the basis of the information available today. To create such a picture about the future seems like a jigsaw puzzle. Here too, all pieces have to be put together before the picture can be clearly recognized. BAFA, Germany's central competent licensing authority is convinced that clear responsibilities and standards are necessary to say who has to contribute these pieces of a puzzle/information when and where. At different moments in time there are different pieces of information, i. e.:

- the item to be exported
- the exporter
- the consignee
- the licensing authority
- other information media.

If the picture is still not clear don't forget that a denial is also possible.