

# **REPORT**

on

## **IMPROVEMENT OF THE EXPORT CONTROL SYSTEM IN UKRAINE**

(Contract SSM 2010/548 dated 18 February 2010 between the Swedish  
Radiation Safety Authority and the Scientific and Technical Centre)

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## **PREFACE AND ACKNOWLEDGEMENTS**

This Report presents the results of work accomplished during 2010 under Contract SSM 2010/548 between the Swedish Radiation Safety Authority (SSM) and the Scientific and Technical Centre (STC). It continues completes the research series initiated in 2007 and is dedicated to studying the European Union legislation and best practices in controlling the export of dual-use items with the overall purpose of improving the current Ukrainian law and harmonizing it with the European Union standards.

All the activities under this contract and the previous ones were undertaken for the benefit and in support of the law-making activities pursued by the State Service of Export Control of Ukraine; hence the research topics had been proposed by or agreed with the State Service's experts.

The Report comprises the following sections:

1. Overview of legislative novelties in the new Regulation (EC) No. 428/2009;
2. Research and analysis of specific legislative provisions of EU Member States in the area of export control over dual-use items:
  - 2.1. Catch-all controls;
  - 2.2. Brokering controls;
  - 2.3. Control over negotiations.
3. Internal compliance programs for enterprises.

The recommendations developed and presented in this Report are based on research and analysis of relevant European Union legislative provisions and are dedicated to amend and complement the current provisions of Ukrainian law in the area of export control over international transfers of dual-use goods.

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## **OVERVIEW OF LEGISLATIVE NOVELTIES IN THE NEW REGULATION (EC) No 428/2009**

### **INTRODUCTION**

This overview is a follow-up to the series of studies completed under cooperation between the Swedish Radiation Safety Authority (SSM) and the Scientific and Technical Centre of Export and Import of Special Technologies, Hardware, and Materials (STC). The objective of those studies was to familiarize Ukrainian export control experts with relevant legislative standards of the European Union and EU Member States in this area and develop recommendations for amending Ukrainian law as necessary to harmonize it with the European Union's legislative requirements regarding the control of international transfers of dual-use goods and technologies. The Annex to the Overview contains a translation of Regulation (EC) No 428/2009 into Ukrainian.

Initially, a thorough overview of Regulation (EC) No 1334/2000, which at the time of the study set out norms and rules for exporting dual-use goods and technologies from the EU territory, mandatory for EU Member States; as well as a comparative analysis of its provisions versus the requirements of its counterpart Ukrainian law was conducted under SSM Contract Identification No. 2008/1797.

The Report prepared discussed the legal provisions of Regulation (EC) No 1334/2000, as well as expected changes in the Regulation, which European Union experts were working on at that point. In 2009, STC continued work under Contract SSM Identification No 2008/1797-1, focusing on specific Regulation (EC) No 1334/2000 provisions, namely those of concern for intangible technology transfer and legal offences during export of dual-use goods and technologies. The results of this work were also presented in the STC report.

An overview of the Regulation (EC) No 428/2009, as adopted by the Council of the European Union 5 May 2009, is necessitated by substantial changes and complementary provisions made to the regulation as compared to its previous version (Regulation (EC) No. 1334/2000). Information on the said changes and complementary provisions is undoubtedly important for Ukrainian experts,

primarily specialists of the State Service of Export Control of Ukraine, who are directly involved in improving Ukrainian export control law and harmonizing it with European Union standards.

Please be also reminded that Regulation (EC) No 428/2000 is the only legally binding (i.e. directly applicable in all EU Member States) act on the control over dual-use exports.

In the overview presented below, in addition to the text of Regulation (EC) No. 428/2009, we drew upon a very interesting and informative scientific paper by Liege (Belgium) University Professor, Dr Quentin Michel, *The European Union Export Control Regime: Comment of the Legislation: article-by-article*, published on the website of the Flemish Department of Foreign Affairs.

Discussed below are all the legislative novelties and changes incorporated in the new Regulation (EC) No 428/2009, but the main focus will be on those provisions regulating controls over export, brokering services, and transit.

## **TITLE AND PREAMBLE**

The new Regulation (EC) No 428/2009 (hereinafter referred to as the Regulation) has not only incorporated a number of new complementary provisions, but also changed its old title to currently read: *Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items*.

Therefore, it is the very title of the Regulation that clearly outlines its applicability as regards controlled international transfers, namely:

- export (outside the EU);
- transfer (within the EU);
- transit (moving of dual-use goods from one third country to another third country through the Community territory); and
- brokering services related to international transfers of dual-use goods.

Certain changes have involved the Regulation Preamble. Thus “authorizations for brokering services” have been added to Item 5 that establishes the responsibility of national authorities to make a decision whether to authorization documents for brokering of controlled international transfers.

Furthermore, new as compared to Regulation (EC) No 1334/2000 are Items 14, 15, 16, 17, and 18 of the Preamble. Below they are discussed in detail.

Item 14, refers to the 2003 EU Member States-adopted Action Plan on Non-Proliferation of Weapons of Mass Destruction (Thessaloniki Action Plan) and the supplementary EU Strategy against Proliferation of Weapons of Mass Destruction (EU WMD Strategy) and requires EU Member States to “make use of all its instruments to prevent, deter, halt, and if possible eliminate proliferation programs that cause concern at global level”.

Item 15 of the Preamble makes reference to United Nations Security Council Resolution 1540, adopted 28 April 2004, specifically paragraph 3 d) of the operative section of the Resolution, requiring UN Member States to “establish, develop, review and maintain appropriate effective national export and transshipment controls over such items (*that are subject to export control – STC*), including appropriate laws and regulations to control export, transit, transshipment and re-export and controls on providing funds and services related to such export and transshipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations” [3]

Based on the UN Security Council Resolution 1540 requirements, the new Regulation establishes “transit and brokering controls”. [1, Preamble, Clause 15]

It should be noted that Resolution 1540 calls upon states to exercise control over “materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of their delivery” [3].

The definition given in the Resolution, according to Pr. Dr. Michel [2], “covers partly the terms of dual-use items as defined by Article 2.1 of this Regulation

which are items that can be used for both civil and military purposes including WMD and conventional weapons”. I.e., the incorporation into this Regulation of specific provisions regarding transit (Article 6) and brokering services (Article 5) related to dual-use goods “extends indirectly the field of implementation required by the 1540 UNSCR presently limited to WMD dual-use items”. [2, page 9]

In addition, pursuant to Operative Paragraph 2 of UNSCR 1540, States are required to legislatively prohibit “any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as **attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them**” [3]. However, no controls over financing related to means of mass destruction are provided for in the new Regulation (EC). This issue will be dwelt upon below.

Next, Clause (16) of the Preamble is devoted to establishing controls over transit of dual-use goods. It enables Member States’ authorities to prohibit a transit whenever these authorities “have reasonable grounds for suspecting from intelligence or other sources that the items are or may be intended in their entirety or in part for proliferation of weapons of mass destruction or of their means of delivery”.

The need to introduce controls on the provision of brokering services involving dual-use goods is discussed in Clause (17) of the Preamble. However, brokering services are subject to controls only when the broker has been informed by competent national authorities or is aware that such provision “might lead to production or delivery of weapons of mass destruction in a third country”.

Clause (18) of the Preamble outlines the main areas of improvement for EU export controls, including:

- A uniform and consistent application of controls throughout the EU;
- Broadening the scope of consultation between Member States prior to granting an export authorization;

- Greater convergence of conditions implementing national controls on dual-use items not listed in this Regulation,
- Harmonization of the conditions of use of the different types of authorizations;
- Improving the definition of intangible transfers of technology, to include making available controlled technology to persons in third countries,
- Further alignment of the modalities for exchanging sensitive information among Member States with those of the international export control regimes, in particular by means of a secure electronic system.

The first export control improvement area, namely its uniform and consistent application, is especially important for Ukraine as it corroborates the course Ukraine has taken towards harmonization of norms and rules in the area of export control over dual-use goods with corresponding standards of the European Union.

The updated Clause (14) of the Preamble of the Regulation's previous version (in Regulation (EC) it is Preamble Clause 19) requires Member States not only to determine penalties applicable in the event of breach of the provisions of the Regulation, but to also make them "effective, proportionate and dissuasive" [1, Preamble, Clause 19].

## **CHAPTER I**

### **SUBJECT AND DEFINITIONS**

Article 1 of the Regulation sets up "a Community regime for the control of exports, transfer, brokering and transit of dual-use items". Therefore, it is the first occurrence of the EU Community law establishing controls over the provision of brokering services and over transit involving dual-use goods.

As regards controls over brokering activities in specific EU Member States, such controls had been in place before the adoption of the new Regulation in such countries as Austria, Germany, and Poland. [2, page 12]

For instance, in Germany a license is required for brokering activities involving items covered by Annex IV to Regulation (EC) No. 1334/2000 (*items under Annex IV require authorization for transfer within the Community– STC*). The authorization requirement does not apply if the purchasing country or the country of destination is listed in Annex II, Part 3 of Regulation (EC) No. 1334/2000 (Australia, Canada, Japan, New Zealand, Norway, Switzerland, and USA).

Apart from that, the authorization requirement also applies to brokering activities undertaken by German nationals outside of Germany if the purchasing country or the country of destination is under an international arms embargo and if the exporter has been informed on possible use of the export for military end-uses, or to countries placed (*by Germany – STC*) on the national country list K (at present Cuba and Syria). [2, page 12]

In Chapter I, the definition text for the term “intangible export”, i.e. the intangible transfer of technology or software by electronic means, has been modified. New is the part of the text referring to transfer by electronic means “...making available in an electronic form such software and technology to legal and natural persons and partnerships outside the Community.” [1, Article 2.2 (iii)]

The issue of control over placing technology on a Web server located outside the EU and its subsequent download from this Web server was controversial due to the difficulty of identifying the exact location of such a server [2, page 17]. However, such controls could be/were intended to be introduced by the above provision [1, Article 2.2 (iii)], although, in the Pr. Dr. Michel’s opinion [2, page 17], “it remains unclear how it will be implemented by Member States export control authorities”.

With regard to making technology available within a corporate network (Intranet), it is similarly treated as transfer by electronic means, therefore a transfer authorization is required if the technology uploaded on the Intranet is accessible to company employees located outside the EU. Moreover, if a company employee has access to controlled technology via the Intranet while

being located outside the EU, such access is subject to licensing even though the company employee has no intention to transfer the technology to another person abroad [2, page 18].

In the EU, Community General Export Authorizations can be granted also for intangible technology transfers, but only to such countries as Australia, Canada, USA, Japan, New Zealand, and Switzerland. In addition to that, certain EU Member States grant global authorizations for intangible transfers to avoid undue administrative burden on industries [2, page 17].

As was already discussed above, Regulation (EC) No. 428/2009 defines brokering activities involving dual-use goods as a separate subject for export control. A definition for the terms “brokering services” and “broker” is given in paragraphs 5 and 6 of Regulation Article 2:

“5. ‘brokering services’ shall mean:

the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or —the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

For the purposes of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance or general advertising or promotion;

6. ‘broker’ shall mean any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community into the territory of a third country;

Therefore, brokering services related to dual-use goods include:

1. negotiations for the purchase, sale or supply of dual-use items from a third country to any other third country;
2. selling or buying dual-use items located in third countries for their transfer to another third country.

Such services involving controlled items as transportation or financing services to be controlled pursuant to United Nations Security Council Resolution 1540 [3, Clause 3d of the operative section] are referred by the Regulation to ancillary services and are exempt from control under this Regulation.

Therefore, subject to control are those brokering activities only, which are carried out/legalized within the European Union territory by persons resident of or established in the EU.

Another Regulation novelty is the definition of the term “transit”, which is treated as a separate subject of control over dual-use exports: “transit” shall mean a transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community” [1, Article 2, paragraph 7].

The updated Chapter I of the Regulation also includes definitions for different types of authorizations used in relation to the export of dual-use goods, namely:

- 1) ‘Individual export authorization’ is granted to one specific exporter for one end user or consignee and covering one or more dual-use items;
- 2) ‘Community General Export Authorization’ is an export authorization for exports to certain countries of destination available to all exporters who respect its conditions of use as listed in Annex II;
- 3) ‘Global export authorization’ is granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users and/or in one or more specified third countries;
- 4) ‘National general export authorization’ is granted in accordance with Article 9(2) and Annex IIIc.

The conditions of use of a Community General Export Authorization [1, Article 2, paragraph 9] are given in Annex II to the Regulation. This authorization can

be issued for all goods listed in Annex I (Common List of Dual-use Items), except for those listed in Annex II Part 2.

This exception primarily concerns items whose transfer within the Community requires authorization (Annex IV). These include items of stealth technology, specific items of the Community strategic control, such as equipment and devices designed to initiate charges, disruptive explosives, cryptographic equipment, specific items of missile technology, substances that can be used in chemical and nuclear weapons. [1, Annex 4]

In addition to that, a Community General Export Authorization may not be issued for the export of items listed in Part 2 of Annex II to the Regulation. This list includes “natural uranium” or “depleted uranium” or thorium in various forms, specific nuclear technologies and software, specific components and technologies subject to control under the MTCR, and a few materials which can be used in the manufacture of biological weapons.

It is a mandatory condition when using the Community General Export Authorization to provide reporting on its use, as well as, if deemed appropriate at the national level, for an exporter to register before making the first use of the authorization. It is important that exports under this authorization are only possible to the countries listed in Part 3 of Annex II, namely: Australia, New Zealand, Canada, Norway, Switzerland, Japan, and United States of America.

According to the Regulation, the Community General Export Authorization may not be used if:

- the exporter has been informed by the competent authorities of the Member State in which he is established or has otherwise become aware that the items to be exported can be used in connection with weapons of mass destruction or nuclear explosive devices;
- the exporter has been informed by the competent authorities of the Member State in which he is established or has otherwise become aware that the items to be exported can be used for a military end-use in a country subject to an arms embargo;

- items are to be exported to a destination within a customs free zone or free warehouse located in countries to which export under this authorization is allowed [1, Annex II, Conditions and requirements for use of this authorization].

The conditions to be met for granting national general export authorizations will be discussed below.

In addition to that, Article 2 of the Regulation includes terms “customs territory of the Community” and “non-Community dual-use items”, defined by paragraphs 12 and 13 Article 2 [1] referencing Article 3 and Article 4 (48) of the Community Customs Code respectively.

## **CHAPTER II**

### **SCOPE**

Article 5 of the Regulation is devoted to controls over brokering activities. Thus paragraph 1 of this Article establishes a condition under which the authorization requirement applies to brokering services related to the export of items listed in Annex 1 (Common Control List of Dual-Use Items), namely in case when “the broker has been informed by the competent authorities of the Member State in which he is resident or established that the items in question are or may be intended, in their entirety or in part, for any of the uses” related to “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”. [1, Article 4.1]

The same paragraph of Article 5 stipulates that if a broker is aware of the above, he must notify the competent authorities which will decide whether or not it is expedient to make such brokering services subject to authorization.

In addition to that, paragraph 2 of Article 5 enables a Member State to extend the scope of paragraph 1 to cover dual-use goods not listed in Annex I, designed for use in connection with WMD and their delivery means, as well as dual-use goods designed for military end-use and destinations referred to by Article 4.2.

This means that control of brokering services in case of a catch-all situation would be covered.

It can be reminded that Article 4 (2) of the Regulation requires obtaining an authorization for goods not listed in Annex 1, 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 Organization for Security and Cooperation in Europe (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” [1, Article 4.2].

Paragraph 3 of Article 5 provides for adopting national legislation of an EU Member State imposing an authorization requirement on the brokering related to Annex 1 items “if the broker has grounds for suspecting that these items are or may be intended for any of the uses” related to WMD or their delivery means.

