

# Catch me if you can: toward a common policy on EU catch-all controls



The 'Catch-all Clause' in the EU Dual-use Regulation empowers national authorities to prohibit the export of non-listed dual-use items where they believe those items might be for illicit use. In theory, a good instrument; in practice, one which is not consistently applied, write Sebastiaan Bennink and Gonnine van Dam.

The current EU export controls system faces various criticisms and challenges, one of which is the asymmetric application of controls within the Union. In order to support the creation of an EU-wide 'level playing field' and to develop an effective and competitive EU export controls regime, in 2011 the European Commission (the 'Commission') began a review of the EU export controls policy, in accordance with article 25 of Regulation (EC) No 428/2009 of 5 May 2009 (the 'Dual-use Regulation') (the 'Review').<sup>1</sup>

During the Review, the Commission identified the implementation of catch-all controls as something that could be improved or further harmonised. Following the Review, in 2016 the Commission plans to propose concrete changes which will modernise the EU export controls system, including, among other things, convergence towards more effective controls with regard to catch-all decisions.<sup>2</sup>

This article describes current EU catch-all controls and the challenges to which those controls are subject.

## Catch-all controls

Catch-all controls are export controls for items not listed in Annex I to the Dual-use Regulation. They are also often referred to as 'end-use controls'. Both listed and non-listed items can qualify as dual-use items, though the reasons for such qualification vary. Listed items are controlled based on their technical qualification. Non-listed items can be controlled if the items are – or may be – intended for weapons of mass destruction end use, or if they are for military end use when the purchasing country or country of destination is subject to an arms embargo. The assessment as to whether a non-listed item may qualify as an item that can be used in such a

manner, and so may be controlled, is left to the competent Member State authority. This leaves room for diverging EU Member State policies to

*The Commission identified the implementation of catch-all controls as something that could be improved or further harmonised.*

influence decision making and means, in practice, that catch-all controls vary substantially from one Member State to another – the result being that an exporter may be obliged to file for an export authorisation with regard to a non-listed item in Member State A, whereas he may not be obliged to do so for the same item in Member State B.

## The Catch-all Clause

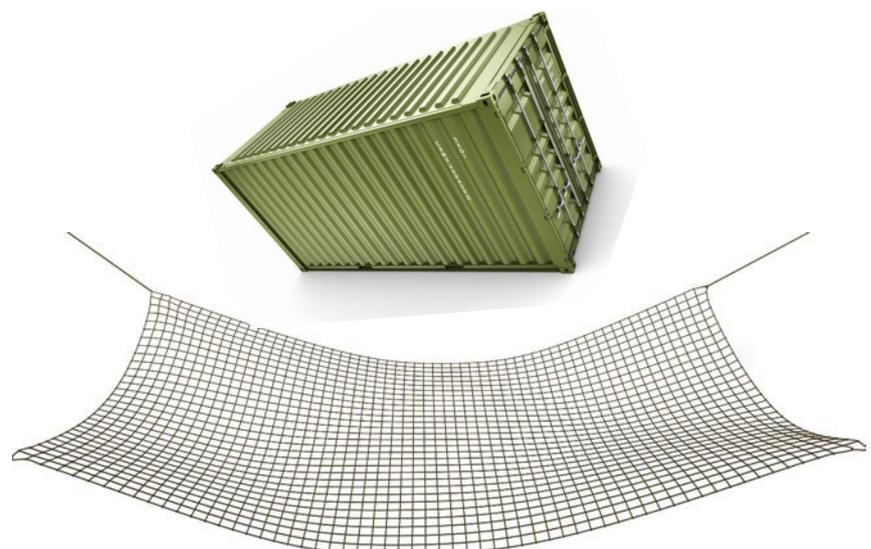
Article 4 of the Dual-use Regulation provides the 'Catch-all Clause'. The Catch-all Clause allows Member States to impose authorisation requirements

for the export of items which are not listed in Annex I to the Dual-use Regulation if they believe that the particular items are, or may be, in their entirety or in part:

- intended for uses related to weapons of mass destruction;
- intended for military end use, if the country of destination is under an EU, OSCE or UN arms embargo; or
- intended as parts or components of military items that have already been exported from the territory of that Member State illegally.

