

Report on 2008 CISTEC Mission to Europe

(CISTEC: The Center for Information on Security Trade Control)

Period: From 20 to 30 November, 2008

Place of the visits:

- (1) The Secretariat Office of the Wassenaar Arrangement (Vienna)
- (2) The Ministry of Economic Development of Italy (Rome)
- (3) The office of Confindustria of Italy (Rome)
- (4) The European Commission, DG-Trade (Brussels)
- (5) BUSINESSEUROPE (Brussels)
- (6) BMWi (The Export control Div., Bundesministerium fur Wirtschaft und Technologie) (Bonn)
- (7) EGAD (The Export Control Group for Aerospace & Defence) (London)
- (8) BERR (The Export Control Organization, Department for Business, Enterprise and Regulatory Reform) (London)

Visitors: 12 members from private companies and CISTEC

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1. Recasting of the EU Regulation 1334/2000

1-1. Current status and future schedule

It was in December 2006 when recasting of the EU Regulation 1334/2000 was proposed. But even two years after that, it appears no agreement has reached yet among the Member States. “It’s been taking a long time because the proposal was too ambitious,” said Ms. Francoise Herbouiller, a lady who is responsible for the project at DG-Trade. On November 25, when we met her at the EU headquarters in Brussels, she mentioned that the twenty-seven different opinions (countries) had been narrowed down to around ten. “The main subjects still pending are (1) Brokering services, (2) Transit/transshipment, and (3) other items like CGEA, denials, ITT and catch-all control,” she said.

Yet the EU seems unable to reach full consensus and is trying to make a breakthrough adding “national options” to any clause on which no agreement was possible. This is the way already applied in Article 4 of the existing Regulation. In addition, some of the important subjects which the EU has failed to reach a consensus are transferred to the Action Plan (see Section 1-12) for further discussion at political level.

On November 26, just a day after our meeting in Brussels, a big conference was held at the same place for discussing the matter by officials from all the Member States. The next day on 27th, we visited Bonn and had a meeting with German export control authorities. A senior official who attended the conference said, “There was a progress, especially, the proposed definition of brokering services was more or less accepted.” His impression was that the recasting would be finalized within six months.

Actually, it is Ms. Herbouiller’s intention to finalize the project within the first quarter of 2009. From now on, everything agreed will be published on EU Official Journal, according to her. An EU-wide seminar on the new EU Regulation is scheduled for 19th February 2009. Even industry sectors can attend it if registered in advance through the Internet.

1-2 Objectives of the re-casting

1-2-1. The problem of the existing Regulation

The biggest problem of the existing Regulation 1334/2000, as Mr. Spencer Chilvers of then DTI pointed out two years ago when we visited the UK, is that the vast majority of the Regulation deals only with how each Member State should implement export controls, not the rule itself. (That the EU could agree only up to this level at the time when it had only fifteen Member States easily suggests that it should be extremely difficult this time to get a consensus on the proposed re-casting when the membership has been expanded to twenty-seven.)

Consequently, each Member State had to re-establish national legislations to complement the Regulation. The result is, however, that certain rules, particularly catch-all controls, technology transfer controls, and CGEA, are implemented quite differently among Member States.

In other words, some Member State (Italy) just re-copied the EU Regulation in its national legislations and some others partially integrated the Regulation into their national legislations. In most cases, however, the Regulation is unidentifiably mixed up with the national legislations, or is even stated with wrong interpretations.

1-2-2. Objectives

The objectives of the re-casting are, therefore, first, to correct the problem, second, to add new rules related to UNSCR No. 1540. The former was, in fact, triggered by the recommendation made in the Peer Review in 2004. According to Ms. Herbouiller, the main objectives of the re-casting are actually as follows.

- (1) to add new rules to comply with UNSCR No. 1540
- (2) to implement the recommendation made in the Peer Review in 2004
- (3) to provide the Member States with a level-playing field for export control implementation
- (4) to strike the right balance between the additional controls (brokering, etc.) and trade facilitation

1-3. Brokering Service

Originally, the term “intermediation services” was used in the proposal. But it was changed to “brokering services” since the UK and Germany were already using the terminology.

1-3-1. Definition of brokering services

The definition of “brokering services,” which is said to have been more or less accepted by the Member States, is almost as follows.

Brokering service shall mean the negotiation or arrangement of transaction for the purchase, sales, or supply of dual-use items listed in ANNEX I from a third country to any other third country; and the selling/buying of dual-use items listed in ANNEX I that are located in a third country for the transfer to another third country.

1-3-2. Scope of controls

- (1) A broker must obtain a license when informed by the authority that the item in question would be used in relation to any WMD program. Also, the broker must notify to the authority if he/she knows that the item in question would be used in relation to any WMD program.
- (2) A broker must be a resident in the EU.
- (3) The following ancillary services are not subject to the control.
 - a) Transportation
 - b) Financial Services
 - c) Insurance and re-insurance
 - d) General advertisement and promotion

1-3-3. National options

Member States can add the following conditions as national options.

- (1) Non-listed items shall be subject to the control.
- (2) “ Has grounds for suspecting ” shall also be subject to the control.

1-4. Transit/Transshipment

It was originally intended to define “transit” based on the EU Customs Code. The idea was abandoned, however, because it would involve customs enforcement and would complicate the matter.

1-4-1. The definition of transit

The definition of “transit” which was explained by Ms. Herbouiller is almost as follows.

Transit shall mean a transport of non-community dual-use items entering and passing through the customs territory of the EU to a destination outside the EU.

1-4-2. Scope of controls

A Member State’s authority can prohibit any transit if it recognizes a WMD end-use diversion risk in a third country.

1-4-3. National options

Member States can add the following conditions as national options.

