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# Analysis of the US and EU legal rules on dual-use trade





## **Abstract**

Dual-use goods, by their nature, represent a persistent challenge for export control agencies. On the one hand, they account for a significant income of the producing country; however, on the other hand, their bipolar nature may raise concern regarding world mass destruction end-use(r). Despite their sensitive nature, it must be recognised that this subject is not a very popular one among scholars and that the amount of literature on this subject is modest.

Does this absence of trouble come from the legal mechanisms regulating dual-use goods? After a closer look, it seems that on the contrary that matter requires constant up-dates and improvements due to the fast changes that occur in this market. Moreover, in the past, the European Union struggled to find the right balance between the common commercial policy and the Member States security policy which has an impact on the completion of the internal market.

Across the Atlantic, the United States (US) faced different problems in relation to this issue. However, a closer look into the US system reveals that it

contains some legal mechanisms that seem hardly justifiable. This cross-examination offers thus a better understanding of what international exporters have to go through and as one says: “Better the Devil you know than the Devil you do not.”

The purpose of this dissertation is to provide a comparison of the European (EU) and the US export regimes concerning the trade of dual-use goods. All the information gleaned reveal that there are two different systems crafted for two different entities. The systems, even if they require constant improvement due to the nature of the controlled goods, adopt in some ways a shared approach due to their need to implement multilateral regimes. But the US distances itself from the EU through particular mechanisms to extend its controls, reinforcing the control of exporters of suspicious goods and having indirectly a negative impact on EU trade. Even if those mechanisms do not exist at EU level, they can be implemented individually by the Member States, blurring the uniformity and the effectiveness of the EU regime.<sup>1</sup>

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<sup>1</sup> However, EU exporters do not seem eager to look at the US regime to offset their uncertainties. According to them, the EU system is as good as Australia's, Canada's or even Japan's. On the contrary, the US's (as well as China's and Russia's) regime is less successful. Indeed, EU exporters complain about the complexity of the US administrative practice and legislation; J. GRAYSTON, “Update on Developments in EU Export Control (2006/2007)”, Grayston & Company, 16 May 2007, available at [www.graystoncompany.com](http://www.graystoncompany.com) (accessed 8 July 2014) 4.

## Introduction

In the modern global economy, controls on international trade are rare and even rarer are controls by countries on their own products. As a result, it has become extremely easy to quickly exchange products between people living at opposite sides of the globe. The development of the Internet has also contributed to that evolution, facilitating intangible transfers. This favorable context for liberalisation of exchanges must however not prevail on the international security which depends on the ability to track and control dissemination of sensitive and potentially proliferating items.<sup>2</sup>

The control on trade in military and dual-use goods comes from the Cold War and the establishment of the COCOM which was designed to

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<sup>2</sup> In particular the non-proliferation of Weapon of Mass Destruction (WMD); A.G. MICARA, "Current Features of the European Union Regime for Export Control of Dual-Use Goods" (2012) JCMS 578.

prevent a large amount of goods and technology from being shipped to the Soviet Union and its allies. After the fall of the Soviet Block, international concern has shifted from preventing the proliferation of nuclear, chemical and biological weapons to the protection of human rights and the prevention of terrorism.

These export controls encompass international agreements, national laws and the implementation of regulations which, together try to find the balance between the economy and (inter)national peace and security.<sup>3</sup>

This problem was well illustrated in the aftermath of the Gulf War when it was discovered that the greatest facilitators of the Iraqi nuclear weapon program were EU dual-use exported goods. More recently, it has been proved that Abdul Quadeer Khan<sup>4</sup> benefited from EU dual-use goods in his research.<sup>5</sup>

Within the EU, military trade remains a sovereign competence organised at the national level. This dates back to the Treaty of Rome where national defence and security policy were excluded from the wider external and internal market provisions. The fate of dual-use goods was however, different. As their name describes, dual-use goods (software and technology

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<sup>3</sup> *Ibid.*

<sup>4</sup> A scientist who played an important role in the Pakistanis secret nuclear weapon program.

