

Bird & Bird & Export controls

New EU export controls – do I need to take action?

On September 9 (2021), the new [EU Dual-use Regulation 2021/821](#) (also known as the EU dual use recast) will enter into force and become directly applicable across all EU Member States and its EU citizens. At the same time, the current EU Dual-use Regulation 428/2009 will cease to apply.

What is new and how to spot it?

In comparison with the latter, the new EU Dual-use Regulation 2021/821 has introduced the following main novelty elements which merit further attention – as depicted by below basic Q&A – in view of assessing whether you need to take action ensuring (ongoing) EU export controls compliance in your export related daily business operations.

NON-LISTED DUAL-USE ITEMS

*There is also a new catch-all licensing requirement regarding export of dual-use items which have been included on the national control list of dual-use items by an EU Member State. These national controlled dual-use items are **not** specifically listed in the EU Dual-use Regulation 2021/821. The national control lists will be published by the European Commission. There is **no** due diligence requirement for the exporter in relation to this specific catch-all as an export licence will be required solely if the exporter has been informed by the competent authority that the dual-use items in question are or may be intended, in their entirety or in part, for uses of concern with respect to public security, including the prevention of acts of terrorism, or to human rights considerations.*

a) Do our business products and/or operations involve or deal with national controlled dual-use items as described above?	Y/N
b) Do we perform export or brokering services related to such national controlled dual-use items?	Y/N
c) Do our commercial contracts cover a scenario where a license requirement might be imposed due to concerns with respect to public security, including the prevention of acts of terrorism, or to human rights considerations?	Y/N

NON-LISTED CYBERSURVEILLANCE ITEMS

*There is a new catch-all control, entailing also due diligence obligations for the exporter, which covers cyber-surveillance items **not** specifically listed in the EU Dual-use Regulation 2021/821. The relevant catch-all control entails licensing control of cybersurveillance related goods, software or technology which are not specified in the Annex I, but are or may be intended, in their entirety or in part, for use in connection with (i) internal repression and/or (ii) the commission of serious violations of human rights and international humanitarian law.*

***Cyber-surveillance items** are being defined as dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems.*

a) Do we know how to determine to what extent our business products and/or operations involve or deal with cyber-surveillance items (specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems)?	Y/N
b) Do we perform export or brokering services related to such cyber-surveillance items?	Y/N
c) Do we know what type of due diligence is being expected?	Y/N
d) Do we perform any due diligence or screening in view of assessing whether there is knowledge or reasonable cause/grounds to believe such cyber-surveillance items are or may be intended, in their entirety or in part, for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law?	Y/N
e) Do we know what is considered as “internal repression” or “serious violations of human rights and international humanitarian law”?	Y/N
f) Do we know how to perform an adequate or satisfactory assessment regarding a risk of internal repression or committing serious violations of human rights and international humanitarian law?	Y/N
g) Do we know how to notify the competent authority and whether any past exports need to be reported as well?	Y/N
h) Do we know whether there is any impact for our commercial regions, commercial partners and customers going forward?	Y/N

TECHNICAL ASSISTANCE & BROKERING

There is a licensing requirement for the provision of technical assistance related to dual-use items listed in the EU Dual-use Regulation 2021/821 if the provider of technical assistance has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part, for any of the uses in relation to weapons of mass destruction, or ii) use as parts of military items listed in the national military list and have been exported without authorisation, or iii) in relation to military end-uses in a country subject to a formal arms embargo.

***Technical assistance** involves any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance.*

*A **provider of technical assistance** is considered to be i) any party providing technical assistance from the EU customs territory into the territory of a third country; ii) any party resident or established in an EU Member State that provides technical assistance within the territory of a third country; or (iii) any party resident or established in an EU Member State that provides technical assistance to a resident of a third country temporarily present in the EU customs territory.*