- (1) To add a pre-authorization licensing system

This was proposed by the UK. Note that in this case, the authorization given by the UK authority is valid only in the UK. Therefore, if any non-community dual-use items passed through the UK and entered into the Netherlands, for example, the items in question must be subject to the control by the authority of the Netherlands.

- (2) Non-listed items shall be subject to the control.
- (3) An authorization is required when the final destination is a UN or EU embargoed country.

1-5. ITT (Intangible Transfer of Technology)

1-5-1. A change in definition of ITT

The biggest point, as far as ITT is concerned, is that the EU is now intending to change its definition, that is, the definition of “export.” Ms. Herbouiller described this more or less as follows.

Whenever a company makes available technologies through the Internet, for example, and a third person in a third country can access the technologies for his/her research and development, etc., then it can be considered a “transfer.”

In other words, when a person in the EU uploads any technology on the Internet so that any third person in a third country can access and download it for any purposes, then it could be subject to the control. This was also mentioned by a senior official of BMWi in Germany. But no agreement had been reached yet on this subject at the time.

1-5-2. The scope of ITT

According to Ms. Herbouiller, the EU Regulation will only regulate the ITT that takes place through electronic media. And any rule on the control of technology transfer which is taking place with the move of a person, within the EU or leaving from the EU, shall be subject to national legislations.

It is worth noting that the German authority mentioned to us in this regard that Border control on technology transfer is quite a problem because it is a fundamental right for a German national to leave the country, and the German authority can not interdict it.

1-5-3. ITT Best Practices

It was reported that Germany had submitted its “ITT Best Practices” to NSG and other multilateral export control regimes, and other EU Member States had accepted the document. The points are as follows.

- (1) Consider the technology in two aspects as follows.
 - a) Technology in devices
 - b) Technology in human brains
- (2) Consider the controls in three phases as follows.
 - a) Pre-licensing phase
 - b) Licensing phase
 - c) Post-licensing phase
- (3) Also pay attention to the following
 - a) Awareness promotion
 - b) Licensing process
 - c) Enforcement

1-5-4. VISA control

In relation to technology transfer controls, there is a move to establish an EU-wide system of VISA controls on foreign students, foreign-national employees and other persons with foreign nationalities. This is not a matter of export control legislations but a matter of other legislations.

1-6. Technical Assistance

Technical assistance is now regulated separately by “ COUNCIL JOINT ACTION 2000/401/CFSP of 22 June 2000. ” This controls provision of technical assistance related to WMD- or other military-end uses, and is already enforced by the UK and Germany.

Further, the Article 2 (b) (iii) of the existing EU Regulation 1334/2000 states “transmission of software or technology by electronic media..... to a destination outside the Community” as a definition of “export.” While the proposed re-casting states “transmission of software or technology, or the provision of technical assistance, by electronic media.....,” in which the underlined part is an additional. In other words, the statement of “intangible technical assistance” within the scope of “intangible technology transfer” was proposed as a definition of “export.”

At this stage, however, it is most likely that the underlined part will be deleted, and the regulation on technical assistance will remain only as JOINT ACTION 2000/401/CFSP, according to Ms. Herbouiller.

For reference, German BAFA stated that technical assistance is always linked closely with an export in one way or another, and there has been no violation case in Germany purely against its rule. Violators in relation to technical assistance are always indicted on charge of contributing to a country’s WMD program, and such cases are, therefore, not violations of export control law but violations of the War Weapons Control Act (KWKG).

1-7. Catch-all control

1-7-1. Implementation status

The rule that is implemented most differently among Member States is catch-all control. In Germany, for example, the authority’s “inform” means denial, and the exporter must stop the transaction immediately. While in the UK, the exporter is asked to apply for a license after “informed” by the authority, who reviews the application taking certain time.

1-7-2. Information sharing

One reason for causing the above problem of catch-all control is that there is no early warning system shared by the Member States at present. To solve the problem, the EU is now considering building a database system of denial information so that the Member States can share the information more deeply and effectively, which is the key to enabling the early warning. Note that this system will be held only by the governments, not open for public. But still, it is up to each Member State to provide such kind of information to the public.

1-8. CGEA

1-8-1. Current problem

CGEA is the only general license established by the EU Regulation. The problem of the current CGEA system is that its implementation rule is different among Member States, and a sense of inequality is arising among exporters. The original idea of using CGEA is that an exporter intending to use CGEA registers its name with the authority and keeps record of exports conducted under the authorization. But there appeared a country, for example, which issues a license in paper against an application. In addition, the rules of registration

and record keeping vary widely from country to country. Therefore, this problem should be rectified by the new Regulation, making clear the rule of using CGEA.

1-8-2. Establishment of new CGEAs

Another move in this regard is to establish new CGEAs as listed below. Those authorize exports of limited items to limited destinations, or non-sensitive transactions to non-sensitive countries.

- (1) Low value shipment
- (2) Export after repair and replacement
- (3) Export for exhibition and fair
- (4) Export of computers
- (5) Export of chemicals
- (6) Export of telecommunication and security

It seems that the discussion on this matter is going on referring to similar license exemptions already implemented in some Member States. At the background of establishing those new CGEAs is the idea of trade facilitation as mentioned in Section 1-2-2 (4). It is based on the philosophy of ex-ante giving a pre-authorization comprehensively under certain conditions, instead of giving individual licenses against individual applications. Another measure established in light of the ex-ante philosophy is the system of global license that allows individual exporters to export several items to several end-users in several destinations.

1-9. Penalties

There was an idea to include in the re-casting a standardization of penalties in certain forms. But actually it failed, according to Ms. Herbouiller. "It was most regrettable," she said.

The idea did fail in the end because, as the case of export controls on arms, Member States argued that enforcing penalties is each Member State's precedence over the Commission's governance. Another reason is that the Court of Justice has recently changed its ruling, which now says that although EC Commission could propose standardized penalties, it can't set up penalties themselves over each Member State's jurisdictions.