As was mentioned above when discussing the definition for the terms “brokering services” and “broker”, subject to controls are services involving facilitation of controlled exports from a third country to any other third country. If brokering services involve the export of an item located within the EU territory to a third country, it will not require brokering authorization and the export is carried out under a normal export authorization granted by competent authorities [2, page 32].

At the same time, whereas, according to the Regulation, subject to controls are brokering activities carried out within the EU territory, Member States are entitled to extend such controls to brokering activities (for instance, making contract arrangements for the export from a third country to any other third country) carried out by a natural or legal person outside the EU [2, page 32].

Article 6.1 entitles a Member State to prohibit the transit of non-Community dual-use items listed in Annex I, if the items are or may be intended, in their entirety or in part, for uses related to weapons of mass destruction or their delivery means referred to in Article 4(1). At the same time, Article 6.2 entitles the competent authorities of a Member State to set a transit authorization requirement with respect to such items.

Therefore, this Regulation establishes a prohibition or licensing requirement for the transit of non-Community dual-use items if such items are related to WMD or their delivery means.

### **CHAPTER III EXPORT AUTHORISATION AND AUTHORISATION FOR BROKERING SERVICES**

Article 9 requires exporters to supply information necessary when reviewing applications for individual or global export authorizations. Such information, *inter alia*, shall contain information on “the end user, the country of destination and the end use of the item exported”. In addition to that, if so decided by the competent authorities of a Member State, “The authorization may be subject, if appropriate, to an end-use statement” [1, Article 9.2, paragraph 3].

Paragraph 3 of this Article stipulates that the period of time to process requests for individual or global authorizations shall be determined by national law of an EU Member State.

Furthermore, paragraph 4 of Article 9 sets forth the conditions for granting/denial of national general export authorizations. Such authorizations may be used by all exporters established or resident in a Member State in accordance with the indications set out in Annex III to the Regulation. Criteria that must be taken into account in making a decision on granting authorization for brokering services are presented in Article 12 of the Regulation [1].

Annex III to the Regulation comprises three parts: III a, III b and III c. The first two provide models for individual or global export and brokering services authorisation forms. Part III c includes common elements for publication of national general export authorizations in national official journals. These publications must contain information as follows:

1. Title of general export authorization
2. Authority issuing the authorization
3. A text to confirm EC validity (standard text provided)
4. Items concerned
5. Destinations concerned

## 6. Conditions and requirements.

Paragraph 2 of Article 9.4b requires Member States to “notify the Commission immediately of any national general export authorizations issued or modified”, and the Commission shall publish these notifications in the Official Journal of the European Union.

National general export authorizations are not granted for items listed in part 2 of Annex II. In addition to that, such authorizations may not be used if “the exporter has been informed by his authorities that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in paragraphs 1 and 3 of Article 4 or in paragraph 2 of Article 4 in a country 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, or if the exporter is aware that the items are intended for the abovementioned uses” [1, Article 9.4c].

It can be noted that the above-mentioned paragraphs 1, 2 and 3 of Article 4 in general refer to the ‘catch-all’ principle, i.e. establishing a licensing requirement for the export of items not listed in Annex I to the Regulation when:

- the exporter has been informed by the competent authorities that the items in question are or may be intended for use in connection with the development, production, handling, storage, etc. of WMD and missiles capable of delivering such weapons;
- the purchasing country or country of destination is subject to an arms embargo and the exporter has been informed by the competent authorities that the items in question are or may be intended for a military end-use;
- the exporter has been informed by the competent authorities that the items in question are or may be intended 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 authorization or in violation of an authorization prescribed by national legislation of that Member State;

- the exporter is aware that dual-use items which he proposes to export, not listed in Annex I, are intended for any of the uses referred to in paragraphs 1,2 and 3 of Regulation Article 4. In this case he exporter must notify the competent authorities, which will decide whether or not it is expedient to make the export concerned subject to authorization.

Article 10 of the Regulation is entirely new and is devoted to authorizations for brokering activities. According to Article 10.1, authorizations for brokering services “shall be granted by the competent authorities of the Member State where the broker is resident or established. These authorizations shall be granted for a set quantity of specific items moving between two or more third countries”. In addition to that, this provision requires, as a condition for brokering authorization, a clear identification of the exact “location of the items in the originating third country, the end-user and its exact location”.

Paragraph 2 of this Article requires brokers to supply the competent authorities with “all relevant information required for their application for authorization under this Regulation for brokering services, in particular details of the location of the dual-use items in the originating third country, a clear description of the items and the quantity involved, third parties involved in the transaction, the third country of destination, the end-user in that country and its exact location”.

The content of such information should be agreed upon by Member States and published, however a common understanding (among Member States) on what information should be supplied by applicants for brokering services authorizations is yet to be reached. [2, page 64]

Paragraphs 3 and 4 of Article 10 refer the determination of timeframes to process requests for brokering authorizations to the responsibility of national authorities and require them to supply the Commission with a list of the authorities empowered to grant such authorizations.

In the new Regulation, Paragraph 2 of Article 11 has been complemented with regard to the right of a Member State to request another Member State not to grant an export authorization if such export might prejudice its essential security interests. If such authorization has already been granted, the State can request its annulment, suspension, modification or revocation. In this case,

according to Article 11.2, the exporting State shall immediately engage in consultations of a non-binding nature with the requesting Member State, to be terminated within 10 working days.

What is new in this provision is that once the exporting State receives a negative response to its request for denial, annulment etc. of export authorization, this should be notified to the Commission and other Member States using the electronic system mentioned in Article 13.6.

Article 12 has been somewhat modified as well. The first clause setting criteria to be met in deciding whether or not to grant an authorization has been complemented with wording on authorization of brokering services.

It can be reminded that such criteria include:

- (a) Obligations and commitments under the relevant international non-proliferation regimes and export control arrangements;
- (b) Obligations under international sanctions;
- (c) Considerations of national foreign and security policy;
- (d) Considerations about intended end use and the risk of diversion [1, Article 12.1].

Therefore, the Regulation establishes the same requirements to the considerations to be taken into account when granting an authorization both for export and brokering services related to dual-use goods.

Furthermore, Article 12 has been complemented with a new paragraph (2) stipulating that, in addition to the criteria listed above, Member States deciding whether or not to grant a global export authorization shall consider “the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorization”.

According to Pr. Dr. Michel [2], this Clause is meant “to constraint Member States to require from exporters adoption of an effective Internal Compliance Program before granting the global authorization” [2, page 72].

Article 13 of the Regulation concerns the possibility of denial of export authorization, as well as its annulment, suspension, modification or revocation. Member States are obliged to report decisions to that effect to other EU Member States and the Commission. What is new here is the requirement of such notification in case the competent authorities of a Member State have determined that the intended export may not be authorized [1, Article 13.1]. In addition, the updated paragraph 1 of this Article stipulates that the competent authority of a Member State which suspended the authorization communicates its final assessment to the Member States and the Commission at the end of the period of suspension.

Next paragraph of Article 13 introduces a new legal provision on denials of authorizations. This provision stipulates that Member States shall review denials of authorizations within three years of their notification and revoke them, amend them or renew them as necessary. The results of the review shall be communicated to the competent authorities of the other Member States and the Commission. Denials which are not revoked shall remain valid.

Paragraphs 1 and 2 shall also apply to authorizations for brokering services [1, Article 13.4].

Paragraph 3 of Article 13 requires Member States to notify other Member States and the Commission of their decisions to prohibit a transit of dual-use items listed in Annex I. Another novelty here is the requirement of this paragraph as regards the content of these notifications, namely: the classification of the item, its technical parameters, the country of destination, and the end user.

Paragraph 5 of this Article concerns compliance with the “no undercut” rule, which is applied by participants of multilateral export control regimes to the export of identical items previously denied by one or more regime participants. The new provision also extends this rule to cover the transit and brokering services of dual-use goods listed in Annex 1. The conditions under which the “no undercut” rule is applied are described in detail in the section devoted to Article 11.2 [1] above.

According to this provision, before the competent authorities of a Member State grant an authorisation for export or decide on a transit they shall examine all valid denials or decisions to prohibit a transit of another Member States for an essentially identical transaction (meaning an item with essentially identical parameters or technical characteristics to the same end-user or consignee).

In this case they shall first consult the competent authorities of the Member States which issued such denial(s) or decisions to prohibit the transit and if following such consultation a positive decision is made on the export or transit, they shall notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision.

Furthermore, paragraph 6 of Article 13 establishes that all such notifications will be made via secure electronic means including via a secure system that may be set up in accordance with Article 19.4 of the Regulation.

Information shared in accordance with the provisions of Article 13 is considered confidential and shall be in compliance with the provisions of Article 19 that will be discussed later.

Article 14 establishes the requirement of using the authorization forms given in Annexes III a (model of individual and global export authorization) and III b (model of authorization for brokering services) to the Regulation. New here is the wording on authorizations for brokering services. As noted by Pr. Dr. Michel [2], the forms proposed in Annex III are meant to be used by Member States as a reference in establishing their own national forms of individual and global authorizations and authorizations for brokering services [2, page 76].

## **CHAPTER IV**

### **UPDATING OF LIST OF DUAL-USE ITEMS**

Article 15 of this Chapter, devoted to updating of the EU common control list, has been complemented with a new provision on updating of Annex IV that contains a list of items whose transfer within the European Union requires an individual authorization and may not be carried under a general authorization, as pointed out in Article 22 of the Regulation.

According to this provision, Annex IV, which is a subset of Annex I, shall be updated with regard to the public policy and public security interests of the Member States. [1, Article 5.2]

## **CHAPTER V CUSTOMS PROCEDURES**

This Chapter has no new provisions; any modifications have only involved references to Articles of Regulation (EC) No. 2454/93.

## **CHAPTER VI ADMINISTRATIVE COOPERATION**

Article 19.2 of this Chapter has been complemented with a provision defining the possible content of information to be shared among the competent authorities of Member States under their cooperation. The purpose of such information exchange, as indicated in paragraph 1 of this Article, is “to eliminate the risk that possible disparities in the application of export controls to dual-use items may lead to a deflection of trade, which could create difficulties for one or more Member States” [1, Article 19.1].

This information may include “details of exporters deprived, by national sanctions, of the right to use the national general export authorizations or Community General Export Authorizations”, as well as information on “sensitive end users, actors involved in suspicious procurement activities”.

In addition, paragraphs 4, 5, and 6 of Article 19 are new. The new provisions concern EU Member States only. Paragraph 4 entitles the Commission to create “a secure and encrypted system for the exchange of information among Member States and whenever appropriate the Commission may be set up by the Commission, in consultation with the Dual-Use Coordination Group set up under Article 23”.

Paragraph 5 charges Member States with the responsibility of providing guidance to exporters and brokers of the Member States where they are resident

or established, as well as making recommendations for best export control practices available to them.

Paragraph 6 of Article 19 concerns the processing of personal data of parties to international transfers in accordance with the EU norms and rules protecting individuals with regard to the processing of personal data and on the movement of such data.

## **CHAPTER VII CONTROL MEASURES**

Article 20 of the Regulation establishes a requirement for exporters to keep detailed registers or records of their exports and offers recommendations on the main requirements as to the content of such registers or records [1, Article 20.1]. What is new here is the provision of this Article [1, Article 20.2] that extends the requirement of keeping registers or records to apply to brokers which fall under the scope of Article 5 of the Regulation. It refers to the authorization requirement for brokers to carry out a transaction involving items listed in Annex I to the Regulation, when the broker has been informed by competent national authorities or is aware that the items to be exported can be used in connection with weapons of mass destruction or their delivery means [1, Article 5.1].

This requirement also applies to brokering operations involving items not listed in Annex I, when the broker has been informed by competent national authorities or is aware that the items to be exported can be used for a military end-use in a country subject to an arms embargo [1, Article 4.2].

In addition to that, Article 20.2 indicates the purpose of keeping such registers or records, namely: they are to make it possible “to prove, on request, the description of the dual-use items that were the subject of brokering services, the period during which the items were the subject of such services and their destination, and the countries concerned by those brokering services”.

## **CHAPTER VIII**

### **OTHER PROVISIONS**

In this Chapter some modifications have involved the provisions related to the Coordination Group. The title of the Group has changed to the Dual-Use Coordination Group (in Regulation (EC) No. 1334/2000 – the Coordination Group). Apart from that, paragraph 2 of this Article has added consulting brokers concerned by this Regulation as another responsibility of the Coordination Group. (Regulation (EC) No. 1334/2000 provided for consultations to exporting organizations only)

### **REFERENCES**

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# **THE STUDY AND ANALYSIS OF CERTAIN LEGAL PROVISIONS OF THE EU MEMBER STATES IN THE FIELD OF EXPORT CONTROL OVER DUAL-USE GOODS:**

## **CATCH-ALL CONTROL**

### **INTRODUCTION**

Nowadays the necessity of national export controls is beyond any doubt for anybody. Over the years of its independence Ukraine has built a sophisticated export control system which meets all commonly accepted requirements in this area as well as novelties meant to enhance its efficiency.

The existence of control lists covers only one part of the problem with non-proliferation even the strongest export control system would be defunct if it did not have a mechanism to when needed put control on so called threshold items. There are countless of low-end dual-use items, for instance common test equipment or decontrolled metal working machines, etc. which are not listed on the multilateral export control regime lists, yet can provide a substantial contribution to weapons of mass destruction or military missiles programs. Therefore, in order to prevent proliferation and providing assistance to such programmes, the international community had to identify techniques for the export control of items both listed and not listed on relevant control lists. In the 1990s, the U.S. and other exporting countries began to apply the so-called “catch-all” controls.\*

Catch-all controls are provided for both in European Union law and in national enactments of EU Member States. Provisions on such controls can be found in relevant Ukrainian enactments as well.

A catch-all mechanism makes it possible for the authorities to put non-listed items under control in case there is information that the item in question could be used in or for a WMD weapons program. The mechanism is by design heavily dependent on intelligence information of the end-user and the end-use.

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\*<http://www.exportcontrol.org/links/1374c.aspx>

With catch-all controls important as they are, the methods and techniques of their application remain complicated not only for exporters of potentially dangerous items, but for export control experts as well. Therefore, the issue of legislative framework for the principle of catch-all controls and procedures for their implementation is still a pressing one.

This section of the Report will discuss and explore the legislative provisions of the European Union, EU Member States and Ukraine that relate to catch-all controls; present a comparative analysis of European vs. Ukrainian export control law and offer recommendations on applying European legislative experience in Ukraine.

To facilitate the analysis, the legislative provisions implementing the principle of catch-all controls will be approached in terms of covering the below-listed activities associated with international transfers of dual-use items subject to export controls, namely:

1. Export of non listed items;
2. Brokering activities;
3. Transit.

## **1. CATCH-ALL CONTROLS IN EUROPEAN UNION LAW**

### **1.1. European Community legislation**

#### **Export of non listed items**

The main legislative instrument of the European Union in the area of control over dual-use exports is Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (hereinafter – the Regulation).

The requirements as regards to applying the principle of catch-all controls are laid down in Article 4 of the Regulation. An authorisation shall be required for the export of dual-use items not listed in Annex I (the EU Common Control List) if:

- the exporter has been **informed by the competent authorities** of the Member State in which he is established that the items in question 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** [1, Article 4.1];
- 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 Organisation for Security and Cooperation in Europe (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 competent authorities of the Member State that the items in question are or may be intended, in their entirety or in part, for a military end-use. In this provision ‘military end-use’ means incorporation into military items listed in the military list of Member States; use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items; use of any unfinished products in a plant for the production of military items [1, Article 4.2];
- the exporter has been informed by the competent authorities of the Member State 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 [1, Article 4.3].

Another explicit, i.e. binding, requirement established by the Regulation is the requirement that an exporter who is aware that dual-use items not listed in Annex I are intended for uses in connection with weapons of mass destruction or missiles for their delivery, or for a military end-use, must notify the national licensing authority accordingly. In this case whether or not the export is subject to authorization is decided by this national licensing authority [1, Article 4.4].