***Brokers** are considered now any party – irrespective of residence and establishment – that provides brokering services from the EU customs territory of the Union into the territory of a third country*

a) Do we have a clear understanding and overview of our current technical related activities?	Y/N
b) Can our activities be regarded as “technical assistance” for dual-use items?	Y/N
c) Does an exception apply for our type of technical assistance?	Y/N
d) Can we be regarded as a “provider of technical assistance” whether being established or having residence in the EU?	Y/N
e) Do we know how to assess (also ensuring data protection and privacy) whether we provide technical assistance to non-EU nationals present in the EU?	Y/N
f) Do we perform any due diligence or screening in view of assessing whether there is knowledge or reasonable cause/grounds to believe that our technical assistance in question is or may be intended, in its entirety or in part, for any of the uses in relation to weapons of mass destruction and in relation to military end-uses in a country subject to a formal arms embargo?	Y/N
g) Do we know whether our EU Member State imposes licensing requirements for technical assistance related to national controlled dual-use items not listed in the EU Dual-use Regulation 2021/821?	Y/N
h) Do we know whether our non-EU legal entities are acting as brokers?	Y/N
i) Do we know whether our activities can be regarded as “brokering services” as defined and interpreted by the involved EU Member State(s)?	Y/N
j) Do we have a <i>brokering service</i> -related notification obligation in the relevant EU Member State(s)?	Y/N

LICENCES

An authorisation for large projects has been introduced for the particular needs of industry. It is to be granted to one specific exporter covering a type or category of dual-use items to multiple specified end-users in multiple specified third countries for specified large-scale project.

*Two new Union General Export Authorisations have been introduced being **EU007 (Intra-group export of software and technology)** and **EU008 (Encryption)**. Both require having an internal compliance program (ICP) in place. Furthermore, the **EU001** authorisation has been expanded to cover Iceland as a friendly country of destination.*

a) Do we know whether our projects can be considered as “large scale projects”?	Y/N
b) Is it an absolute <i>must</i> having an ICP in place considering our export activities?	Y/N
c) Do we have an adequate ICP in view of obtaining global licences or any of the new EU007 or EU008 authorisations?	Y/N
d) Do we have the required end-use statements for individual export authorisations in place?	Y/N
e) Do we know whether the current EU Dual-use Regulation 428/2009 continues to apply for authorisations applications made before September 9?	Y/N

In addition to above main novelty elements, the new EU Dual-use Regulation 2021/821:

- i) expands the scope of the “exporter” by including persons carrying dual-use items for export as personal baggage;
- ii) enables non-EU resident or established parties to obtain individual export licences (which raises questions as to how this will work with the EU customs law related requirement of the “exporter” having to be resident or established in the EU);
- iii) enables EU Member States to introduce national general export authorisations for low-risk exports;
- iv) enables imposing an authorisation for non-listed dual-use items if another EU Member State imposes an authorisation requirement for the export of those items on the basis of

its national control list and if the exporter has been informed that these items in question are subject to public security or human rights related concerns and considerations;

- v) extends the export related recordkeeping period to five years.

For the sake of completeness, the above general Q&A template focuses solely on the main novelty elements and does not cover above export controls aspects i) to v) or those which remain unchanged under the new EU Dual-use Regulation 2021/821.

Anything else to keep in mind?

If there is indeed impact and further compliance action is to be undertaken (such as due diligence and screening measures, assessing the product portfolio, setting up or ameliorating the internal compliance program/ICP, reviewing or updating commercial contracts and documents, checking the efficiency of the export controls licensing portfolio, etc.), before doing so, it is our strong recommendation to have also clear insight of the national export controls laws of the relevant EU Member State(s) which may have additional controls and elements that need to be taken into account as well (considering also the “*enforcement coordination mechanism*” set by the new EU Dual-use Regulation 2021/821 involving information-exchange and cooperation on enforcement between the EU Member States).

We are of course happy to go into further detail regarding the novelties and differences of the new EU export controls legislation as well as, if need be, act as a critical sounding board helping find the most effective and non-disruptive export controls compliance approach and program going forward.

Our contacts:



Brian Mulier
Partner
Tel: +31703538896
brian.mulier@twobirds.com



Goran Danilović
Associate
Tel: +31703538878
goran.danilovic@twobirds.com



Dick Ignacio
Associate
Tel: +31703538917
dick.ignacio@twobirds.com

twobirds.com

Abu Dhabi & Amsterdam & Beijing & Berlin & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Dusseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & San Francisco & Shanghai & Singapore & Stockholm & Sydney & Warsaw & Satellite office: Casablanca

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.