Especially, Ms. Herbouiller planned to make the global license applicable to ITT, and tried to set up some balancing clause of criminal penalties against its violations. But all her plan was failed, which was extremely regretful for her.

1-10. ICP (Internal Control Program)

Along with the ex-ante philosophy, the EU Commission tried to make it mandatory for exporters to establish the ICP. It failed again, however, because most of the Member States opposed it arguing it's too cumbersome. But it is not so regretful for Ms. Herbouiller because a good number of Member States are already implementing the ICP.

1-11. The duality of the EU export control legislations

Finally, we asked Ms. Herbouiller that if the EU Regulation was made to cover all necessary aspects in detail, then there would be no need for each Member State to establish national legislations additionally. Her reply was, “Such was actually the idea when establishing the existing Regulation.”

In this regard, however, she also mentioned that she would ask each Member State, after the new Regulation has been finalized, to repeal every part in national legislations that is similar to or in conflict with the Regulation.

Further, in the UK, we asked a BERR officer if the above was possible. He answered, “It will not happen in the foreseeable future because it’s a fact that, in one way or another, each Member State is enforcing its own rules besides the EU Regulation.”

We must realize the fact that even in the on-going re-casting project, are they trying to evade coming up against the wall providing national-option clauses, and that such national options have to be established in national legislations. It is apparent, therefore, that the duality of the EU export control legislations will never disappear.

In addition, all the national options adopted by each Member State will be published in the EU Official Journal in different languages to notify them to all exporters in the EU. In other words, all EU exporters must be aware of those national options so that they can deal with other countries’ national rules as well as with their national legislations. Thus the system will become more complicated.

1-12. The Action Plan against proliferation

Besides the re-casting of the EU Regulation, the Council has adopted “a renewed Action Plan against proliferation.” This is a move at higher, political level to enhance prevention of WMD proliferation. With the following subjects included in it, the Action Plan will help realize more aligned implementation of export controls across the EU.

- (1) promote awareness to industry
- (2) code of conduct for professionals
- (3) training for authorities and industry
- (4) sharing intelligence
- (5) risk analysis
- (6) setting up criminal sanctions against most serious violations

2. The process of revising ANNEX I attached to the EU Regulation

The ANNEX I attached to the EU Regulation lists the controlled items. This list is reviewed and revised once a year, or once in 1.5 years, incorporating the revisions made to the lists established by the international export control regimes. The UK is responsible for the consolidation of such revisions into a proposal of the Commission, which will then be

adopted by the Council. The new list will be published as a revision of the EU Regulation after translated into different languages.

The latest list has been issued as Council Regulation (EC) No. 1167/2008 of 24 October 2008, which will come into force 30 days after December 3, 2008. The new list covers the revisions of the regime lists made in the period from September 2007 till October 2008.

3. EU's international outreach activities

The meeting at the EU building in Brussels started with Ms. Herbouiller's explanation about international outreach activities at EU level. According to her, the EU is conducting outreach activities extensively, covering not only Europe but also other areas such as Russia and South-East Asia. The following outlines the areas the EU reaches out.

- (1) Neighboring countries: Malta, Egypt, and Balkan countries
- (2) EU member candidates: Turkey, Croatia
- (3) Russia: Started in 2002; wrap up meeting will be held in December 2008
- (4) South-East Asia: EU has recently started its outreach activities in South-East Asia.

Especially, EU Member States like the UK and Germany are visiting Thailand to teach export control system of the EU, and Thailand, in response, is visiting those countries to learn how border controls are implemented. The UK is presenting the systems of Goods Checker and OGEL Checker to Thailand, and Germany is visiting UAE, Malaysia and China for outreach activities.



The European Commission, DG-Trade, in November 25, 2008

4. Export control system in brief in the UK, Germany and Italy

4-1. UK

4-1-1. Organization

The Export Control Organization (ECO) of BERR, or The Department for Business, Enterprise and Regulatory Reform, is in charge of export controls in the UK. BERR is responsible for issuing licenses for both arms and dual-use items. ECO is an organization of about 90 people, operating on an annual budget of 4 million British pounds. It processes approximately 12,000 license applications each year. The applications are reviewed by an inter-agency committee joined by the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MoD). The committee only makes advice, and BERR decides whether license can be issued or not based on the advice. According to EGAD (see Section 10-2-4), nearly 70 percent of the 12,000 applications are related to exports of arms.

4-1-2. Legislations

4-1-2-1. The three-year review

The UK's export control legal system was completely renewed in May 2004, and the required three-year review was recently conducted. As a result, a new Order, namely "The Trade in Goods (Categories of Controlled Goods) Order 2008" was enforced as of October 1, 2008. With this new Order, the authority revised the following two Orders, both dealing with the control of trafficking and brokering of military items.

- (1) The Trade in Goods (Control) Order 2003
- (2) The Trade in Goods (Embargoed Destinations) Order 2004

The points of the revision are two folds as stated below.

- (1) The items subject to the control have been rearranged into Category "A" goods, Category "B" goods, and Category "C" goods.
- (2) A revision to OGTCL (Open General Trade Control License) was made to introduce the following two new OGTCLs.
 - a) OGTCL (Small Arms)
 - b) OGTCL (Category "C" goods)

Note that BERR will revise "The Trade in Goods (Categories of Controlled Goods) Order 2008" in April 2009.

4-1-2-2. Future: Integration into one Order

A future vision has already been drawn up. According to BERR, it has been decided to integrate the secondary legislations, the multiple Orders established under the Act, into one single Order in the future. If that is the case, the legal system of the UK will become much more simplified—one law and one regulation. The Department for "Regulatory Reform" will deserve its name in that sense.