The four explicit requirements of the Regulation listed above are in legal effect throughout the European Union, i.e. directly legally binding for EU Member States without their compulsory incorporation into national enactments.

Discussed below are also voluntary provisions of the Regulation related to catch-all controls, i.e. such that **can be incorporated** in Member States' national law by a government decision.

According to Item 5 of Article 4, an EU Member State may adopt national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds for **suspecting** that those items are or may be intended for use **in connection with weapons of mass destruction or means of their delivery**, or for a **military end-use** (if the purchasing country or country of destination is subject to an arms embargo, or the items are designed for use as parts or components of military items that have been exported without authorisation or in violation of an authorisation) [1, Article 4.5].

This provision, like that of Article 4.5 of the Regulation, charges the exporter with the responsibility for preventing possible diversion of the export and hence for identifying possible risks of such a diversion.

Considering the importance of assessing diversion risks during the export of items not listed on control lists, below is a checklist to help assess such risks. This list was presented at the 2003 Wassenaar Arrangement Plenary Meeting and is available in the Liege University Professor, Dr Quentin Michel's Commentary paper [2, page 26-27]:

1. Do you know your customer? If not, is it difficult to find information about him/her?
2. Is the customer or the end-user tied to the military or the defence industry?
3. Is the customer or the end-user tied to any military or governmental research body?
4. If you have done business with the customer before - is this a usual request for them to make? Does the product fit the business profile?
5. Does the customer seem familiar with the product and its performance characteristics or is there an obvious lack of technical knowledge?

6. Is the customer reluctant to provide an end-use statement or is the information insufficient compared to other negotiations?
7. Does the customer reject the customary installation, training or maintenance service provided?
8. Is unusual packaging and labelling required?
9. Is the shipping route unusual?
10. Does the customer order an excessive amount of spare parts or other items that are related to the product, but not to the stated end-use?
11. Is the customer offering unusually profitable payment terms, such as a much higher price?
12. Is the customer offering to pay in cash?

Answers to these questions help the exporter to understand if the export in question could be considered as suspicious and if there is a need to consult the national licensing authority as necessary.

In addition to the above-mentioned grounds for applying the principle of catch-all controls, the Regulation entitles Member States to prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of **public security** or **human rights** considerations [1, Article 8.1].

It should be noted that the same review procedures apply to exports subject to catch-all controls as do to items listed on the control list (Annex 1). Before the competent authorities grant an authorisation they shall examine all valid denials or decisions to prohibit a transit of another Member States for an essentially identical transaction (meaning an item with essentially identical parameters or technical characteristics to the same end-user or consignee). Following such an examination, they shall consult the competent authorities of the Member States which issued such denial(s). If following such consultation a decision is made to grant an authorisation, they shall notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision [1, Article 13.5].

### **Brokering activities**

According to Article 5.1 of the Regulation, obtaining authorisation for brokering services is **mandatory** only if the services **involve dual-use items listed on the control list** (Annex 1) and **the broker has been informed** by competent national authorities that the items proposed for export can be used in

connection with **weapons of mass destruction** or **missiles** capable of delivering such weapons.

In addition, this Article requires a broker to notify the competent national authorities of any uses of the brokering services he proposes in connection with weapons of mass destruction and their means of delivery in case he becomes aware of any.

As was demonstrated above, the Regulation provides for no direct requirement for applying the principle of catch-all controls to brokering activities related to dual-use items not listed on the control list. At the same time, the Regulation envisages the possibility of applying the catch-all principle in Member States' national law: "A Member State may extend the application of paragraph 1 (of Article 5 - STC) to non-listed dual-use items for uses referred to in Article 4(1) ..." [1, Article 5.2]..

Article 5.3 [1] also entitles Member States to "adopt or maintain national legislation imposing an authorisation requirement on the brokering of dual-use items if the **broker has grounds for suspecting** that these items are or may be intended" for use in connection with weapons of mass destruction or their delivery means.

Therefore, whether or not to apply the principle of catch-all controls to brokering activities can be decided by each Member State of the European Union on its own.

### **Transit**

Regulation (EC) No 428/2009 establish provisions for control over the transit of dual-use goods, but entitles a Member State to prohibit the transit through the State's territory if the items are or may be intended for use in connection with weapons of mass destruction and their means of delivery.

Article 6 also entitles a Member State to impose, in certain cases, a licensing requirement as regards the transit of dual-use items (listed in Annex 1) if they are or may be intended for use in connection with weapons of mass destruction and their means of delivery [1, Article 6.2].

In addition, Member States are entitled to extend Article 6.1 to the transit of dual-use goods not listed on the control list (i.e. Annex 1) if these items are intended for use in connection with weapons of mass destruction and their means of delivery [1, Article 6.3].

Therefore, whether or not to authorise the transit of dual-use goods both listed and not listed on the control list shall be decided on an individual basis by the Member State's competent authority. It concerns, however, the transit of those items **only** that are or may be intended for **use in connection with weapons of mass destruction**.

### **Summary**

It can be concluded that in terms of applying the principle of catch-all controls Regulation (EC) No 428/2009 provides for both requirements binding on all EU countries and the right of incorporating specific legislative provisions as regards catch-all controls in national law.

Additional legislative provisions regarding catch-all controls that could be established at the national level include the following provisions:

1. Imposing an authorisation requirement on the **export** of items not listed on the control list if the exporter has **grounds for suspecting** that these items are or may be intended for use in connection with WMD or their delivery means [1, Article 4.5];
2. Imposing an authorisation requirement on **brokering services** related to items not listed on the control list **which can be used in connection with WMD and their means of delivery** [1, Article 5.2];
3. Imposing an authorisation requirement on the **transit** of dual-use items not listed on the control list which can be used in connection with **WMD and their means of delivery** [1, Article 6.3], and
4. Prohibiting or imposing an authorisation requirement on the export of dual-use items not listed on the control list for reasons of public security or **human rights** considerations [1, Article 8.1].

Below is a discussion of how these provisions are incorporated in the national law of such EU Member States as Sweden and Poland.

## **1.2. Swedish legislation**

Sweden's law On control over products with dual-use and over technical assistance (hereinafter – the Law of Sweden) [3] which came into effect on 1 August 2010 complements Regulation (EC) No 428/2009 whose explicit requirements are binding for the Government of Sweden.

In addition, as was shown in subsection 1.1 of this Report, the Regulation has four provisions containing voluntary requirements that can be incorporated in relevant national enactments of an EU Member State. These include the requirements presented in Regulation Articles 4.5, 5.2, 6.3 and 8.1.

In the Law of Sweden section “Export, transfer, transit and brokering activities”, paragraphs 4a, 4b, 4d and paragraph 5 entitle the Government to issue regulatory acts implementing the provisions of Regulation Articles 4.5, 5.2, 6.3 and 8.1 respectively.

To date, there are no additional regulations adopted under Swedish law implementing the Regulation's voluntary requirements in national law of Sweden.

## **1.3. Polish legislation**

To date, international transfers of dual-use and military goods in Poland are regulated by the law “On foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security” dated 20 November 2000 and most recently amended 11 May 2004 (hereinafter – the Law of Poland) [4].

The new revision of the Law addressing the requirements of Regulation (EC) No. 429/2009 is yet to be published; therefore, this Report will refer to relevant provisions of the existing version of the Law of Poland.

According to this Law, foreign trade (*in strategic goods – STC*) includes export, brokering services, technical assistance, import and transit. The export of dual-use goods [*i.e. of goods listed on the EU Common Control List - STC*] and brokering services involving such goods can only be provided based on an

authorisation [4, Article 6.1]. The transit, however, requires an authorisation for military items only [4, Article 6.2].

As to applying the principle of catch-all controls, according to Article 6.7 of the Law of Poland [4], the **export** of items not listed on the list of dual-use goods or the list of military goods **requires an authorisation if the exporter is aware or has been informed** that such goods can be used for the purposes and under the circumstances listed below:

- “1) The end user intends to use military goods to violate or repress human rights and fundamental freedoms;
- 2) The delivery of military goods poses any threat to peace or may otherwise cause destabilisation in the region
- 3) The country of final destination supports, facilitates or encourages terrorism or international crime
- 4) Military goods may be used for any other purpose than to satisfy justified requirements of defence and security in the country of destination” [4, Article 10.1].

It can be understood from the above that it is Item 3 only, that can be applied to dual-use goods, albeit lacks a direct reference to this type of controlled items.

No new Polish enactments that might have incorporated the voluntary requirements of relevant Regulation provisions have been published as yet.

## **2. CATCH-ALL CONTROLS IN UKRAINIAN LEGISLATION**

### **Export of non listed items**

In Ukrainian legislation the conditions for applying the principle of catch-all controls are set out in the Law of Ukraine “On State Control of International Transfers of Goods Designated for Military Purposes and Dual-Use Goods” (hereinafter – the Law of Ukraine) [5]. According to Article 10 of this Law,

export control procedures with respect to items not listed on Ukrainian control lists apply under the following circumstances:

- (1) When the central bodies of executive power that implement export control receive information about **intended or possible** use of goods not included in the lists **in connection with weapons of mass destruction or their means of delivery**, they are obliged to notify the State Service of Export Control of Ukraine (SSECU) which **has a right** in this connection to apply to such goods procedures of state export control [5, Article 10, par.1].
- (2) When export or temporary movement (*outside Ukraine – STC*) of goods not included in the control lists is destined to countries under a **full or partial military goods embargo** pursuant to **resolutions of the UN Security Council, other international organisations** or by the **national legislation** [5, Article 10, par.4];
- (3) When the exporter has been informed by SSECU or is **otherwise** informed about possible use of goods not included in the control lists in connection with **WMD and their means of delivery**, or for a **military end-use** in countries under **international or national military goods embargo**, he shall apply to SSECU for an export authorisation.

In addition, Ukrainian law envisages applying the principle of catch-all controls to the **import** of items not listed on the control lists if such items are brought into the territory of Ukraine with the provision of an international import certificate as requested by the exporting state [5, Article 10, par.3];

Therefore, according to relevant legislative provisions, in Ukraine **applying the principle** of catch-all controls in case of the export can be initiated **by the state** represented by SSECU or the **exporter**. As to the import, the initiator of applying this principle *de facto* is the foreign exporting state by imposing a requirement of obtaining an international import certificate.

### **Brokering activities**

As was shown in the Report section on the control over brokering activities, the Law of Ukraine lacks norms providing for controls over brokering activities involving the export of dual-use goods.

## **Transit**

Provisions on the control over transit of dual-use goods are set forth in the Cabinet of Ministers of Ukraine (CMU) Decree No 86 dated 28 January 2004 [6]. According to this Decree, a SSECU **conclusion** (i.e. authorisation document) is **mandatory** for the transit through the territory of Ukraine of the following goods:

- (1) MTCR Category I items (finished delivery means and finished subsystems capable of being used in finished delivery means);
- (2) Items listed on the NSG List Section I Part 1 (source and special fissionable material);
- (3) Items listed in Section I Part 1 of the National List of dual-use goods which can be used in the production of chemical weapons (toxic chemicals and precursors), and
- (4) Items listed in Part I of the National List of dual-use goods which can be used in the production of bacteriological (biological) and toxin weapons (pathogens dangerous for humans and animals, and toxins).

The transit of other dual-use goods does not require a SSECU conclusion and follows the procedure established by the law [6, Item 29].

### **3. A COMPARATIVE ANALYSIS OF UKRAINIAN LEGISLATION VERSUS EUROPEAN LEGISLATION IN THE AREA OF CATCH-ALL EXPORT CONTROL**

For the sake of our comparative analysis, the Table given below was compiled, containing relevant provisions of the European Union Community law (Regulation (EC) No. 428/2009) and of Ukrainian legislation in the area of export control over dual-use items.

The provisions shown on the Table are divided into two groups: provisions containing explicit legislative requirements and those containing voluntary legislative requirements. Regulation provisions that are legally binding (i.e.

containing explicit requirements) are highlighted with shading. STC comments provided as necessary to explain the references to provisions of the Regulation that are not presented on the Table are given *in italics*.

As was already mentioned above, STC currently has no information on incorporation of the voluntary legislative requirements of Regulation (EC) No 428/2009 in relevant national enactments of Sweden and Poland.

Therefore, the conclusions and recommendations resulting from the comparative analysis of European and Ukrainian law and presented in this Report will be based on the explicit requirements of the Regulation.

As seen from the Comparison Table, the EC Community law requirements represented in Regulation (EC) No 429/2009 can be divided into two groups:

1. Explicit legislative requirements (legally binding on all EU Member States) (Article 4.1 – 4.4) and
2. Voluntary requirements (may be incorporated in national law by a government decision of a Member State) (Article 4.5; 5.2; 6.3 and 8.1).

## Legislative provisions for applying the principle of catch-all controls over exports, brokering and transit of dual-use items

No.	Regulation (EC) No 428/2009	Law of Ukraine No 549 dated 20 February 2003
	<b>PROVISIONS CONTAINING EXPLICIT REQUIREMENTS</b>	
1.		<p><u>Article 10, par.1</u>            When the central bodies of executive power that implement export control receive <b>information about intentions or a possibility of use</b> of whatever goods, that are <b>not included in the lists</b>, in countries that are their end-users, for designing, production, assembling, testing, repairing, technical servicing, modification, upgrading, operation, managing, storage, exposure, identification, or for proliferation of <b>weapons of mass destruction or means of their delivery</b>, the mentioned bodies are obliged to inform whereof the duly authorised state export control body, which has a <b>right in this connection to apply to such goods procedures of state export control</b>.</p> <p><i>This provision has no equivalents in the Regulation, it states the responsibility of Ukrainian governmental bodies to inform SSECU about the possibility of using export in connection with WMD. The information got by SSECU from the above bodies gives it the right to apply export control procedures in respect of such export.</i></p>
2.	<u>Article 4.1</u>	<u>Article 10, par. 5</u>

No.	Regulation (EC) No 428/2009	Law of Ukraine No 549 dated 20 February 2003
	<p><b>An authorisation shall be required</b> for the export of dual-use items <b>not listed in Annex I</b> if the <b>exporter has been informed</b> by the competent authorities of the Member State in which he is established that the <b>items in question are or may be intended</b>, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of <b>chemical, biological or nuclear weapons or other nuclear explosive devices</b> or the development, production, maintenance or storage of <b>missiles capable of delivering such weapons</b>.</p>	<p><u>If an <b>entity involved in foreign economic activity is informed</b> by the duly authorised state export control body or <b>informed in other manner</b> about a possibility of full or partial use of whatever goods, that are intended for export or temporary movement to other countries for designing, production, assembling, testing, repairing, technical servicing, modification, upgrading, operation, managing, storage, exposure, identification, or for proliferation of <b>weapons of mass destruction or means of their delivery</b>,</u></p> <p>or for the <b>military end-use in countries to which full or partial embargo on shipment of goods designed for military use</b> is applied pursuant to resolutions of the UN Security Council, other international organisations, which member is Ukraine of, or by the national legislation, this entity is obliged to address the duly authorised body of state export control to receive a permit to exercise a right to export these goods <b>irrespective of the fact whether these goods are included in the lists or not</b>.</p> <p>The first part of this provision (underlined text) sets the requirement similar to that of Article 4.1 of the Regulation.</p>
3.	<u>Article 4.2</u>	<u>Article 10, par. 2 and 4</u>