<sup>5</sup> A.G. MICARA, above note 1, 579.

included) are bipolar. On the one hand, they are industrial products involved in a huge valuable market, and are therefore linked to economic concerns. On the other hand, their export may raise questions regarding the foreign policy.<sup>6</sup>

This area is governed by the provisions of the internal market since the majority of such goods are for civil purposes. It implies that the trade of sensitive goods comes under a common EU export licensing regime casted in a Regulation. The Regulation emphasises the free movement of most dual-use goods within the internal market and sets up common controls on export outside the EU. The control of such matters remains a complex matter since the commercial part falls into the exclusive competence of the EU under the common commercial policy which could be undermined by security aspects remaining a national concern of the Member States (MSs).<sup>7</sup>

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<sup>6</sup> For example, some fire retardants used for civil constructions can also be used for the production of poison gases; Dutch Ministry of Foreign Affairs, “Export Control: User Guide on Strategic Goods and Services for The Netherlands”, 2013, available at <http://www.government.nl/issues/export-controls-of-strategic-goods> (accessed 1 June 2014) 11;

J.A. JOINER, “Dual-Use Export Controls on Nanotechnology” (2008) *Nanotechnology Law & Business* 55.

<sup>7</sup> FITZPATRICK ASSOCIATES & STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE (SIPRI), “Export Licensing of Military and Dual-Use Goods in Ireland”, Forfás, May 2004, available at <http://www.djei.ie/publications/trade/2004/exportmilitarydualuse.pdf>

Far from the structural problem of the EU, the United States of America (US) have developed a system taking into account not only the national security and commercial interests, but also the right to sovereign self-defence.

Intrusive, complicated and far-reaching, the US regime is characterised by a broad definition of “export” of those sensitive items. This has a dramatic impact on US and foreign traders. A deep knowledge of the US regime is therefore crucial for EU exporters.<sup>8</sup>

The object of this dissertation is to analyse the EU and the US dual-use export control regimes. It seems crucial for an exporter to have a deep knowledge on that subject since, depending on the circumstances, several authorisations will be required and sanction may be claimed. Moreover, it is interesting to describe how these two regimes have adopted different strategies to cope with the same dilemma characterising the export of dual-use goods.

Since the US regime is a national one and the EU regime is an international one, making a comparison upfront is unreasonable. It is crucial to understand first how the EU system works in order to be able to

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(accessed 11 July 2014) 2-3.

<sup>8</sup> R. ROSANELLI, “US Export Control Regulations Explained to the European Exporter: A Handbook”, European Studies Unit ULG, available at

[http://local.droit.ulg.ac.be/jcms/service/file/20140108134656\\_Handbook-RR-0801.pdf](http://local.droit.ulg.ac.be/jcms/service/file/20140108134656_Handbook-RR-0801.pdf) (accessed 29 May 2014) 3.



compare it with the US regime. To do so, this dissertation will first discuss the legal ground *i.e.* the international agreements signed between participating States which emphasises information exchanges and coordinated strategies. Those multilateral agreements are the headstone of each regime but their weaknesses have constrained the participating State to take other approaches (Chapter 1). This dissertation will look at the development of the EU regime. The adoption of the first legal framework lasted three years. The problem was not over the need for that framework: there was a common understanding of the need to avoid a *forum shopping* in favour of the laxest Member State (MS).<sup>9</sup> The problem was rather for the MSs to waive their sovereign rights to control exports from their territories once goods had been cleared by another national agency. Another problem was also to develop and update the list of controlled goods. But the most crucial problem was the articulation between the EU common commercial policy and the national foreign and security policy. Are the MSs free to rely upon non-EU legal mechanisms in order to impose trade restrictions on third-countries? If so, to what extent and in which circumstances can they do so?<sup>10</sup> (Chapter 2).

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<sup>9</sup> P. KOUTRAKOS, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of sanctions, exports of dual-use goods and armaments* (Oxford, 2001) 94-95.

<sup>10</sup> P. KOUTRAKOS, "Security and Defence Policy within the Context of EU External Relations: Issues of Coherence, Consistency and Effectiveness" in M. TRYBUS & N. WHITE (eds.), *European Security Law*

Finally, the dissertation is going to compare the EU and the US regimes, showing us the *longa manus* of the latter system which poses excessive burdens and responsibilities on exporters. Indeed, because of this extensive out-reached regime, breaches of export control rules can happen without the conscious knowledge of non-diligent firms. The results will cost them heavy sanctions and the degradation of their image (Chapter 3). A particular care is thus required for the exporters, regardless of their nationality/ies.<sup>11</sup>

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(Oxford, 2006) 254.

<sup>11</sup> Y. AUBIN & A. IDIART, *Export Control Law and Regulations Handbook: A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance* (Alphen aan den Rijn, 2007) 9.