The Export Control Organization, Department for Business, Enterprise and Regulatory Reform (BERR) in November 28, 2008

4-2. Germany

4-2-1. Organization

The Federal Office of Economics and Export Control (BAFA), an organization subordinate to the Federal Ministry of Economics and Technology (BMWi), is in charge of export controls in Germany. BAFA consists of about 400 people, a half of which involving in export controls. BAFA processes approximately 8,000 license applications for dual-use items each year.

4-2-2. Legislations

There have been no major revisions in German export control legislations. The present legal system is comprised of the following legislations.

- (1) The EU Council Regulation (EC) No. 1334/2000
- (2) The Foreign Trade and Payments Act (AWG)
- (3) The Foreign Trade and Payments Regulation (AWV)
- (4) The War Weapons Control Act (KWKG)



Federal Ministry of Economics and Technology (BMWi) in November 27, 2008

4-3. Italy

4-3-1. Organization

The Export Control Unit (ECU) in the Ministry of Economic Development is in charge of export controls. ECU is a compact organization consisting only with 15 people. It processes about 400 license applications for dual-use items each year. The applications are reviewed by the Advisory Committee, an inter-agency body chaired by the Ministry of Foreign Affairs. Note that export controls on arms are under the responsibility of the ministry.

The biggest problem of export controls in Italy, according to an industry association, is that it takes a long time—three to four month—after submitting an application to obtain a license for an export of dual-use items.

4-3-2. Legislations

The present legal system in Italy is as follows.

(1) Dual-use items

- a) The EU Council Regulation (EC) No. 1334/2000
- b) Decree No. 96 of April 2003

(2) Arms

Law No. 185/1990



The Ministry of Economic Development in November 24, 2008

4-4. Other noticeable point

One noticeable point that is common among the above three states is that each country has one or more officials who are playing a key role in the organization and have been handling export controls for as long as ten to fifteen years. (For reference, there is an official in the Bureau of Industry and Security (BIS) in the U.S. who has twenty years of experience.) It's a big difference from Japan where officials change positions every two years on the average.

5. Each country's outreach activities towards industry

5-1. UK

In 2007, BERR:

- (1) held 34 workshops and seminars, which were joined by 893 people from over 400 companies,
- (2) visited 15 companies for on-site training,
- (3) provided 18 presentations at industry associations and other locations,
- (4) updated its website, and
- (5) uploaded a video clip introducing export controls on the site of You Tube.

In addition, BERR conducts on-site inspections on about 600 companies each year. The companies subject to the inspection are mainly those who use open licenses (OGELs).

5-2. Germany

The German authority summarized its outreach activities as follows.

- (1) Update of the website
- (2) Council for industry
- (3) Making a film
- (4) Training events for start-up companies

5-3. Italy

- (1) ECU conducts industry outreach activities even towards foreign companies established in Italy.
- (2) ECU is recommending exporters to establish the ICP, saying that ICP-established companies can enjoy certain incentives in licensing.

6. Catch-all implementation—present and future

6-1. The present status of Catch-all implementation

6-1-1. UK and Germany

As mentioned in Section 1-7-1, there exists a distinctive difference between the UK and Germany in the implementation of catch-all controls.

6-1-2. Italy

A case of proliferating end-use may be pointed out to ECU by the exporter himself/herself or by other administrative bodies such as the Ministry of Foreign Affairs, the Ministry of Defence and the Ministry of Interior, or maybe brought up by the Intelligence Service. In all cases ECU communicates to the exporter and to the Customs Agency that the transaction is subject to a license. If the exporter, though being aware of the difficulties in proceeding with the transaction, decides to submit a license application, the procedure is identical to that for the individual license.

In 2007 ECU had a total of 32 “informed” cases, and in 2008 it had had a total of 50 “informed” cases at the time of our meeting.

6-2. Enhancement of the military end-use control

An enhancement of the military end-use control was proposed by the UK and is now under serious discussion in the EU. This is going on outside the framework of the re-casting of the EU Regulation. It was triggered by the claim raised by NGOs that present rule in the EU Regulation is insufficient in terms of items and destinations subject to the control. But BERR stated it would take years to reach an agreement in the EU.

The NGO came up in various places in Europe this time is Saferworld. This NGO bases its operation in Europe, Africa and Asia, and has an influential power raising policy proposals related to international security including arms transfer.

6-3. End-use Certificate

It seems the EU is intending to unify the format of the End-use Certificate.

6-4. Statement of Understanding published by the WA

The WA adopted at the 2007 plenary “Statement of Understanding on Implementation of End-Use Controls for Dual-Use Items,” which was proposed by Germany.

7. ITT (Intangible Transfer of Technology)

7-1. Recent trends

Recent trends in regard to ITT are, as mentioned already, (1) introduction of the new ITT definition, and (2) the Best Practices proposed by Germany. In addition, the WA adopted at the 2006 plenary “BEST PRACTICES FOR IMPLEMENTING INTANGIBLE TRANSFER OF TECHNOLOGY CONTROLS.”

7-2. Implementation status

At each place of the visits, we tried to ask how the authority or industry association was implementing ITT. In most cases, however, we were first asked the same question to the contrary. We understood from this phenomenon that they were still struggling to find the Best Practices. Again, we heard from a person in the UK that industry and academia very strongly opposed the new regulation of technology transfer controls with which the government introduced completely new concept of the transfers (IN→OUT、OUT→OUT、IN→IN→OUT、OUT→IN→OUT). As for Italy, ECU receives very few license applications in relation to ITT, according to the authority.

7-3. ITT Best Practices

The UK and German explanations about ITT best practices could be summarized as follows.

- (1) Pre-licensing screening by exporters.
- (2) Licensing review by the authority.
- (3) Record keeping by the exporter.
- (4) Post-licensing check by the authority.
- (5) Exporters’ voluntary controls based on the ICP.
- (6) Promotion of industry awareness.
- (7) Aggravated penalties against violations.