No.	Regulation (EC) No 428/2009	Law of Ukraine No 549 dated 20 February 2003
	<p><b>An authorisation shall also be required</b> for the export of dual-use items <b>not listed in Annex I</b> if the <b>purchasing country or country of destination is subject to an arms embargo</b> decided by a common position or joint action adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an <b>arms embargo</b> imposed by a binding resolution of the Security Council of the United Nations and if the <b>exporter has been informed</b> by the authorities referred to in paragraph 1 that the <b>items in question are or may be intended</b>, in their entirety or in part, <b>for a military end-use</b>.</p>	<p>The state <b>export control is also applied</b> to export and temporary movement of goods that are <b>not included in lists</b> in case if <b>export or temporary movement of such goods outside Ukraine is performed to the countries to which full or partial embargo on shipments of such goods is applied pursuant to resolutions of the UN Security Council, other international organisations</b>.</p> <p><i>Article 4.2 of the Regulation is more specific and unambiguous as compared to Article 10 (par. 2 and 4) of the Law of Ukraine which extends the export authorisation requirement to items whose export to a specific country is embargoed. Instead, the Regulation requirement concerns the export to countries under an arms embargo and applies if there is a risk of military end-use of these items.</i></p>
4.	<p><u>Article 4.3</u></p> <p><b>An authorisation shall also be required</b> for the export of dual-use items <b>not listed in Annex I</b> if the <b>exporter has been informed</b> by the authorities referred to in paragraph 1 that the <b>items in question are or may be intended</b>, in their entirety or in part, for <b>use as parts or components of military items</b> listed in the national military list <b>that have been exported</b> from the territory of that Member State <b>without authorisation or in violation of an authorisation</b> prescribed by national legislation of that Member State.</p>	<p><i>Ukrainian law lacks an identical provision (Article 4.3. of the Regulation),</i></p>
5.	<p><u>Article 4.4</u></p>	<p><u>Article 10, par. 5</u></p>

No.	Regulation (EC) No 428/2009	Law of Ukraine No 549 dated 20 February 2003
	<p><b>If an exporter is aware</b> that dual-use items which he proposes to export, <b>not listed in Annex I</b>, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1,2 and 3, <b>he must notify the authorities</b> referred to in paragraph 1, <b>which will decide whether or not it is expedient to make the export concerned subject to authorisation.</b></p> <p><i>Paragraphs 1, 2 and 3 provide for the authorisation requirement for uses connected with WMD or their delivery means; if the recipient country is under an embargo, if the items are designed for a military end-use, as well as if the items being exported are designed for use as parts or components of military items that have been exported without authorisation or in violation of an authorisation.</i></p>	<p><b>If an entity involved in foreign economic activity is informed</b> by the duly authorised state export control body or <b>informed in other manner about a possibility of full or partial use of whatever goods, that are intended for export or temporary movement to other countries for designing, production, assembling, testing, repairing, technical servicing, modification, upgrading, operation, managing, storage, exposure, identification, or for proliferation of weapons of mass destruction or means of their delivery</b>, or for the military end-use in countries to which full or partial embargo on shipment of goods designed for military use is applied pursuant to resolutions of the UN Security Council, other international organisations, which member is Ukraine of, or by the national legislation, <b>this entity is obliged to address the duly authorised body of state export control to receive a permission to exercise a right to export these goods irrespective of the fact whether these goods are included in the lists or not.</b></p> <p><i>This provision in a certain degree specifies the requirement for exporters, if they are aware that non-listed dual-use goods are intended for uses connected with WMD or for military uses. to inform SSECU about this awareness (“informed in other manner”).</i></p>
	<b>PROVISIONS CONTAINING VOLUNTARY REQUIREMENTS</b>	

No.	Regulation (EC) No 428/2009	Law of Ukraine No 549 dated 20 February 2003
6.	<p><u>Article 4.5</u>  <b>A Member State may adopt</b> or maintain national legislation imposing an <b>authorisation requirement</b> on the export of dual-use items <b>not listed in Annex I</b> if the <b>exporter has grounds for suspecting</b> that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1 (<i>in connection with WMD and their delivery means – STC</i>).</p>	<p>This requirement is missing in the Law of Ukraine</p>
7.	<p><u>Article 5.2</u>  <b>A Member State may extend the application of paragraph 1</b> (<i>Article 5.1: the authorisation requirement for brokering services – STC</i>) to dual-use items <b>not listed in Annex I</b> for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).</p> <p><i>Article 4.1: in connection with WMD or their delivery means; Article 4.2 : the recipient country is subject to an arms embargo decided by the Council or OSCE or an arms embargo imposed by the UN SC.</i></p> <p><i>In addition, Article 5.1. requires the exporter, if he is aware of possible use of the export in connection with WMD or their delivery means, to notify the national licensing authority, which will decide whether or not to issue an authorisation for brokering services.</i></p>	<p>This requirement is missing in the Law of Ukraine</p>

No.	Regulation (EC) No 428/2009	Law of Ukraine No 549 dated 20 February 2003
8.	<p><u>Article 6.3</u>  <b>A Member State may extend the application of paragraph 1</b> (Article 6.1: entitles a Member State to prohibit a transit of dual-use goods if the items passing through this State's territory can be used in connection with WMD or their delivery means - STC) to dual-use items <b>not listed in Annex I</b> for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).</p> <p><i>Article 4.1: in connection with WMD or their delivery means; Article 4.2. : the recipient country is subject to an arms embargo decided by the Council or OSCE or an arms embargo imposed by the UN SC.</i></p>	<p>This requirement is missing in the Law of Ukraine</p>
9.	<p><u>Article 8.1</u>  <b>A Member State may prohibit or impose an authorisation requirement</b> on the export of dual-use items <b>not listed in Annex I for reasons of public security or human rights considerations.</b></p>	<p>This requirement is missing in the Law of Ukraine</p>

Let us review the first group of requirements. The legislative requirement specified in the first part of par.5 of Article 10 of Ukrainian Law is in substance identical with that of Article 4.1 of the Regulation. At the same time, it would be expedient to split paragraph 5 of this article into two separate paragraphs (as shown in the Table above) so that one paragraph would refer to the use of exported goods in connection with WMD and second to the use in connection with military goods in countries under embargo. To this end, we propose to use the texts of Article 4.1 and Article 4.2 of the Regulation as a basis for wording of the above mentioned two new paragraphs. Suggested texts are presented in Recommendations below.

Ukrainian law lacks a provision similar to Article 4.3 of the Regulation. Therefore, with a view to further harmonizing Ukrainian law in the area of control over the export of dual-use goods, an essentially identical provision should be incorporated in the Law of Ukraine. It is thus proposed to introduce in the Law of Ukraine a provision on controlling the export of not listed dual-use goods in the event of availability of information (communicated to the exporter) on the use of items proposed for export as parts or components of military items that have been exported without authorisation or in violation of an authorisation.

Article 10, par.5 of the Ukrainian law *inter alia* refers to the obligation of an exporter “to address the duly authorised body of state export control (*SSECU* – *STC*) to receive a permission to exercise a right to export these goods irrespective of the fact whether these goods are included in the lists or not“ in case when he has been “informed in other manner about a possibility“ of use of the goods in connection with WMD.

In STC opinion, it is necessary to more clearly determine the responsibility of exporters in case when they are aware that proposed to export items not listed in control lists are intended for the use in connection with WMD or military goods, as it is stated in Article 4.4 of the Regulation. So it would be expedient to include in Article 10 of the Ukrainian Law a separate paragraph (clause) comprising a requirement to exporters to inform SSECU about their awareness of the intended use of proposed export in connection with WMD, military goods intended to export in countries under arms embargo and the intended use as components of controlled military items that have been exported from Ukraine without authorization or in violation of an authorization. Suggested text of new provision is presented in Recommendations below.

Until this point we have discussed the provisions of the Regulation which are legally binding on all of Member States of the European Union, completed a comparative analysis of these provisions versus corresponding provisions of the Law of Ukraine and offered recommendations resulting from the analysis.

Next, we will discuss the Regulation's voluntary requirements associated with applying the principle of catch-all controls, i.e. the requirements which can be **incorporated in** national law by governmental decision of a Member State:

1. Imposing an authorisation requirement for items not listed on the control list if **the exporter has grounds for suspecting** that these items can be intended for use in connection with weapons of mass destruction and their delivery means (Article 4.5. of the Regulation);
2. Imposing an authorisation requirement for **brokering services** associated with items not listed on the control list if such items can be used in connection with weapons of mass destruction and their delivery means, as well as for military end-use and destinations subject to an international embargo (Article 5.2);
3. Imposing a requirement of **prohibiting the transit of items** not listed on the control lists if they can be used in connection with weapons of mass destruction and their delivery means, as well as for military end-use and in destinations subject to an international embargo (Article 6.3);
4. Imposing a **prohibition or authorization** requirement for the **export** of dual-use goods not listed on the control lists for reasons of public security or human rights considerations (Article 8.1).

As was already mentioned, the four provisions presented above are not legally binding on EU Member States, i.e. whether or not to incorporate them in national law is left to the discretion of the government of an EU Member State. The first of these provisions concerns imposing an authorisation requirement in the event of suspecting the exporter of possible end-use of the export in connection with WMD and their delivery means. The second one concerns brokering activities involving dual-use items, which is currently exempt from national controls in Ukraine, and the third one concerns prohibiting the transit of dual-use items not listed on the control lists.

In STC opinion, it is the fourth of the above provisions that can be of current concern for Ukraine, imposing a prohibition or a licensing requirement for the export of items not listed on the control lists for reasons of public security or human rights considerations. We therefore propose to introduce into the Law of Ukraine a provision extending the principle of catch-all controls to covering the export of non listed military goods and of dual-use goods in the event of systematic human rights violations in the recipient country or if such export might conflict with public security interests.

The STC's recommendations are summarized below.

## **RECOMMENDATIONS**

1. Split paragraph 5 of Article 10 of the Ukrainian Law into two individual parts (paragraphs) and edit the texts of new paragraphs on the basis of wording used in Articles 4.1 and 4.2 of the Regulation, as follows:

“An authorisation shall be required for the export of dual-use items not listed in control lists if the exporter has been informed by the duly authorised state export control body that the items in question 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“ and

“An authorisation shall also be required for the export of dual-use items not listed in control lists if the exporter has been informed by the duly authorised state export control body that the items in question are or may be intended for military end-use in countries which are subject to full or partial embargo on shipment of military goods applied pursuant to resolutions of the UN Security Council, other international organisations, which member is Ukraine of, or by the national legislation of Ukraine.

2. Introduce in the Law of Ukraine a provision on controlling the export of not listed dual-use items in the event of the exporter being informed by the competent national authorities on the use of items proposed for export as parts

or components of military items that have been exported without authorisation or in violation of an authorisation (Article 4.3 of the Regulation)

3. Introduce an individual paragraph (clause) in Article 10 of the Ukrainian Law comprising a requirement to exporters to inform SSECUC about their awareness of the intended use of proposed export in connection with WMD or military end-use using wording of Article 4.4 of the Regulation, as follows:

“If an exporter is aware that dual-use items which he proposes to export, not listed in control lists, are intended, in their entirety or in part, for any of the uses referred to in paragraphs ... (see Recommendations 1 and 2 above) ... he must notify the duly authorised state export control body which will decide whether or not it is expedient to make the export concerned subject to authorisation“.

4. Introduce into the Law of Ukraine a provision extending the principle of catch-all controls to covering the export of non listed military goods and of dual-use goods in the event of systematic human rights violations in the recipient country or if such export might conflict with public security interests.

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6. Cabinet of Ministers of Ukraine Decree No.86 dated 28 January 2004 “On Approval of the Procedure for State Control over International Transfers of Dual-use Goods”

## **CONTROL OVER BROKERING**

### **INTRODUCTION**

According to the operative part of UN Security Council Resolution No. 1540 dated 28 April 2004, “all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery...” [1, Clause 3]. For this purpose, they shall “develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and **brokering in such items** in accordance with their national legal authorities and legislation and consistent with international law” [1, Clause 3.c].

Therefore, the control over brokering (intermediary) services associated with international trade in dual-use goods that can be used in connection with weapons of mass destruction (WMD) and their means of delivery is viewed upon by the world community as a necessary element of the nonproliferation regime.

This part of the Report will discuss provisions of the European Community law, Member States’ national legislation, as well as Ukrainian law establishing requirements to the control over brokering activities associated with dual-use items. In addition, we will offer recommendations for amending and complementing Ukrainian law, developed based on our analysis of relevant European law provisions.

## **1. CONTROLS OVER BROKERING IN EUROPEAN COMMUNITY LEGISLATION AND NATIONAL LEGISLATION OF EU MEMBER STATES**

### **1.1. Control over brokering in European Community legislation**

The main legislative instrument of the European Union establishing requirements as regards the control over international transfers of dual-use goods, including intermediary activities associated with these goods, is Regulation (EC) No. 428/2009 adopted by the Council on 5 May 2009 (hereinafter – the Regulation) [2].

Clause (15) of the Regulation Preamble references UN Security Council Resolution 1540 in connection with the EU-established controls over brokering in materials related to weapons of mass destruction (WMD) and defines them as “materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery”.

Controls over brokering services are enforced if “the broker has been informed by competent national authorities or is aware that such provision might lead to production or delivery of weapons of mass destruction in a third country” [2, Preamble, Clause 17]. I.e. the brokering controls do not apply to all international transfers of dual-use items, but rather to the export of those items that can be used by the recipient country in connection with weapons of mass destruction.

According to Article 2.5 of the Regulation, “brokering services” mean:

“— the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or

— the selling or buying of dual-use items that are located in third countries for their transfer to another third country”.

At the same time, the Regulation establishes no controls over “the sole provision of ancillary services”, including “transportation, financial services, insurance or re-insurance, or general advertising or promotion” [2, Article 2.5, par.3].

According to the Regulation, “broker” means “any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community into the territory of a third country” [2, Article 6].

It should be noted that the scope of control over brokering services, defined by those Regulation provisions that contain explicit requirements, is a legally binding minimum to be complied with by all EU Member States. This does not prevent them from unilaterally expanding the defined scope of control at

the level of national law, based, *inter alia*, on the Regulation voluntary (nonmandatory) requirements.

Therefore, according to Regulation (EC) No.428/2009, any natural or legal person or an entity resident or established in the European Union shall obtain authorisations for brokering services associated with dual-use items listed on Annex I to the Regulation [2] if: "...the **broker has been informed by the competent authorities** of the Member State in which he is resident or established that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4(1)" [2, Article 5.1], i.e. use in connection with weapons of mass destruction or missiles capable of delivering such weapons.

If the **broker is aware** of any of the abovementioned uses of Annex I goods for which he proposes brokering services, he **must notify** the competent authorities which will decide whether or not it is expedient to make such brokering services subject to authorisation [2, Article 5.1].

In addition, based on the Regulation voluntary provisions (requirements), an EU Member State may extend the authorisation requirement for brokering services to:

- Items not listed on Annex I if these items are designed for uses in connection with WMD and their means of delivery;
- Dual-use items intended for a military end-use. According to Article 4.2 (a), (b) and (c) of the Regulation, such use means: (a) incorporation into military items listed in the military list of Member States; (b) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the abovementioned list; and (c) use of any unfinished products in a plant for the production of military items listed in the abovementioned list; and
- Items proposed for export to a country 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 [2, Article 5.2].

Authorisations (licences) for brokering services are granted by “... competent authorities of the Member State where the broker is resident or established. These authorisations shall be granted for a set quantity of specific items moving between two or more third countries. The location of the items in originating third country, the end-user and its exact location must be clearly identified. The authorisations shall be valid throughout the Community” [2, Article 10.1].

To obtain an authorisation (licence) for brokering services, brokers shall supply the competent national authorities with all necessary information that concerns brokering services related to dual-use items, in particular, details on the “location of the dual-use items in the originating third country, a clear description of the items and the quantity involved, third parties involved in the transaction, the third country of destination, the end-user in that country and its exact location” [2, Article 10.2].

In deciding whether or not to grant an authorisation for brokering services, in accordance with the Regulation [2], Member States shall take into account their international obligations and commitments with respect to valid international sanctions/embargoes, considerations of national foreign and security policy, and considerations about intended end-use and the risk of diversion [2, Article 12.1].

An authorisation for brokering services in European Union countries is issued on a special form a model of which is given in Annex IIIb to the Regulation [2, Article 14.1]. Such a form should include at least the details listed below:

1. Name/title of broker/applicant;
2. Identification number;
3. Expiry date (if applicable);
4. Contact point details;
5. Exporter in originating third country;
6. Issuing authority;
7. Consignee in third country of destination;
8. Member State in which the broker is resident or established;

9. Originating third country/third country of location of the items subject of brokering services;
10. End user in country of destination (if different from consignee);
11. Third country of destination;
12. Third parties involved, e.g. agents (if applicable);
13. Description of the items;
14. Harmonised System or Combined Nomenclature Code (if applicable);
15. Control list number;
16. Currency and value;
17. Quantity of the items;
18. End use;
19. Additional information required by national legislation (to be specified on the form)
20. Title of issuing authority, date, signature and stamp.

Regulation (EC) No. 428/2009 assigns to Member States the responsibility for provision of guidance to exporters and brokers. The Commission may also offer recommendations for best practices in the application of this Regulation [2, Article 19.5]. In addition, exporters and brokers can be consulted on Regulation implementation by experts of the so-called Dual-Use Coordination Group set up according to the Regulation [2, Article 23].

One important requirement of the Regulation [2] is keeping registers or records for brokering services [2, Article 20.2]. Such registers shall be kept in accordance with national law or practice in force in the respective Member States. The registers or records shall be kept for at least three years and be produced, on request, to the competent authorities of the Member State in which the broker is established or resident [2, Article 20.3].

To ensure that the Regulation export control measures are being properly applied, a Member State shall allow representatives of governmental authorities to enter the premises of persons involved in the supply of brokering services, for the purpose of inspecting their activities [2, Article 21].

Therefore, the Regulation [2] clearly establishes the conditions under which the provision of brokering services related to transfers of dual-use goods is subject to export control, namely in the event of awareness that providing such services can lead to production or delivery of WMD in a third country.

At the same time, as was mentioned above, the Regulation reserves for Member States the right to extend the controls to brokering activities (i.e. require obtaining an authorisation for such activities) associated with dual-use goods not listed on the control list if such goods can be used in connection with WMD or their means of delivery, are intended for military end-uses, or are proposed for export to countries of destination subject to an international arms embargo.

Relevant provisions of the Regulation set forth requirements to controlled brokering services, licensing of such activities and interaction between the government and brokers that envisages both providing informational/advisory assistance to brokers and monitoring of their activities to ensure proper compliance with the Regulation requirements.

Discussed below are national legislation provisions adopted in Poland, Germany and Sweden that concern the control over brokering in dual-use goods. It should be noted that to date Sweden is the only country to have adopted and published a new revision of the law on the control over export of dual-use items and technical assistance associated with such items. Changes are expected to the national law in Poland and Germany, which would reflect, expand or complement the Regulation (EC) No. 428/2009 requirements as regards the control over brokering activities. Considering the above, in this Report we deal with the current provisions of Poland and Germany's law, remembering that controls over brokering in such items are already in place in these states, according to the new Regulation (EC) provisions.

## **1.2. Control over brokering in Poland**

The main Polish legislative instrument which establishes requirements to the control of both military and dual-use goods is the Law of Poland "On international trade in goods, technologies and services of strategic significance for state security and maintenance of international peace and security" (hereinafter – The Law of Poland) [3].

Article 3 of this law defines brokering services as "activities conducted by natural or legal persons consisting in:

- a) Conducting negotiations, providing consultations on trade-related matters and assistance in the signing of contracts, as well as any form

of involvement in export, import, transit or concluding a contract and/or a deed of gift, leasing, loan, cession or contribution in kind that may concern, in particular, a transfer of goods of strategic significance from one country to another,

- b) Purchase, sale or arrangement of a transfer of goods of strategic significance and, in particular, freight-forwarding of goods of strategic significance from one country to another” [3, Article 5a].

It should be reminded that in the Law of Poland goods of strategic significance mean both dual-use and military goods [3, Article 3.3].

Therefore, unlike comparable provisions of the Regulation (EC) No. 428/2009 [2], the Law of Poland already at this point has in place controls over brokering activities associated with all dual-use items, regardless of their end-use.

Another essential difference of Polish law from EU Community law is the territorial limits for applying brokering controls. According to the Law of Poland, subject to controls are intermediary services concerning “transfers of goods of strategic significance from one country to another [3, Article 3.5a]. The comparable Council Regulation (EC) No. 428/2009 provision provides for controls over brokering services that concern transfers of items from third countries to any other third country” [2, Article 2.5].

According to the Law of Poland, subject to controls are any brokering (intermediary) activities involving the transfer of items of strategic significance, regardless of the broker’s place of residence or establishment, whereas the comparable provision of the Council Regulation (EC) No. 428/2009 controls the activities of those brokers only that are resident or established in a Member State of the Community and provide brokering services “from the Community into the territory of a third country ” [2, Article 2.6].

Besides, unlike comparable provisions of the Regulation (EC), the Law of Poland places under control the so-called ancillary services as well, freight-forwarding of strategic goods to another country in particular.

As regards licensing of transactions related to dual-use goods, all of them including export, brokering services and provision of technical assistance require obtaining an authorisation (licence) [3, Article 6.1] to be issued by Poland's Ministry of Economy.

Therefore, brokering controls in Poland have larger scope than those established by Regulation (EC) No. 428/2009 and cover all dual-use goods rather than those only that potentially can be used in connection with weapons of mass destruction.

### **1.3. Control over brokering in Germany**

Germany's Regulation Implementing the Foreign Trade and Payments Act (hereinafter – the Law of Germany) [4] lacks a separate definition for “brokering activities”. Instead, a combined term “trafficking and brokering” is used, to mean “the brokering of a contract referring to the acquisition or disposal of goods, or the proof of an opportunity to conclude such a contract, or the conclusion of a contract referring to the disposal of goods” [4, Article 4 c, i.6].

A detailed interpretation of the components making up the term “trafficking and brokering activities” is given in the Information Leaflet of the Federal Office of Economics and Export Control (BAFA) [5, pages 6-7].

Thus, “the term “**contract**” includes all agreements regarding the acquisition or disposal of goods. Therefore it is not necessary to sign a sales agreement. Moreover, hiring, borrowing and safekeeping contracts fall within the term of trafficking and brokering like letting, leasing or service contracts. The decisive point is the content of the contract which must focus on the acquisition or disposal of an item” [5, page 6, par.4]. Besides, according to the information given in the Leaflet [5], “it does not matter in which way or form the contract comes about; even oral contracts are sufficient” [5, page 6, par.6].

Furthermore, “the **brokering of a contract** presupposes that contacts have been established with the two potential contracting parties in order to make them conclude the contract or (at least) to raise their readiness to do so” [5, page 6, par.8].

As to such a component of the term “trafficking and brokering activities” as “case proof of an opportunity to conclude a contract”, it applies “if the person who intends to conclude the contract is informed about the name of another person who is possibly willing to do so. As a rule, the person must not be identified so that the other person who was given the name can not get in touch with this person” [5, page 6, par.9].

The licensing requirement for “trafficking and brokering” associated with military goods is established in Article 40 (1) of the Law of Germany, namely:

“Anyone who intends to undertake a trafficking and brokering transaction related to goods that are referred to in Part I Section A of the Export Control List (Annex AL) and are located in a third country or in the economic territory, and have not been subjected to import clearance yet, and that are to be exported to another third country, shall require a licence” [4, Article 40 (1)].

Control over trafficking and brokering activities in the area of dual-use goods apply to the items listed on Annex IV to Regulation (EC) No. 1334/2000 as amended and complemented (i.e. to date, it is Annex IV to Regulation (EC) No. 428/2009 ). The licensing requirement [4, Article 41 (1)] is consistent in content with the requirement as regards military goods discussed above. It can be reminded that Annex IV contains particularly sensitive items which transfer even within the Community requires a licence (authorisation).

In addition, the licence requirement extends to trafficking and brokering transactions covered by the abovementioned Articles 40 and 41 when they are carried out by German nationals in a third country that is subject to an international embargo or in a country listed on the so-called Country List K. To date, Country List K includes two countries: Cuba and Syria [6, page 10-11]. This requirement concerns goods not listed on Annex I to the Regulation that are mentioned in Article 4.2 of Regulation (EC) No. 1334/2000 (*this Article has remained unchanged in the new Regulation (EC) No. 428/2009 – STC*) [4, Article 4.2]. It can be noted that Article 4.2 of the Regulation refers to items not listed on the control list which, according to the competent authorities, are or may be intended for a military end-use.

As to the procedure for licensing of brokering activities in the area of dual-use goods in Germany, it is similar to the general procedure for obtaining licences

for the export of dual-use goods. Licences are issued by the authorised agency – the Federal Office of Economics and Export Control (BAFA).

Therefore, German national law has in place controls over brokering in dual-use goods which are listed on Annex IV to Regulation (EC) No. 428/2009, i.e. only with respect to very sensitive goods whose transfer within the Community is subject to export control. In addition, these activities are subject to control if brokering services are provided by German nationals in a third country subject to an international embargo or listed on Country List K.

It is clear that amendments to German law are forthcoming as necessitated by the new Regulation (EC) No. 428/2009 requirements envisaging a larger scope of control over brokering activities if they are associated with items that can be used in connection with weapons of mass destruction and their means of delivery.

#### **1.4. Control over brokering in Sweden**

The Law of Sweden establishing requirements as regards the control over international transfers of dual-use goods is complementary to the European Community legislation. Hence all relevant provisions of Regulation (EC) No. 428/2009 are applicable in Sweden.

The new revision of Sweden's law on control over dual-use items and technical assistance (hereinafter – the Law of Sweden) [7], published on 1 August 2010, indicates that it uses all the definitions of the terms, including the terms “brokering services” and “broker”, given in Article 2 of the Regulation [7, paragraph 2].

In addition, paragraph 18 of the Law of Sweden (the paragraph version which came into legal effect on 1 August 2010) provides a penalty for deliberate unauthorised provision of brokering services involving dual-use items listed on the control list, including technologies and software, if they are associated with WMD and their means of delivery.

As regards the Regulation Article 5.3 **voluntary requirement** entitling a Member State to introduce in national law an authorisation (licence) requirement for brokering in **dual-use items not listed on the control list** if the broker has grounds for **suspecting** that these items may be used in

connection with WMD or their delivery means, the Law of Sweden provision 4 c states that the Government may issue regulations incorporating such a requirement [7, paragraph 4c].

## 2. CONTROL OVER BROKERING IN UKRAINE

In Ukraine the requirements for the control over international transfers of both military and dual-use goods are established in the Law of Ukraine No. 549-IV dated 20.02.2003 “On State Control of International Transfers of Goods Designated for Military Purposes and Dual-Use Goods” (As amended pursuant to Law No. 2561-IV (2562-17) dated 23.09.2010) (hereinafter – the Law of Ukraine) [8].

As stated in its Article 2 (Scope), it covers “activities associated with international transfers of goods, **including provision of intermediary (brokering) services ...**” [8, Article 2, par.1].

In the Law of Ukraine the term “**military services**” means

“provision of foreign legal entities or individuals in or outside Ukraine with services, including intermediary (brokering) ones, in the field of development, manufacture, building, assembling, testing, repairing, maintenance, modification, modernization, exploitation, management, demilitarization, destruction, sale, storage, detection, identification, purchase or use of military products or technologies, as well as provision of the above legal entities of foreign state or their representatives or foreigners with services on financing such works” [8, Article 1, par. 17].

The new revision of the Law of Ukraine was complemented with the term “dual-use services (technical assistance)”, namely:

“dual-use services (technical assistance) means provision of foreign legal entities or individuals in or outside Ukraine with technical support related to repairs, development, production, use, assembly, testing, modification, modernization, retaining operability including follow-on and guarantee supervision or any other maintenance of systems, equipment or their components, software and technologies which are subject to state export control. The services (technical assistance) may take the form of giving instructions, consultations, taking measures for

the purpose of professional development, training, practical mastering of operation modes, provision of consultations and may include transfer of technical data {Article 1 was complemented with a new paragraph, according to Law No. 2561-VI ( [2561-17](#) ) dated 23.09.2010}“ [8, Article 1, par. 23].

It can be seen from the above that dual-use services are rendered equal to the provision of technical assistance associated with dual-use items and do not include the provision of brokering services involving such items, i.e. **brokering in dual-use goods is exempt from national controls.**

The validity of such a conclusion is also confirmed by the wording defining the term “intermediary (brokering) activity”:

“intermediary (brokering) activity” means any actions of a economic operator of Ukraine contributing to international transfers of military goods, including actions on financing, transportation or forwarding of freights irrespective of their origin and territory on which the above activity is carried out” [8, Article 1, par. 37].

A number of Law of Ukraine provisions mentioning “intermediary (brokering) activity” are also associated with military goods (8, Article 1, par. 29; Article 11, par. 10; Article 12, par. 1).

Therefore, Ukrainian law **does not provide for** controlling intermediary (brokering) activities associated with international transfers of dual-use goods.

## 2. ANALYSIS OF EU LEGISLATION. RECOMMENDATIONS FOR AMENDING UKRAINIAN LEGISLATION

As was demonstrated above, brokering controls are an important component of the European Union legislation on export control over dual-use goods. In Ukrainian law such activities are exempt from control. At the same time, according to the Law of Ukraine requirements, intermediary (brokering) activities in the area of military goods do get controlled. This fact would facilitate establishing such controls in provisions similar in content to the provisions covering military goods.

What is important for establishing such control is a clear definition of the terms “intermediary (brokering) activities” and “broker”. The definition of intermediary/brokering activities in the Law of Ukraine [8] quoted in Section 2 of this Report is not quite clear – it refers to brokering activities as “contributing to international transfers of military goods” whereas the actions that make up such activities are not specified.

Now, in order to develop recommendations for introducing provisions into Ukrainian law whereby requirements to the control over brokering in dual-use goods will be established, we will discuss the following relevant elements of European law, namely:

- (1) Definition of the term “brokering activities/brokering services”;
- (2) Definition of the term “broker”;
- (3) Definition of items brokering in which should be under controls;
- (4) The jurisdictional territory within which the national legislation requirement as regards the control over brokering activities applies, and
- (5) Conditions for the implementation of brokering control.

The respective legislative elements are presented in the Table below.