8. Control policy towards Iran, China and Russia

8-1. Iran

8-1-1. EU Regulation

In response to UNSCR 1737, the UN sanctions against Iran, the EU enforced the Council Regulation (EC) No. 423/2007 of 19 April 2007. This Regulation has been amended from time to time when the UN renewed its sanctions against the country. The latest revision is the one issued as the Council Regulation (EC) No. 1110/2008 of 10 November 2008.

The EU Regulation against Iran is much stricter than the UN sanctions in the following aspects.

- (1) The EU Regulation enforces full embargo.
- (2) It annexes additional control lists. Currently, it has three control lists as follows.
 - a) NSG/MTCR list (ANNEX I): Items subject to export prohibition
 - b) EU autonomous list (ANNEX IA): Items subject to export prohibition
 - c) EU autonomous list (ANNEX II): Items subject to licensing
- (3) It also controls technical services, financial services, investments and others.

8-1-2. Explanation by the UK FCO

Iran is a difficult country for export controls because there are lots of concerns. The authority receives many individual license applications for petro-chemical industry. It's important to check the utility of the items. The UK implements additional controls in regard to nuclear and missile concerns, and even civilian aircrafts and sea vessels are controlled to Iran.

The most typical question raised by exporters is to ask whether an export to a specific end-user in Iran is acceptable or not. The only Entity List published by BERR as guidance is related to Iran. The entities on the list are chosen based on two criteria: (1) the entities sanctioned by the UN or the EU, (2) entities denied in the past. BERR instructs exporters to apply for a license even when exporting non-listed items to Iran, if the end-user is on the list. BERR decides whether it is licensable or not on a case-by-case basis.

The ANNEX II list attached to the Council Regulation (EC) No. 423/2007 contains a broad range of low utility items like seals and gaskets. But all of them require a license for exports to Iran. On daily basis, the BERR receives license applications for the exports of items in this category. The authority checks the following points in judging if it can grant a license.

- (1) The item's utility
- (2) The end-user
- (3) If the quantities are reasonable
- (4) If there is any intelligence information
- (5) If the procurement is really necessary
- (6) If the end-use is reasonable

8-1-3. Explanation by German BAFA

Iran is a difficult country for Germany as well as for the EU in respect of export controls. Since long ago, Iran has been an important trade partner for Germany. But currently, Germany is implementing rigorous controls on exports to Iran in accordance with the EU Regulation.

For reference, BAFA has recently published on its website detailed guidance concerning export controls to Iran. It says that a license must be obtained from BAFA when transferring from Germany any Iranian controlled items to any other country in the EU. Of course, another license must be obtained in the country when exporting the items from there to Iran.

8-1-4. Explanation by the Italian Government

In many cases, the Italian authority denies license applications for exports to Iran in view of diversion risk.

8-2. China

8-2-1. Explanation by the UK FCO

The UK exports lots of dual-use items to China for processing industry, communication industry and others.

When exporting arms to China, the EU's policy of arms embargo must be considered. But the problem in this regard is that interpretation and implementation of the policy differ from country to country in the EU. The UK implements strict controls on arms exports to China in accordance with the EU policy as well as with the Consolidated EU and National Arms Export Licensing Criteria, the UK's national code established based on the EU Code of Conduct on Arms Exports. Especially, the UK denies exports of lethal weapons, guns and cannons, fighter aircrafts and military vehicles. Also, the authority pays great attention to exports of items controlled for a reason of human rights concerns. Consultations with the Sanctions Team of FCO will be done when necessary.

It's very rare to deny exports to China based on Criterion I (UK's international commitment). But exports of surveillance equipment (thermal imaging devices except for fire detectors) to China are generally denied. Exports, in some cases, are also denied based on Criterion II (Respect of human rights and fundamental freedom in the country of final destination). The decision is usually made on a case-by-case basis, and few cases are denied.

We asked if there were any cases in the UK that Chinese companies acquire high-tech companies in the UK. The answer was that there had never been such cases in the UK, but even if it actually happened, the government would be able to deal with it properly, applying Section 5 and 6 of the Industry Act of 1976.

8-2-2. Explanation by German BAFA

BAFA also mentioned EU's policy of arms embargo against China. As for exports of dual-use items to the country, the authority pays special attention to mixed companies in China, that is, those who are running civilian businesses but have certain military relationships at the same time. "To avoid any diversion, we must check the final destination, end-user and end-use well in advance," said BAFA. The authority makes it mandatory for exporters to obtain the Import Certificate or End-use Certificate endorsed by the Chinese Government when exporting controlled items to the country. In addition, the authority checks intelligence information and other countries' denial information as well. Germany implements very strict controls on exports of nuclear-related items to China.

We raised a recent topic that Chinese companies are acquiring some machine tool manufacturers in Germany. Surprised with that question, BAFA responded that the matter was now under discussion within the government. It seemed some revisions to related laws and regulations are necessary.

8-2-3. Explanation by the Italian Government

The Italian Government has no particular export control policy towards China. We mentioned that the licensed exports to China in 2003 accounted for 23 percent, the largest share, according to a document given before from the authority. The government replied that the situation had been changed now.

8-3. Russia

8-3-1. Explanation by the UK FCO

There exist no sanctions against Russia. BERR temporarily stopped issuing licenses to Russia and Georgia when the two countries got into conflicts against each other. It is now issuing licenses as usual, though. Russia, as a military giant, has a large basis of indigenous military technologies. BERR, therefore, is not concerned about military diversion of the items exported to Russia from the UK. But the authority denies exports of those items that could contribute to regional conflicts, which is in accordance with the Criterion IV (Maintenance of regional peace and security).

While lots of low-technology items are exported from the UK, BERR receives many license applications for exports to Russia (exact number is available in the annual report). But it's not a concern for the authority since the majority of the items are for civilian applications only.

The UK Government keeps watching the situation of the conflicts between Russia and Georgia through the information from the UN and NGOs, and from the UK posts in those countries as well.