## Principal elements of control over brokering in European legislation

Legislative requirements	Regulation (EC) 428/2009	Law of Sweden	Law of Poland	Law of Germany
<p><b>Definition of the term “brokering activities/brokering services“</b></p>	<p>(1) The negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country;</p> <p>(2) The <b>selling or buying of dual-use items</b> which are located in third countries for their transfer to another third country.</p>	<p>Uses the Regulation (EC) definition.</p>	<p>(1) <b>Conducting negotiations, providing consultations</b> on trade-related matters and assistance in the signing of contracts, as well as involvement in <b>export, import, transit or concluding various contracts</b> (gift, leasing, loan, etc.) that may concern a transfer of goods of strategic significance from one country to another</p> <p>(2) <b>Purchase or sale</b> of goods of strategic significance from <b>one country to another</b>;</p> <p>(3) <b>Arrangement of a transfer of goods</b> of strategic significance from one country to another, freight-forwarding in particular.</p> <p><i>Poland’s law refers both military and dual-use goods to strategic ones - STC.</i></p>	<p>(1) Provision of intermediary <b>services that concern a contract on the acquisition or disposal of goods</b>;</p> <p>(2) <b>Proof of an opportunity</b> to conclude a contract;</p> <p>(3) Intermediary services in <b>concluding a contract</b> referring to the disposal of goods.</p>

Legislative requirements	Regulation (EC) 428/2009	Law of Sweden	Law of Poland	Law of Germany
<b>Definition of the term “broker”</b>	“Broker” is a natural or legal person <b>resident or established in a Member State of the Community</b> that carries out services <b>from the Community into the territory of a third country.</b>	Uses the Regulation (EC) definition.	A definition is missing.	A definition is missing.
<b>Items brokering in which is subject to controls</b>	<p>Items that can be used in connection with weapons of mass destruction <b>or their delivery means.</b></p> <p>The Regulation entitles Member States to extend brokering controls to items not listed on the List of dual-use goods if:</p> <p>(1) The items are intended for uses related to WMD and their delivery means;</p> <p>(2) The items are designed for a military end-use, and</p> <p>(3) The items are proposed for export to countries subject to an embargo.</p>	<p>Uses relevant Regulation (EC) provisions.</p> <p>Provided for incorporating such a requirement in Swedish Government regulations.</p>	Controls cover <b>brokering activities related to all strategic goods</b> (i.e. military goods and dual-use goods).	<p>(1) <b>Particularly sensitive items listed on Annex IV</b> to the Regulation (EC) No. 428/2009 whose transfer within the Community is subject to licensing.</p> <p>(2) Items <b>not listed on the List</b> of dual-use goods (Annex I to Regulation (EC) No. 428/2009 ) designed for a military end-use if the broker operates <b>in a third country subject to an embargo</b> or listed on Country List K (to date, Cuba and Syria).</p>

Legislative requirements	Regulation (EC) 428/2009	Law of Sweden	Law of Poland	Law of Germany
<b>Territory</b>	Brokering activities are subject to control if they are <b>carried out from the territory of the EU Member State</b> where the broker is resident or established.		<b>Subject to controls</b> are any brokering (intermediary) activities involving the transfer of items of strategic significance, <b>regardless of the broker's place of residence or establishment</b>	Not limited by the EU borders.
<b>Conditions for enforcing brokering controls</b>	The broker <b>has been informed</b> by the national authorities or <b>is aware</b> that the <b>items</b> subject to brokering services <b>can be used</b> in connection with <b>WMD or their delivery means</b> .		There is no condition for enforcing controls similar to that of Regulation (EC) 428/2009.	There is no condition for enforcing controls similar to that of Regulation (EC) 428/2009.

The Table above presents, in our opinion, the principle elements to be specified in the Law of Ukraine as it is complemented to introduce controls over brokering (intermediary/facilitating) activities in the area of dual-use goods.

It is clear that such controls must be established in the first place, with relevant provisions incorporated into the Law of Ukraine.

For this purpose, Article 1 of the Law of Ukraine (Definition of the terms) must **incorporate a definition for the term “brokering (intermediary activities) in the area of dual-use goods”**. Considering that the Law already has a definition for brokering in military goods, two options can be suggested:

- (1) Develop a definition that would concern brokering in both military goods and dual-use goods, i.e. amend par. 36 of this Article accordingly;
- (2) Develop a separate definition for dual-use goods to provide a specific description of brokering/intermediary transactions that shall be subject to control. For this purpose, one can follow the example of defining comparable terms in the Regulation and/or the Law of Germany.

In addition, it would be expedient to **introduce** in Article 1 of the Law of Ukraine a **definition of the term “broker”**. Here the Regulation (EC) No. 428/2009 definition of this term can be used.

Next, one important material element of legislative requirements as regards the control over brokering activities is **to define goods (items) brokering in which shall be subject to control**. The basis for such a definition can be sourced from the Regulation definition, i.e. establishing control over brokering activities associated with items that can be used in connection with weapons of mass destruction and their means of delivery. In addition, the catch-all principle could be applied to items not listed on the List of dual-use goods given an intent to export them to countries subject to an international arms embargo or to countries the export whereto is limited due to considerations of Ukraine’s national security or compliance with its bi- and multilateral obligations.

As to the territorial limits of national brokering controls’ applicability, in defining them one should take into account the difficulty of enforcing controls over brokers’ activities outside the country. Therefore, it might make sense to settle on the

Regulation (EC) option, i.e. to **limit the scope** of relevant provision or provisions to **brokering services provided from the territory of Ukraine**.

It would be appropriate, in our opinion, to introduce a separate Article of the Law of Ukraine to establish a **requirement of control over brokering** (obtaining an authorisation for such activities) in the event **that the broker has been informed** by the competent authorities or **has otherwise become aware** of possible use of the goods in connection with **WMD or their means of delivery**.

The recommendations offered are summarized below.

## **RECOMMENDATIONS**

1. With a view to harmonising Ukrainian law in the area of export control over dual-use goods with comparable European Union law, amend the Law of Ukraine to establish control over brokering (intermediary) activities associated with dual-use goods listed on the relevant control list of items that can be used in connection with weapons of mass destruction and their means of delivery.
2. Introduce into Article 1 (Definition of the Terms) of the Law of Ukraine a definition of the terms “brokering activities” and “broker”. In defining the term “brokering activities”, specify all brokering transactions involving dual-use goods that shall be subject to national export control. In addition, define in the term “broker” the territorial limits within which brokering activities are subject to national control.
3. Introduce into the Law of Ukraine a relevant provision establishing control over brokering activities associated with dual-use goods not listed on the control list if the broker has been informed by the competent national authorities or has otherwise become aware that the goods in question can be used in connection with WMD or their means of delivery, or are intended for a military end-use, or are proposed for export to a country subject to an UNSC arms embargo.

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## CONTROL OVER NEGOTIATIONS ON DUAL-USE EXPORT

This part of our research is special for the fact that control over the conduct of contractual negotiations on dual-use exports is provided for in neither Regulation (EC) No. 428/2009 nor the legislative instruments of Sweden, Poland, Finland and Germany which we explored in the framework of our research efforts. This makes it impossible for a comparative analysis to be the basis for developing recommendations in this area. Therefore, this part of the Report will only deal with relevant Ukrainian law provisions and proposed amendments thereto, and whether or not such changes are appropriate will be decided by the State Service of Export Control of Ukraine (SSECU).

## AN OVERVIEW OF UKRAINIAN LEGISLATION REQUIREMENTS

In Ukraine the requirements as regards the control over international transfers of both military and dual-use goods are established in the Law of Ukraine No. 549-IV dated 20.02.2003 “On State Control of International Transfers of Goods Designated for Military Purposes and Dual-Use Goods” (As amended pursuant to Law No. 2561-IV (2562-17) dated 23.09.2010) (hereinafter – the Law of Ukraine) [1].

The Law of Ukraine envisages that an “economic operator may conduct **negotiations** with foreign business and other entities **with regard to entering into foreign economic agreements (contracts) on export** of goods for deliveries of which to respective foreign state **partial embargo is established** only provided that he/she obtained positive conclusion of competent executive authority for state export control about **possibility of holding thereof**” [1, Article 18, par. 1].

It can be noted that in the Law of Ukraine the term “goods” refers to both military and dual-use goods [1, Article 1, par. 14]. Therefore, according to Ukrainian law, an exporter wishing to hold negotiations for the export of military or dual-use goods to a country of destination subject to a **partial embargo** shall obtain a positive SSECU conclusion.

In the Law of Ukraine the term “embargo” (absolute or partial) means “prohibition of or restrictions on export of goods to states determined by international organizations of which Ukraine is the member, or to states regarding which relevant national policy is carried out” [1, Article 1, par. 8].

The procedure for imposing or lifting a full or partial embargo, as well as other restrictions for the export of goods whose international transfers are subject to national export controls, is determined according to President of Ukraine Decree No. 861 dated 15 July 1999 [2].

In accordance with this Decree, the Cabinet of Ministers of Ukraine adopts resolutions on Ukraine's compliance with UN Security Council embargo-imposing resolutions and on confirming the nomenclature of export-embargoed items [2, Provision, par.5]. Such resolutions shall be adopted no later than one month after the UN SC decision is made [2, Provision, par.7]. This also concerns embargoes imposed by other international organizations, of which Ukraine is a member, as well as restrictions for the supply of controlled goods imposed due to national security considerations.

In order to expedite the implementation or invalidation in Ukraine of UN sanctions on international transfers of military and dual-use goods, SSECU and other central administrative authorities, upon receipt of a notification from the Ministry of Foreign Affairs of Ukraine to that effect, may implement or invalidate these sanctions pending the adoption of relevant Cabinet of Ministers of Ukraine acts [3, Item 2].

The procedure for control over the conduct of negotiations on concluding foreign trade agreements (contracts) for the supply of dual-use goods is determined by Cabinet of Ministers of Ukraine Resolutions No. 86 dated 28.01.2004 [4] and No. 125 dated 04.02.1998 [5]. Based on these resolutions, the format of a negotiation summary report was developed and approved by SSECU Order No. 86 dated 05.10.2009.

It should be noted that, following the most recent amendments introduced in the Law of Ukraine in connection with the requirements to controlling the conduct of negotiations on the export of military goods, SSECU is currently working on a new revision of the Cabinet of Ministers Resolution [5]. The dual-use goods related provisions of this document remain unchanged. It is these provisions that will be discussed below.

Resolution No. 125 dated 04.02.1998 establishes the following procedure for the state control over the conduct of negotiations:

- obtain a SSECU Conclusion (individual, open, or general) on eligibility for/to proceed with negotiations;

- conclude agreements with foreign business entities;
- submit negotiation summary reports to SSECU;
- responsibility for non-compliance with the established negotiation procedure [5, Item 5].

A Conclusion to proceed with negotiations is a document entitling to enter into negotiations for concluding foreign trade agreements (contracts) on international transfers of military goods or export of dual-use goods and other goods to countries subject to a partial embargo for the supply of such goods [1, Article 1, par. 31].

As was noted above, a Conclusion can be individual/one-time (negotiations related to a specific agreement, valid for up to one year), general (multiple negotiations with a specific end-user) or open (multiple negotiations with various end-users of a specific state). The validity term of a general or an open conclusion is up to three years.

To obtain a Conclusion to proceed with negotiations on the export of dual-use goods, one is to submit to SSECU a letter of application and the following documents:

- a standard application form; and
- a written approval by the Ministry or another central executive authority to whose administrative management domain he belongs [5, Item 13].

In addition to these documents, the exporter can be required to supply additional details or other documents necessary for Conclusion-related decision-making.

According to the Resolution [5], exporter applications for a Conclusion to proceed with negotiations shall be reviewed by SSECU within 15 days in the event that an additional inter-agency agreement is not necessary [5, Item 14]. At the same time, Article 15, par.7 of the Law of Ukraine [1] indicates that the review period is set depending on the goods category, but may not exceed 30 days – in case of dual-use exports.

In addition, should an inter-agency agreement be necessary, the timeframes for reviewing an application for obtaining a Conclusion and for decision-making on Conclusion issuance or denial may not exceed 90 days after receipt of all the documents required [1, Article 15, par.8].

Once the negotiations are over, exporters shall submit to SSECU standard reports summarizing their outcomes. The timeframes for submitting such a report are determined as the Conclusion is issued [5, Item 16]. The report shall include information/details on the obtained Conclusion to proceed with negotiations, negotiation dates and locations, negotiation parties, names of all the entities involved in the international goods transfer, the subject of negotiations, goods supply terms, information on the agreement as regards required issuance of guarantee documents and goods delivery confirmation documents, as well as information required for decision-making on the subject of negotiations.

In addition, exporters shall submit to SSECU, no later than three months after the expiry date of the Conclusion to proceed with negotiations, a document informing whether the obtained Conclusion has been used or not [6].

Exporters failing to comply with the requirement to submit a negotiation summary report are punishable under Ukrainian law by a fine amounting to 500 non-taxable individual minimum incomes [1, Art. 25, par. 7]. In addition, “pursuing negotiations for concluding international contracts for the export of dual-use goods without obtaining a Conclusion is punishable by a fine amounting to 1,000 non-taxable individual minimum incomes” [1, Art. 25, par. 6].

## **CONCLUSIONS AND PROPOSALS**

Discussed above were Ukrainian law requirements with respect to national controls over the conduct of contract negotiations on the export of dual-use goods to countries subject to a partial embargo for the supply of such goods.

For these requirements to be met, before an exporter applies to SSECU for a Conclusion on eligibility (or ineligibility) for negotiations, he shall obtain a written approval of the Ministry or other central executive authority to whose administrative management domain he belongs. Understandably, it requires some time (officially – 3 to 7 working days). Therefore, factoring in the Conclusion application review period comprising 15 days (should no inter-agency agreement be necessary), under favorable conditions the exporter may enter into negotiations approximately three weeks after making his decision to conduct such negotiations.

While the abovementioned Conclusion application review period of 15 days is determined by a Cabinet of Ministers resolution, the Law of Ukraine, however, establishes another deadline for reviewing applications for authorization documents (conclusion) related to the export of dual-use goods, namely 30 days.

Should an inter-agency agreement become necessary in the process of reviewing an application and positive decision-making on a Conclusion to proceed with negotiations, the review period can be extended to 90 days (since receipt of all documents required).

Once the negotiations are over, regardless of their outcomes, exporters shall submit to SSECU a report detailing the negotiation process and, in addition, a document informing whether the obtained Conclusion has been used or not.

Consequently, following all the negotiation procedures for the export of dual-use goods to a country subject to a partial embargo places a heavy administrative burden on exporters and an additional administrative burden on governmental officials involved in the process of issuing a conclusion to proceed with such negotiations.

It is clear that control over the conduct of negotiations is a sort of a barrier to preclude illicit exports. But the question arises if such controls are efficient enough. How justifiable is the time spent (let alone the administrative burden) in connection with this, in fact, pre-licensing control?

Besides, if an exporter fails to comply with the current Ukrainian law requirement to submit a negotiation summary report, he is punishable by a fine amounting to about USD 1,000. The fine for conducting such negotiations without a positive SSECU Conclusion amounts to about USD 2,000.

In this connection it is not quite clear in what manner SSECU, being responsible for penalizing legal persons for conducting negotiations without a positive Conclusion to that effect, establishes the fact of conducting negotiations if such negotiations have resulted in no agreements reached.

The necessity of obtaining an authorization to proceed with contract negotiations on the export of dual-use goods is also disputable now that the main “screening” of an exporter-proposed international transfer is done at the stage of reviewing the export application by SSECU experts. Furthermore, if the export is intended to go to a country subject to a partial embargo, the catch-all principle is normally applied, which implies a most thorough analysis of potential risks associated with the proposed export.

To decide whether or not it is justified to keep the legislative requirement of controlling negotiations related to the export of dual-use goods to a destination

subject to a partial embargo for the supply of such goods, one should scrutinize such a requirement for efficiency as an export control tool.

Now, as long as a partial embargo for dual-use items is concerned, an exporter should be in a position to orientate himself whether the proposed export is legitimate. Hence, he should be aware not only of the valid partial embargoes, but also of the list of items banned for export under such embargoes.

Summarizing the above, STC proposes:

1. Further review the possibilities for reforming the legislative requirement of control over negotiations related to the export of dual-use goods to a destination subject to a partial embargo for the supply of such goods, considering the efficiency/effectiveness of such controls *versus* the associated time consumption and administrative burden on exporters and governmental authorities.
2. Ensure that online and regularly updated information about countries subject to a partial embargo for the supply of dual-use goods with a detailed and comprehensive list of such goods is available on the SSECU website.

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# **INTERNAL COMPLIANCE PROGRAMS FOR ENTERPRISES**

## **INTRODUCTION**

In pursuit of the policy of non-proliferation, arms control, and combating terrorism, states establish national export control systems. Export control internal compliance programs for companies is one element of these systems. Internal compliance can be considered the first line of defense since it is implemented within enterprises, firms, and companies which are either direct manufactures or exporters of products subject to national export controls and thus has the first contact with a request for an item.

Indicative of the increasing attention paid to export control internal compliance is that during the 11<sup>th</sup> International Export Control Conference held in Kiev in June 2010 the entire Day 2 was dedicated to internal compliance objectives and challenges.

The work presented below involved an overview and analysis of the current legal framework of EU Member States and Ukraine which regulates the establishment and functioning of internal compliance systems, an exploration of administrative matters related to internal compliance, computer support for its operability, etc.