8-3-2. Explanation by German BAFA

There's no arms export ban policy toward Russia, and Germany exports even arms to

the country. German authority is vigilant on exports to those end-users in Russia which were originally founded as military-related companies but are now transformed into or mixed with civilian businesses. It reviews license applications prudently, and judges if those are licensable or not after consulting with an inter-agency committee including the intelligence agency.

We mentioned that Russia seems to be giving influences on Airbus Industry through a means of shareholding and supply of parts and components, or even through procurement of the aircrafts themselves manufactured by the company, and asked BAFA if it was a concern that European high technologies would be transferred to Russia. Their response was simply, “not sure.”

8-3-3. Explanation by the Italian Government

The Italian Government has no particular export control policy towards Russia.

9. Policy on arms exports

9-1. EU Code of Conduct on Arms Exports

June 2008 marked the tenth year since the EU Code of Conduct on Arms Exports was established. We were told at the last visit two years ago that this would be made legally binding. This time, we have heard that discussions are going on to re-state it as a “Common Position.”

In UK’s case, the Consolidated EU and National Arms Export Licensing Criteria are applied quite strictly when BERR judges if license can be granted or not against each application for an arms export. No political or economic decision can be made beyond the Criteria.

9-2. The EU’s arms embargo against China

Almost every person we met in Europe affirmed that the EU would never lift the embargo anytime soon. It seems a strong US power is working.

However, it is also a fact that the interpretation and implementation of the EU’s embargo policy against China vary from country to country. Also, not all the items categorized as “arms” are prohibited for the exports to the country. The UK, for example, is implementing the policy strictly in accordance with its own code of conduct as already mentioned.

9-3. ICT (Intra Community Transfer of Defense Related Products)

A new arms transfer control policy called ICT, or “Intra Community Transfer of Defense Related Products,” is now under discussion in the EU. This was raised not by DG-Trade but by DG-Industry, and was officially proposed by the EU Commission on December 5, 2007.

Currently, controls on arms transfer is a matter of each Member State's precedence as even an intra-community arms transfer requires a license issued by individual countries. The ICT was proposed to introduce unified and simplified rules over intra-community arms transfers so that the EU defence industry can be more competitive internationally. It is intended to introduce a new licensing system that gives some incentives to companies certified as excellent in compliance. The decision will be made as a Directive (Transfer Directive).

10. Industry response to the extra-territorial application of US regulations

10-1. Dialogues with industry associations

This time, we had dialogues with the following industry associations in Europe.

- (1) Confindustria in Italy
- (2) BUSINESSEUROPE in Belgium
- (3) EGAD (The Export Group for Aerospace & Defence) in the UK

10-2. Results of the dialogues

10-2-1. Overview

The response, we have found, to the extra-territorial application of US regulations differs from country to country, or from industry to industry. Especially, multinational enterprises (Philips) or defence industry (EGAD) is taking much more time for dealing with them than for dealing with the national or EU legislations. Also, companies in defence industry are even forced to choose which legislations they should "break."

10-2-2. Confindustria

The Italian Confindustria's reply to our question about the US re-export control was simply, "We don't know how to control." Italian people always said that they were implementing export controls "pragmatically." For reference, the Italian government responds only when they are notified of any particular matters from the US Embassy. In other words, they usually do nothing about the US re-export controls, it seems.



The Office of Confindustria in November 24, 2008

10-2-3. BUSINESSEUROPE

“U.S. re-export control is a big concern.” This remark symbolizes the mentality of people from BUSINESSEUROPE with regard to the extra-territorial application of US regulations. Mr. Lamoureux, the compliance manager at a French company THALES and the chief of the association’s export control group, consistently sounded off his complaints about the US re-export controls as well as about the EU legislations. “Europe is politically weak against the US,” he even mentioned.

Meanwhile, the export control officer at Philips who attended the meeting revealed that eighty percent of his time is spent for dealing with the US re-export controls. Actually, his company often obtains licenses from BIS in the US. Although the company gets information about the ECCN from the US suppliers, they always conduct the EAR classification of US-origin items themselves because the final responsibility lies with the company itself.

BUSINESSEUROPE has recently published a report on the meeting with us CISTEC at the Headline corner of its website, which says as follows.

BUSINESSEUROPE SHARES VIEWS WITH JAPANESE EXPORT CONTROLS ORGANIZATION

At a meeting in Brussels on 25 November, BUSINESSEUROPE’s Export Controls Chairman Dominique Lamoureux met a delegation from CISTEC. The Center for Information on Security Trade Controls is the only organization in Japan working exclusively on export controls of dual-use products, including on the impact on companies of export control regulations. The discussion focused on current issues in export controls in Japan and the European Union, including the current recast of the EU’s primary export control regulation. Both sides also shared their concerns about the extraterritorial application of US re-export

regulations which place a dual burden on European and Japanese industry given that they are already covered by their respective domestic systems.



BUSINESSEUROPE in November 26, 2008

10-2-4. EGAD

10-2-4-1. Defence industry's position in the UK.

The person who mainly stood before us at the meeting was Mr. David Hayes. He is the chief of the export control group at EGAD and is a professional providing consultancy services to private companies. Again, eighty percent of his time is spent for dealing with the extra-territorial application of US export control regulations.

The most important point of his presentation is that in the UK the production of the defence industry accounts only for 2 percent, while the number of its license applications accounts for 66 percent. This means that the number of license applications per company in defence industry is much higher than that in dual-use industry, which consists of a vast number of small- and medium-sized companies. Mr. Hayes boldly said, "In an extreme sense, it's more economical for small- and medium-sized companies in dual-use industry in the UK to disregard export controls."

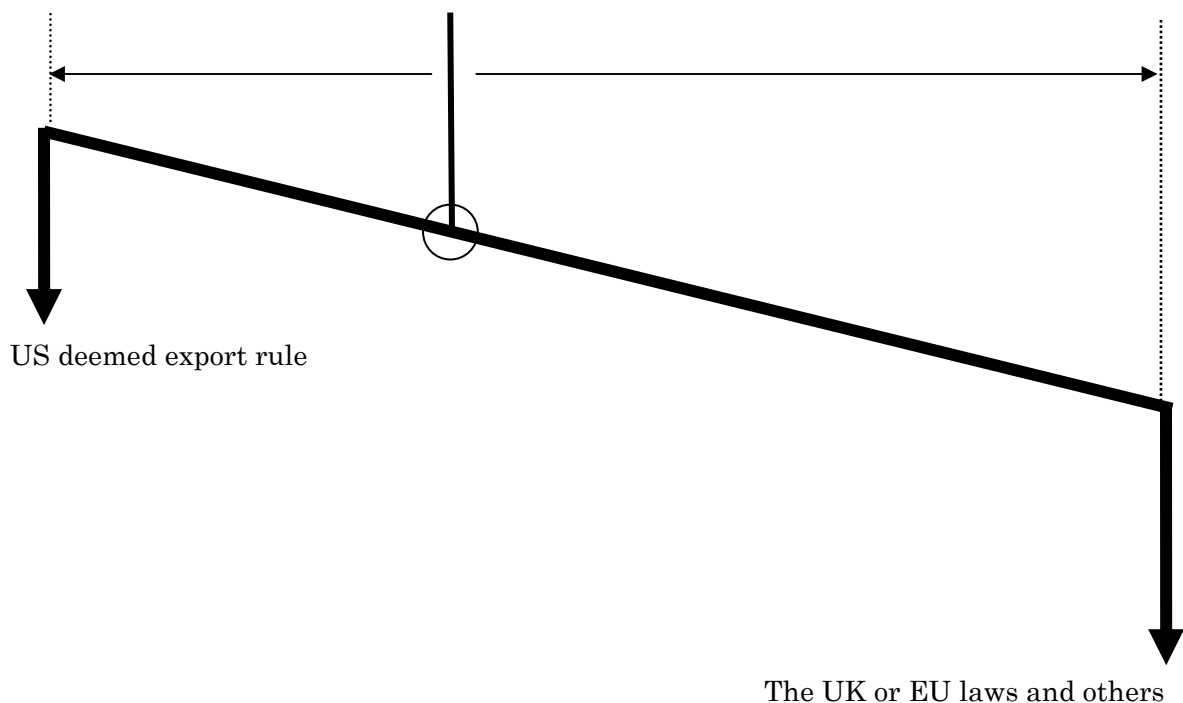
10-2-4-2. Conflicts between UK laws and US laws

Another very important point Mr. Hayes pointed out is that there are irreconcilable conflicts between UK laws and US laws in the world of export control. In this regard, he introduced an eye-catching phrase, "Do you break US law, or British and European law? The choice is yours. " This best explains the situation that the UK defence industry is in a dilemma that whichever side they take, they must break the other side's law. A person from BAE expressed the dilemma saying, "We are somewhat in a situation that we must break the UK law to comply with the US law."

To be exact, the following UK or EU laws and others are in conflicts with the US deemed export rule.

- (1) British Race Relations Act (1976)
- (2) EU Treaty of Rome (1957)
- (3) European Convention on Human Rights
- (4) British Human Rights Act (1998)
- (5) Employment Rights
- (6) Others

Do you break US law, or British and European law? The choice is yours.



10-2-4-3. The US-UK Defence Trade Cooperation Treaty

“US-UK Defence Trade Cooperation Treaty” was signed by both governments. Referring to this treaty, Mr. Hayes lamented, “UK defence companies must comply strictly with the conditions set up in the Treaty in handling US technologies, but.....” (Recent news reports say that the approval of the treaty by the US Congress seems to be delayed.)

10-2-4-4. Certification program in the UK

A certification program similar to CISTEC’s STC Program is about to be introduced in the UK defence industry. The outline is as follows.

- (1) Name of the program: The Defence Academy Training Course (not confirmed if this is the official name)
- (2) Operating body: EGAD and Cranfield University (assisted by the BERR)
- (3) Courses
 - a) Basics (contents have been completed)
 - b) Roles of 1st contact (to be started from 1Q of 2009)
 - c) Compliance manager (contents still missing)
 - d) A module of Master of Science (already started)
- (4) Method: On-line method

10-2-4-5. Dialogue with U.S. counterparts

EGAD is trying to deepen its tie with US counterparts keeping dialogue at the place of TABD, The TransAtlantic Business Dialogue.



Export Control Group for Aerospace & Defence (EGAD) in November 28, 2008

11. A visit to the WA Secretariat Office

11-1. WA's creation and its objective

The Wassenaar Arrangement (the WA) was created as a successor regime to “The New Forum,” which was established after the COCOM was dissolved. It started with 33 Member States and has been expanded to a membership of 40 countries.

While the other multilateral export control regimes were established for the purpose of preventing proliferation of Weapons of Mass Destruction (WMD), the WA was created for the purpose of controlling transfer of conventional arms and dual-use items that can be used both for civilian and arms applications. To be more exact, the WA published on its website

the following statement about its objective.

The WA has been established in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfer of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations.

11-2. The WA Secretariat

This time, we visited the WA Secretariat Office in Vienna and met the Ambassador Danielsson who is from Sweden. The office consists of 13 staff members including part timers. Its key role is to act as a coordinator among Member States, never initiates anything including policy matters. Written below are summaries of what the Ambassador told to us.

11-3. The decision-making mechanism

The WA is an organization that operates through Member States' inter-actions. Any discussion, including that on revisions of the control lists, is, therefore, takes place triggered by a proposal raised by a Member State, and all decisions are taken by consensus and the deliberations are kept in confidence. The WA Plenary is the decision-making and governing body of the Arrangement, but it rather rubberstamps the decisions already made by subsidiary bodies like the General Working Group (GWG), the Experts Group (EG), and others.