In addition, as part of the Swedish Radiation Safety Authority's activities a working visit to Stockholm was arranged for representatives of STC and the State Service of Export Control of Ukraine (SSECU) with the purpose of familiarizing with practical aspects of export control internal compliance organization and functioning within Swedish companies whose activities are associated with export of controlled items.

During the working visit the Ukrainian delegation was given a number of presentations: by the Swedish Agency for Non-Proliferation and Export Controls (ISP), Radiation Safety Authority (SSM), and the Board of the Swedish Export Control Society. A presentation dedicated to establishment and improvement of export control internal compliance systems was given by Mrs. Anne-Charlotte Merrell Wetterwik, Center for International Trade and Security (University of Georgia, USA).

Also, instructional trips scheduled under the visit program were made to Westinghouse Electric Company and FLIR Systems AB, during which the Ukrainian visitors were given an opportunity to get an idea of how the companies implement internal controls of compliance with norms and rules for the export of

sensitive products. The information obtained during the working visit is presented in this report.

Based on the results of the work completed, recommendations were developed for implementing the EU's best practices in the area of internal compliance program in Ukraine.

## **1. INTERNAL COMPLIANCE PROGRAMS (ICP) IN EUROPEAN UNION MEMBER STATES**

The main EU legislative instrument on the control over dual-use export – Regulation (EC) No. 428/2009 of 5 May 2009 (hereinafter referred as the Regulation) [1] which is legally binding throughout the European Union – lacks provisions related to the establishment of ICP. Nevertheless, Article 12.2 of this Regulation states that “... when assessing an application for a global export authorization Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorization”. According to Liege University Professor Dr. Quentin Michel, author of *The European Union Export Control Regime: Comment of the Legislation: article-by-article*, this article of the Regulation offers a recommendation to EU Member States “to require from exporters the adoption of an effective Internal Compliance Program before granting the global authorization”. [2, page 72, par.1]

In what follows, it will be discussed how issues of ICP are addressed at the national level in EU Member States Poland and Sweden. To facilitate further comparative analysis, 4 aspects of export control internal compliance (ECIC) will be taken a look at, namely:

1. Legal framework;
2. Establishment and functioning;
3. Government-to-industry cooperation, and
4. Computer support for ICP systems.

## 1.1. POLAND

### Legal framework

The main requirements to the establishment and functioning of internal compliance systems within Polish enterprises, firms etc. whose activities are associated with international transfers of controlled items are given in the Law of Poland “On international trade in goods, technologies and services of strategic significance for state security and maintenance of international peace and security” (hereinafter referred to as Polish Law) [3] .

This law, unlike its Ukrainian counterpart, lacks a definition for the term “export control internal compliance system”, yet it does define the main ICP tasks and requirements to its establishment and functioning. According to the Polish Law, an internal compliance system must include laying down, *inter alia*, “the responsibilities of the Enterprise's departments, key responsibilities in the area of trade control and management for each position, principles of cooperation of the Enterprise with government administration in regard thereto, as well as guidelines for recruitment, data archiving, training, internal control and order execution” [3, Article 11.1].

Establishment and functioning of ICP system is a **mandatory condition** for a natural or legal person seeking to apply to the national licensing authority for an **individual or global authorization** for export, provision of brokering services or technical assistance involving strategic goods. (*i.e. both military and dual-use goods - STC*) [3, Article 10.2].

A **general authorization** is granted to that natural or legal person only who can “prove existence of an internal sales control and management system for at least **3 years**” [3, Article 8.2].

An ICP system is also necessary for an enterprise or a company involved in importing controlled products into the territory of Poland if the import of such products is subject to the requirement of granting an import certificate or end-use confirmation to the exporter. Poland’s licensing authority may deny the above-said guarantee documents in case of “**failure** by the Enterprise **...to apply** an internal control system” [3, Article 22.6].

In order to ensure proper ICP system operability, the Law of Poland establishes the requirement of its state certification in the Polish law Article 11.2. [3, Article 11.2] Therefore, requirements as to the establishment and functioning of export control internal compliance systems within Polish enterprises, companies, etc. whose

activities are associated with international transfers of controlled items, are indeed envisaged in Polish law. The functioning of ICP systems is under state control exercised primarily via national certification of ICP systems.

### **Establishment and functioning**

Until 2006, the requirements as to the establishment and functioning of ICP systems had been set out by provisions of the standard PN-EN ISO 9001:2001 “Quality management systems. Requirements” (Polish version of the International Standard ISO 9001:2001) and the official document of the Polish Committee for Standardization (PKN) “Criteria for an export control internal compliance system (Additional requirements to the quality management system according to ISO 9001:2000)”.

In July 2006, the Polish Committee for Standardization issued a new standard PN-N-19001:2006 “Internal compliance system (ICS) – Requirements” [4], developed based on the international standard ISO 9001:2001. This standard, beginning with Section 4, contains all the requirements related to quality management within an enterprise, as well as additional requirements to the internal compliance system. Standard PN-N-19001:2006 complies with the requirements of international standards of the ISO series and can thus be the basis for certification of an ICP system, superseding the previous document “Criteria for an internal compliance system” [5].

The introductory section of the standard [4] (General provisions) provides a rationale for establishing ICP systems as an important component of controlling international trade in goods of strategic importance. Of interest is that, according to standard, it is recommended to establish an internal compliance system not only within exporting enterprises, but also within “trade firms, research & development organizations, intermediary organizations such as freight-forwarders, transporters, trans-shipment firms...” [4, Introduction, par. 3]. The same section of the standard identifies the role of the internal compliance system and its main tasks, namely:

- Regulating the principles of foreign trade in goods of strategic significance;
- Determining the accounting modality for foreign trade;
- Monitoring each department of the organization;
- Arranging the decision-making process;
- Preventing personnel errors;
- Building confidence in the organization,

as well as the three pillars of internal compliance: knowledge of the trade partner; knowledge of the item's technical parameters; and knowledge of the item's possible uses [4, 01, par. 6 and 7].

The Standard establishes all the requirements to be met in order to ensure effective ICP system functioning and avoiding risks of illicit international transfers of military and dual-use items.

In addition, the Polish Centre for Management Improvement "MERITUM" developed and published a handbook for quality management system self-implementation (including an ICP system) within an enterprise – "37 Steps for ISO Implementation". This handbook contains a description of quality management system implementation steps, interpretation of specific provisions of the standard, numerous examples, a sample Book of Quality, etc. [5].

Certification of an ICP system upon its establishment and periodic certification of the already functioning system for compliance with the requirements of standard PN-N-19001:2006 [4] is conducted by the Polish Centre for Testing and Certification. The Centre is a leading Polish organization operating within the framework of European Community compliance assessment. The organization's legal status is that of a joint-stock company of the National Treasury [6].

To obtain a certificate, a natural or legal person shall apply to the Polish Centre for Testing and Certification which is the only organization in Poland that is empowered to conduct certification of ICP systems within enterprises whose activities are associated with foreign trade in goods, technologies, and services of strategic significance [7].

The system is certified only upon its establishment by a natural or legal person – on his own or with the assistance of the Department of Export Control of Poland's Ministry of Economy.

The list of certified enterprises and organizations is available at the web-site of Poland's Ministry of Economy. To date, 238 legal and natural persons possess valid ICP system certificates in Poland. They include 14 of those subordinated to or controlled by Poland's Ministry of Defense; 46 manufacturers/exporters of strategic products; 56 enterprises and organizations whose activities are associated with information technologies and telecommunications; 42 organizations that provide freight-forwarding, transportation, and customs services; 50 trade companies and firms that provide brokering services; 8 chemical industry enterprises; 10 scientific & research organizations; and 12 other organizations. Out

of the total number of certificates issued about 10 are personal, i.e. issued in the name of a natural person [7].

### **Government-to-industry cooperation**

The Department of Export Control of Poland's Ministry of Economy is tasked with "cooperation with entrepreneurs in the area of establishment, implementation and improvement of existing internal compliance systems". The Department has a unit for internal control system implementation tasked, *inter alia*, with "monitoring and control of entrepreneurs (natural or legal persons), who are involved in foreign trade in goods, technologies, and services of strategic significance for the State's security, as well as for maintaining international peace and security" [7].

This unit's responsibilities also include coordination and preparation for the senior officials of the Ministry (*of Economy – STC*) and other national authorities of information material on the implementation, functioning, and role of ICP in connection with business entities' foreign trade in arms and dual-use goods, services, and technologies".

The Department of Export Control of Poland's Ministry of Economy, with the involvement of the firm awarded a tender for governmental orders, conducts training for all interested entrepreneurs. It helps firms implement ICP mechanisms and train employees responsible for the operation of this system. The training is funded by the Ministry of Economy [7].

Thus, in 2009, the Ministry of Economy signed an agreement with the firm EMS Sp. z .o.o. for export control training within the period of 28.09.2009 through 20.11.2009 on subjects: "Export control internal compliance system for foreign trade in goods of strategic importance" and "Classification of goods of strategic significance under an export control internal compliance system", with five training seminars for either subject respectively. The seminars were attended by 300 participants representing 108 enterprises. To date, principal attendees of training seminars include representatives of firms and companies carrying out foreign trade in goods of strategic importance. Yet it is becoming increasingly obvious that a broader coverage is needed for higher education establishments, scientific & research institutions, etc. which develop software and sensitive technologies [7].

Therefore, in terms of ICP systems the Government of Poland provides:

- Assistance in the establishment of an ICP system within an enterprise;
- Monitoring of ICP system functioning;

- Training for company employees responsible for compliance with export control norms and rules.

### **Computer support**

Demo versions of the WSK3921 computer programs for ICP systems within enterprises are available on the website of Poland's Ministry of Economy [8].

Two versions of such programs are available:

- (1) A version designed for exporters, importers, and firms carrying out transit or providing such services as brokering, trade consultations, assistance in contract negotiation, etc.; and
- (2) A version designed for companies that provide such services as freight-forwarding, transportation, and customs services.

Below we will discuss the functional capacities of the WSK3921 computer program that is used by internal compliance departments of companies exporting controlled products.

WSK3921 consists of a few applications. The first application (Internal compliance system) has a Main Menu with the following sections:

1. About the Program;
2. Introduction into an internal compliance system;
3. Program elements;
4. Working with the handbook on the ICP system;
5. Implementation tools;
6. References.

Sections 2 and 3, presented in slides, provide general information, information about the internal compliance system and its tasks, etc.

Thus, Section 3, made up of the Administrative and Analytical parts, *inter alia*, offers recommendations for selecting personnel for the ICP department, data archiving, employee training, information on preparing for ICP system certification, audits, execution of orders, etc. (Administrative part). The Analytical part includes slides with information on implementing a list of license denials, commodity classification methodology, and analysis of risks associated with international transfers of controlled items. Section 4 represents the text of a

handbook to assist companies in establishing an ICP system on their own and preparing it for certification.

Section 5 (Implementation tools) consists of documentary and software subsections. The documentary subsection provides samples of all documents used by the ICP department, references to the Internet sites of the U.S. Department of Trade and the UK Department of Trade and Industry where one can locate information about export license denials and lists of firms involved in the production, research, and development of weapons of mass destruction. This section also provides sample checklists to help ICP departments prepare for an external audit.

The software subsection of Section 5 consists of the following further subsections:

1. List of customers;
2. Commodity database;
3. Commodity classification;
4. Application form.

Subsections 1, 2 represent Microsoft Access-based databases containing comprehensive information about customers and products at companies' disposal, including information on stated end-use and possible end-uses, and details of relevant export authorizations.

Subsection 3 (Commodity classification) is a database with a function of commodity search by its name on the dual-use or military list. Such a search results in displaying on the computer screen all the control list positions that contain the commodity in question.

Subsection 4 (Application form) is an electronic version of the application for export, import, transit, and services authorization. Using the computer program, once a company employee fills out the application form he can get an application printout at the output.

Finally, Subsection 6 of the Main Menu (References) provides a list of Community and national export control regulations, as well as references to relevant Internet resources: List of dual-use goods; List of military goods; contact details of government officials; internal contact information, etc.

Therefore, the WSK3921 software the main elements of which were discussed above consists of an informational/instructional part and a working/functional part.

The first part contains information necessary for addressing administrative matters with respect to ICP system establishment and ensuring its operation within an enterprise. The second (functional) part contains tools necessary for locating a commodity in control lists and preparing an application for authorization.

## **1.2. SWEDEN**

### **Legal framework**

Swedish law does not have specific norms requiring establishment and functioning of export control internal compliance systems. At the same time, practical compliance with norms and rules of trade in items subject to national export controls is a priority for firms and companies exporting such items. It was explicitly demonstrated during the visit to Sweden.

### **Establishment and functioning**

As was discussed above, compliance with export control norms and rules in the process of export of controlled items is an obligation for each Swedish company. In addition, the availability of an ICP system within an enterprise (company) will aid the company to obtain a global license from the Swedish Agency for Non-Proliferation and Export Controls (ISP) [11]. Granting such a privilege can be regarded as practical implementation of Regulation (EC) No. 428/2009 represented by Article 12.2. It can be reminded that this provision requires the licensing authority to “take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorization” when considering and assessing applications for global export authorization by the national licensing authority.

Therefore, Swedish companies exporting sensitive products, primarily big companies with large amounts of export, have an added incentive to establish and maintain ICP systems.

Thus, the Ericsson Company, a manufacturer of telecommunications equipment using data encryption systems, strictly complies with export control procedures and rules when carrying out export of systems referred to items subject to export control. The company’s corporate document “Trade Compliance Policy” states that “Ericsson actively promotes the global development of an open, liberal, multilateral trading environment, while strictly observing export controls and other trade laws and regulations. A compliance management of export control, customs and preferential origin matters are essential to Ericsson” [10].

Ericsson currently staffed with 53 thousand employees has established a special department for trade law compliance staffed with 19 employees [10]. The company is in close cooperation with the Swedish Agency for Non-Proliferation and Export Controls (ISP) whose representatives inspect the company for internal compliance at least once a year.

In addition, considering that Ericsson uses U.S. goods and technologies in its activities, it also complies with the U.S. export control law and cooperates with the Bureau of Industry and Security of the U.S. Department of Trade.

Internal compliance system have been established and successfully functioning at the Westinghouse Electric Company specializing in supplies of fuel rods for nuclear reactors, reactor piping made of zirconium alloys, and reactor core components; as well at the FLIR Systems AB Company, a leader in the production of infrared cameras [11].

### **Government-to-industry cooperation**

The Swedish Agency for Non-Proliferation and Export Controls (ISP) which issues authorizations for international transfers of military and dual-use items conducts regular examinations of ICP departments within firms and companies to monitor compliance with export control norms and rules. ISP notifies companies in advance of such examinations and provides them with questionnaires to be filled out when preparing for the examinations. Upon completion of examinations, ISP representatives draw up a statement on the examination findings, highlighting the deficiencies detected and offering measures to remedy them [11].

Similar procedures are used by the Swedish Radiation Safety Authority (SSM) that is the responsible national licensing authority in the area of nuclear activities.

With a view to preventing legal violations in the area of export control, ISP and SSM conduct yearly seminars to supply information about changes in the law and control list updates. As necessary, ISP representatives conduct outreach activities for a specific industry sector or offer explanations regarding a specific export control mechanism. ISP recently developed a new methodology for informing academic institutions on export control issues. ISP and SSM's licensing department officers are responsible for consulting company employees via phone, e-mail, and face-to-face [11].

The Swedish Export Control Society is an important link between governmental organizations responsible for export control and the industry. The Society was

founded in 1994 at the initiative of Swedish industry with a view to providing support to employees of firms and companies responsible for internal compliance with Swedish, European, and U.S. export control law. The Society activities are planned and governed by the Board whose members regularly meet with the management of the Swedish Agency for Non-Proliferation and Export Controls. At such meetings Society members express their views with respect to regulatory export control norms and licensing procedures, and propose amendments to export control law [12].

As was discussed above, the main task of the Society is providing support to company employees responsible for compliance with export control requirements. The Society gathers “under one umbrella” representatives of Swedish enterprises and organizations carrying out export of both dual-use goods and military goods. These two areas of international trade are regulated by various acts and regulations, but there are grey zones where commodities are difficult to classify and define; therefore, knowledge of both trade areas becomes critical. Outreach activities pursued by the Society helps companies maintaining good export control compliance, avoid being levied fines or getting in trouble, and avoid destructive rumors about the company’s non-compliance with the law. They help uphold the reputation and save costs required for participation in seminars where exporters are offered training at modest prices. The information presented in this paragraph and onward in the “Government-to-industry cooperation” section was gathered during the recent visit to Sweden. [11].

The Society membership can only include natural persons who represent the interests of their company or corporation. The number of representatives from one organization is unlimited. To date, there are 132 Society members from 50 different companies exporting military goods and companies exporting dual-use goods (the same ratio). Joining the Society is possible only by filling out an electronic application on the official website of the Society.

The Society Board is comprised of 8 persons representing the area of military and dual-use goods, the Stockholm Chamber of Commerce, and the Confederation of Swedish Enterprise. The Board meets 8-10 times a year. A general assembly is held once a year in March, which elects the Chairman and other members of the Board. The assembly decides on the annual membership fees and makes other binding decisions according to the Society Statute. Representatives of ISP and other Swedish national authorities are always invited to attend the assembly.

Twice a year the Society meets with the management of the Swedish Agency for Non-Proliferation and Exports Control (ISP) where Society members express their

views with respect to export control legislation and licensing procedures, and propose novelties to the export control law. Speakers at these meetings include renowned export control experts.

The Society's financial issues are handled by the Stockholm Chamber of Commerce which, according to the Society Statute, is represented by one Board member. The Society's operation is funded by membership fees. The membership costs 1,600 Swedish kronas (approx. €150) per year and is paid by the organizations represented by the Society members. Apart from financial and accounting issues, the Stockholm Chamber of Commerce also deals with such practical issues as updating the membership list; distributing invitations to meetings, courses, and seminars; developing of the model of the Society's newsletter EXSTRA and updating the Society's Internet site.

One of the more important Society's activities include the two-day seminar on "Recent updates of Swedish export controls over dual-use and military goods". The seminar has been held since 1997 and is available for all exporting companies and authorities. As a rule of thumb, the seminar is attended by 45-60 individuals.

The first half of Day 1 is focused on the information about changes in Swedish law, with the remaining time being devoted to a specific topic. Seminars are conducted out of town, in a casual ambiance, providing the attendees with an opportunity to communicate one with another and discuss their problems in small groups.

Apart from training seminars, the Society provides export control training (Export Control Curriculum) made up of the following 4 courses (parts):

1. Fundamentals of Export Control – lasts 2 days (common for military and dual-use goods);
2. Classification of Military and Dual-use Goods – 1.5 days each;
3. Detailed Procedures of Export Control over Military and Dual-use Goods – 1.5 days each;
4. Export Control within an Enterprise – 1 day (common for military and dual-use goods).

Such training is conducted annually, within the period of September through April of next year. The training material consists of 4-6 cm thick A4 folders. Based on the training results, a Certified Export Control Manager diploma is issued.

The Swedish Export Control Society also publishes EXSTRA, a newsletter on export control news on its website. The newsletter contains information about new legal provisions (with commentary), sanctions, information about the Society's activities (decisions made at Board meetings, future plans, information about training courses, etc.).

### **Computer support**

Software used for commodity classification and identification varies from company to company. Some companies maintain a close link to the internal compliance software and corporate computer network (Intranet). The majority of export control-related companies have an independent connection to the ISP licensing system (SEK). This system allows submitting applications and obtaining authorizations in an electronic form. It requires the availability of a gateway server for communication with ISP using a special access card.

Since there is no common technical provider of software for ICP systems as such, the systems of different companies vary. Such programs are developed under individual orders, thus companies are reluctant to share information on such software. This also concerns databases established individually within each enterprise depending on specific goods, trade routes, and customers. Information about them is commercially sensitive and thus normally inaccessible to outsiders [9].

## **2. INTERNAL COMPLIANCE PROGRAM IN UKRAINE**

### **Legal framework**

The main requirements to the establishment and functioning of internal compliance systems within Ukrainian enterprises, firms etc. whose activities are associated with international transfers of goods subject to export control, are laid down in the Law of Ukraine "On State Control over International Transfer of Military and Dual-Use Goods" No. 549-IV dated 20 February 2003 (hereinafter referred as the Law of Ukraine) [13].

It should be noted that, according to the Law of Ukraine, establishing and ensuring the functionality of export control internal compliance system is mandatory for enterprises, companies, etc. seeking to obtain authorization (*granted by the Cabinet of Ministers Ukraine - STC*) for export/import of military goods and goods containing information that constitutes a state secret [13, Article 14, par.2].

As regards legal persons whose activities are associated with international transfers of dual-use goods, this is only required in case of their intent to obtain a **general** or **open** permit (authorization) [15, Article 13, par.2].

Article 1 (Definition of Terms) of the Law of Ukraine defines the export control internal compliance system as “a set of measures of organizational, legal, informational, etc. nature to be implemented by an entity involved in international goods transfers with the view of observance by itself and its subordinate subdivisions of legislative requirements in the area of export control” [13, Article 1, par. 35].

The State Service of Export Control of Ukraine (SSECU) conducts certification of export control internal compliance systems and issues certificates to that effect [13, Article 14, par. 3]. The certification procedure is determined by the Cabinet of Ministers Ukraine (CMU) [15, Article 13, par. 4].

Therefore, the establishment and functioning of an export control internal compliance system for enterprises, companies, and organizations of Ukraine is mandatory for exporters of military goods regardless of the type of authorization to be obtained, as well as mandatory for exporters of dual-use goods wishing to export under general or open permits (authorizations). However meeting this requirement is unnecessary to obtain an individual (one-time) permit for export of dual-use goods.

### **Establishment and functioning**

In establishing and ensuring proper functioning of internal compliance systems within enterprises, Ukrainian companies and organizations are constantly supported by the Government. ICP systems are established “according to recommendations of the specially authorized administrative body (*SSECU – STC*) which facilitates the establishment of such a system and provides this entity with information and methodology assistance” [13, Article 14, par. 1].

A newly-established ICP system is subject to national certification the procedure of which is determined by CMU Decree dated 17 July 2004 No.1080 [14].

According to this Decree, for national certification of an export control internal compliance system a legal person shall prepare and submit to SSECU a package of documents which, *inter alia*, shall include evidence of having taken “organizational, legal, informational, and other measures to ensure observance of legislative requirements in the area of export control [14, Item 5 (3)].

Apart from that, what is especially important, is that the manager of an enterprise, firm or organization undergoing an ICP system certification shall submit to SSECU an official document containing his personal commitment to ensure compliance with export control law; to refrain from international transfers that may result in breaching Ukraine's law or international commitments; to avoid signing contracts for international goods transfers if he is aware that they may be used to create WMD or their delivery means; etc [14, Item 5 (4)].

The exporter-submitted documents are reviewed by an *ad-hoc* commission instituted by SSECU and including representatives of the Ministry of Foreign Affairs, Foreign Intelligence Service, Security Service of Ukraine, and other central administrative authorities involved, as well as specialists of enterprises, institutions, and organizations [14, Item 6]. After review of the documents by the Commission an enterprise is given a Document of State Certification [14, Item 10].

The Document of State Certification is issued for a period of three years, whereupon the internal compliance system is subject to re-certification [14, Item 11]. In addition, in case of reorganizations or termination of the legal person or its non-compliance with export control law, the certification of an ICP system can be annulled by decision of the SSECU Chairman [14, Item 14].

SSECU and other central government authorities are entitled to send their representatives who are members of the Certification Commission to enterprises, firms, etc. with a mission to establish availability and functionality level of certified ICP systems [14, Item 7].

To assist the industry in establishing ICP systems, SSECU developed the "Methodology recommendations for establishment by entities involved in international transfer of goods of export control internal compliance systems" approved by SSECU Order No. 412 dated 17 November 2006 [15].

### **Government-to-industry cooperation**

The Government of Ukraine as represented by SSECU cooperates closely with ICP departments within enterprises, firms, and companies whose activities are associated with export of controlled products. In addition to the above-mentioned "Methodology recommendations", the "Procedure for providing information and methodology assistance in establishing and ensuring operability of export control internal compliance systems established by entities involved in international transfer of goods" was developed and approved by the SSECU Order [16].

This document establishes mechanisms for providing such assistance, taking into account relevant Ukrainian law and regulations. The objective of the assistance is “to determine the level of completion of the set of measures of organizational, legal, informational, etc. nature to be implemented by an entity involved in international transfer of goods ...” and to offer recommendations on eliminating the ICP system’s deficiencies and on its possible improvements [16, Item 2].

To explore the level of ICP operability, “an authorized commission is instituted to include SSECU representatives that are members of the Commission on state certification of export control internal compliance system” [16, Item 3]. A schedule of examinations/inspections is prepared for each calendar year. The enterprise’s managers are notified about verifications two weeks in advance of the planned visit of the authorized commission and are provided with the inspection agenda/plan [16, Item 5.1, par.3].

Based on the inspection results, an analytical report is prepared on the authorization documents issued to the exporter over the previous and current years (reporting on negotiations, use of issued authorization documents), according to the established form [16, Item 5.2]. In addition, a statement is prepared “on the incidence of legal offences in the activities of an entity involved in international transfer of goods ...” [16, Item 5.3]. When the work is complete, the Commission develops a summary document “Conclusion on the assessment of the level of functioning of the export control internal compliance system and recommendations for its improvement” [16, Item 7].

### **Computer support**

To date, export control internal compliance departments are able to use the computer program “PVFEK 2004” – Version 3 of the program developed especially for ICP units within Ukrainian enterprises.

For its structure and functionality, it is close to the software used by Polish companies, the difference lies in addressing specific needs of Ukrainian companies exporting controlled products.

The “PVFEK 2004” program consists of two parts; the informational/instructional one and the functional one. The informational/instructional part provides all necessary information and recommendations as to establishing and ensuring effective functioning of the ICP unit within an enterprise. The functional part allows searching for an item by control list and preparing an application for authorization or conclusion for international transfers in a written application to SSECU.

### **3. COMPARATIVE ANALYSIS OF ICP IN UKRAINE VS. EUROPEAN UNION**

#### **3.1. Legal framework**

In Ukraine, like in Poland, the establishment of ICP systems is envisaged by law. The difference is that, according to Polish law, such systems shall be established within all companies exporting controlled products regardless of the type of export authorization/license. In Ukraine, however, this requirement is not obligatory for exporters of dual-use goods using only one-time (individual) authorizations.

Swedish legislative requirements to the establishment of ICP systems are missing, yet a **global export authorization** may only be obtained by those companies that have established and ensured proper functioning of ICP systems.

#### **3.2. Establishment and functioning**

Newly established export control internal compliance systems both in Ukraine and in Poland are subject to certification, i.e. shall meet certain requirements. Such requirements in Poland are established in the national standard, whereas in Ukraine - by SSECU-developed methodology recommendations. In this regard, Poland's requirements to the establishment of ECIC systems are more stringent than those of Ukraine. Furthermore, unlike Ukraine, establishment and certification of such a system is very costly in Poland, too costly for some enterprises to enter the pool of exporters of sensitive products.

Both countries conduct periodic examinations of ICP systems, based on the results of which the level of functioning is determined and recommendations for its improvement are offered.

In Sweden the functioning of ICP units within enterprises and companies is monitored by national licensing authorities – the Swedish Agency for Non-Proliferation and Export Controls (ISP) and Radiation Safety Authority (SSM).

#### **3.3. Government-to-industry cooperation**

In both Ukraine and Poland the government provides substantial support in the establishment and proper functioning of ICP systems, conducts periodic examinations of such systems to detect deficiencies, and offers recommendations for their improvement.

In Ukraine, quite detailed recommendations were developed as to ICP systems establishment (Cabinet of Ministers Decree of 17 July 2003 No. 1080). In Poland, however, such recommendations are presented in a Handbook the volume of which allows a much more detailed discussion of recommendations and advice on the establishment and functioning of ICP systems. Such a handbook is a wonderful aid to enterprises in establishing and ensuring effective functioning of export control internal compliance systems.

Drawing upon this Polish experience, it would make sense to develop, based on Ukrainian “Methodology recommendations” and SSECU Orders No. 412 dated 17.11.2006 and No. 34 dated 19.03.2010, a “Handbook on export control internal compliance systems within enterprises”.

Another positive example of Polish governmental activities in assisting ICP unit employees is arranging free-of-charge seminars for them, as well as involving scientific & research institutions in the establishment of ICP systems.

In Ukraine it would also be reasonable to arrange free-of-charge (i.e. at the expense of the State Budget) export control seminars for officers responsible for compliance with export control norms and rules within enterprises. Such seminars can be held every year, in fall, for instance, and with relevant certificates to be issued to the attendees.

As far as scientific & research and academic institutions are concerned, compliance with export control norms and rules by such institutions’ employees in Ukraine has been largely escaping the attention of both Ukrainian governmental and non-governmental organizations whose activities are associated with non-proliferation and export control. Of course, we are not talking at this point about establishing ICP systems within scientific & research and academic institutions, but, at least as a first step, about outreach activities. This would probably involve developing a training program for seminars or a handbook or guidance on non-proliferation and export controls, especially tailored for scientists and higher education instructors.

Interesting in terms of government-to-industry cooperation is the experience of the Swedish Export Control Society. Numerous tasks of this organization include building a bridge between the Government and entrepreneurs, enabling a lively dialogue between them on a variety of export control issues. Establishment of a similar Society in Ukraine would address a number of problems such as training of export control specialists, timely informing about and explaining novelties in export control law and procedures, publishing an Internet journal on export controls, etc.

### **3.4. Computer support**

The computer programs designed for use by enterprises/companies' units responsible for compliance with export control norms and rules in Ukraine and Poland have much in common. Both the Ukrainian and Polish software has informational/instructional and functional parts. The tasks to be handled by this software are identical.

As was mentioned earlier in this report, computer programs for supporting ICP units in Sweden are developed under individual orders by companies and are tailored to suit the tasks of a specific company. In addition, they are part of the electronic document management system, often with a link to the licensing authorities' computer network, which enables electronic applying for authorization.

Therefore, considering that in Ukraine a transition to an electronic document flow both for the administrative authorities and the industry is a near-term perspective, it would be expedient to come up with administrative and technical solutions as to integrating the ICP software into electronic document management systems within enterprises and companies whose activities are associated with export of controlled items.

The recommendations discussed in sections 3.1 – 3.4 are summarized below.

### **RECOMMENDATIONS**

1. Based on the “Methodology recommendations” (CMU Decree dated 17 July 2003, No. 1080), as well as SSECU Orders dated 17.11.2006, No. 412 and dated 19.03.2010, No. 34, develop a “Handbook on export control internal compliance systems within enterprises”.
2. Organize at the expense of the State budget an ongoing seminar on export controls for employees of export control internal compliance departments within enterprises and organizations whose activities are associated with international transfers of items subject to state export control.
3. Develop a training program for seminars or a handbook or guidance on non-proliferation and export controls especially tailored for scientists and higher education instructors.

4. Explore the possibility of and develop a proposal for establishing in Ukraine a Society of sensitive products exporters as a non-governmental, self-sustaining organization to unite representatives of enterprises and organizations whose activities are associated with export of military and dual-use goods.
  
5. Prepare administrative and technical solutions for integrating the ICP computer program (software) into the electronic document management system within enterprises and companies whose activities are associated with export of controlled items.

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