11-4. Policy implementation by Member States

Export controls are implemented by individual Participating States. Although the scope of export controls in each country is determined by the WA Lists, practical implementation varies from country to country in accordance with national legislations.

11-5. Recent policymaking

The WA issues from time to time policy statements based on the Plenary decisions. But as stated above, how it shall be implemented is at the sole discretion of each Member State. The WA, therefore, has no function to monitor Member States' implementation status. Listed below are the Statements of Understanding recently issued by the WA.

- (1) Statement of Understanding on Arms Brokerage (2002)
- (2) Statement of Understanding on Control of Non-Listed Dual-Use Items (2003)
- (3) Statement of Understanding on Implementation of End-Use Controls for Dual-Use Items (2007)

In addition, the WA publishes other documents like the Best Practice guidelines. As for the item (2) above, Japan implemented the decision in 2008 introducing the conventional arms catch-all control.

11-6. Lists of the controlled items

11-6-1. The criteria for choosing controlled items

The WA Lists consists of (1) the Munitions List and (2) the Dual-Use List. The criteria for choosing controlled items to be listed on the Dual-Use List are as follows.

- (1) Major or key elements for conventional military capabilities
- (2) Foreign availability
- (3) Controllability
- (4) Non-duplication of other export control regimes.

11-6-2. SL items and VSL items

The difference between SL items and VSL items is as follows.

- (1) SL items : Key elements directly related to advanced conventional military capabilities
- (2) VSL items : Elements essential to the most advanced conventional military capabilities

11-6-3. Sensitive items the WA pays attention to

Sensitive items to which the WA recently pays attention are as follows.

- (1) Night Vision for Civilian Use
- (2) MANPAD (MAN-Portable Air Defence System)
- (3) IED (Improvised Explosive Device)
- (4) Aircraft Missile Protection System
- (5) Charged Multiplication System
- (6) Camera

For reference, the US has enlarged the Entity List adding many entities which are suspected of being involved in IED transactions. The list includes even some German and UK entities.

11-6-4. Relationship with the EU List

The EU straight away adopts the WA Lists as its own List (ANNEX I to the EU Regulation).

11-7. Conditions for getting a membership

Although it's free for any countries to apply for a membership, there are conditions for becoming a Member as stated below.

- (1) Whether it is a producer/exporter of arms or industrial equipment respectively
- (2) Whether it has taken the WA Control Lists as a reference in its national export controls
- (3) Its non-proliferation policies and appropriate national policies
- (4) Its adherence to fully effective export controls

For reference, China has never applied for its membership.

11-8. Inside stories

As stated above, WA decisions are made all by consensus. But there are, of course, clashes of each Member State's national interests during the discussion as the Ambassador Danielsson mentioned. Although all of the deliberations are kept in confidence, we happened to have a glimpse of the inside stories of WA meetings.

At the meeting with EGAD in London, a person who worked for BERR before and used to attend WA meetings said that members representing one specific country always rejected whatever constructive proposals he made at meetings. This story, of course, is based on his experience years ago. But apparently, such scenes still frustrate him so much that he went on telling it angrily without stop.

In addition, another person at another place revealed to us that at a WA meeting it's a business as usual for representatives of the UK and of the specific country to start a heated debate over a subject, sitting face to face at each side of the conference table.



WA Secretariat Office in November 21, 2008

12. Proposals on EU-Japan industry cooperation for better export controls

12-1. The Proposals

In this mission to Europe we had dialogues with three industry associations as mentioned in Section 10-1. It's a policy of the International Relations Committee of CISTEC to build up friendly and cooperative relationships with foreign industry associations. We believe we have already established the basis of the cooperation. So this time, we made proposals of "EU-Japan industry cooperation for better export controls" in order to deepen the relationships.

12-1-1. Reduction of the controlled items

While list control is an essential part of export controls, the associated work of item classification is no doubt a heavy burden on every exporter. The present control lists of each country or international regime have their long histories of review and revisions. But does each item's control purpose or reason really match the present security or economic situation of the world? Aren't there any items on the lists whose control purposes or reasons are ambiguous or mismatching the situation? Isn't it reasonable to propose a reduction of listed items since we have another control of catch-all? Having those questions in mind, we made the proposal to reduce the controlled items.

Assuming it will be submitted eventually to the Wassenaar Arrangement, the proposal aims to reduce controlled items for a reason of "foreign availability" as the first approach.

12-1-2. Better compliance, more incentives

Like AEO or C-TPAT, it's a current trend of competent authorities to put their resources more on the control of sensitive transactions, trusting the voluntary controls of the companies certified by them as excellent in compliance. We consider this idea should be adopted in the world of export controls, too, thus made our proposal.

Assuming it will be submitted to each country's government authority, the proposal aims to realize the following incentives, for example.

- (1) Relaxation of the conditions attached to General Licenses.
- (2) Establishment of a new license exemption similar to "Intra-Company Transfer."
- (3) Quicker issuance of Individual License (Fast-track treatment).
- (4) Establishment of a new license exemption that allows exports between those companies who are certified as excellent in compliance.

12-1-3. Against extra-territorial application of US regulations

Assuming its submission to the US Government, we made this proposal with a strong desire that it exclude the EU and Japan from the countries subject to its extra-territorial export controls, which put dual-burden on non-US exporters. We asked the European industry associations to take a synchronized step toward our common goal, handing out a copy of our letter signed by Mr. Oshida, the Executive Director of CISTEC, that was submitted last year to BIS of the US Commerce Department to request the exclusion.

12-2. Result

All our proposals received favorable responses from the industry associations, though not received an immediate response to start up any joint project. We would like to deepen and further the discussion with them, keeping on sending our delegation to Europe.

= end =