## Enforcement

In theory, the Catch-all Clause is rather simple. If the item to be exported is (i) not listed and (ii) the end use of it is related to any of those uses described above, an export authorisation may still be required.<sup>3</sup> In each case, the exporter is informed where an export authorisation is required. If an exporter knows or suspects the illicit end use of the item, he is obliged to self-report this to the competent authorities.<sup>4</sup> Where appropriate, the competent authority should inform the other Member States and the



Commission of its decision to impose an authorisation requirement.<sup>5</sup>

Whilst in theory it may seem quite straightforward, in practice a common application by the Member States appears difficult. The idea of the Catch-all Clause is to make it possible to adequately respond to technological developments and politically changing environments with a safety net for non-listed items and end uses. However, the current system provides far too much discretionary authority to the Member States when deciding if a non-listed item should be controlled.

Firstly, it allows national political interests to influence a Member State's decision whether or not to apply a catch-all control or how strictly to apply these controls. A good example of how national interests can influence the application of catch-all controls was seen in their use by the Dutch authorities in relation to the Russia sanctions regime after the MH-17 crash. Because of the involvement of the Netherlands in this crash, the Dutch authorities applied far stricter controls over exports of non-listed items to Russia and for Russian end-

users than some other EU Member States.

Secondly, the current system allows Member States to adopt stricter national legislation when the exporter has grounds for suspecting that a non-listed item may be used for illicit purposes. The application of the

***The current system leaves too much room for Member States to weigh national political interests over common interests when considering applying the Catch-all Clause.***

suspicion clause is optional and not all Member States (e.g. the Netherlands) have introduced such a clause into their national regimes. But even if they have, it appears that Member States apply the controls differently, adopting varying national requirements.

Thirdly, Member States tend to

impose different sanctions for violations of these controls.<sup>6</sup>

Finally, the current system makes use of undefined vague terms, such as 'being informed',<sup>7</sup> 'being aware',<sup>8</sup> and 'where appropriate'<sup>9</sup>. Such vagueness devalues the common application of these controls by the Member States.

In sum, whether it concerns economic or security interests, the current system leaves too much room for Member States to weigh national political interests over common interests when considering applying the Catch-all Clause. Despite the fact that the EU export controls regime falls under the EU common trade policy, the individual Member States decide independently on how they enforce these rules at the national level. This means that the enforcement of, and punishment for, violations of the catch-all controls rests with individual Member States. This leads, not surprisingly, to differing Member State policies and greater uncertainty for exporters.

**The challenges**

The fact that it may be possible to export a non-listed item from one Member State without any additional export requirement but not from another is not ideal. It can create an advantage for exporters operating in Member States with more favourable policies and may encourage exporters with illicit intent to choose to have their products exported from Member States with less risk of discovery and lower penalties for violations.

Responding to this problem, several suggestions as to how harmonisation of catch-all controls between EU Member States can be improved have been put forward.

As the Catch-all Clause includes rather vague terms and leaves much room for interpretation, it is recommended that a common interpretation be issued and clear definitions of these terms be provided. Since the Catch-all Clause in itself already implies a reduced legal certainty, it is even more pressing that exporters should be able to rely on a consistent application of it. This would mean that an item is assessed similarly in every Member State and exporters clearly informed on what basis any additional export requirements are applied. The result would be that export authorisations are not subject to individual Member State internal

**EXPORT COMPLIANCE TRAINING INSTITUTE**  
**e-Seminars**

**Learn WHEN, HOW & WHERE it is convenient for YOU!**  
**U.S. Export Controls & Embargoes**  
**EAR, ITAR & OFAC Compliance Training**

**Train from your home or office computer... at YOUR convenience.**

Now it is easier than ever to get the best in export compliance training for your company.

Easy to use e-Seminars include all of the content of our highly praised live seminars and combine:

- \* Video instruction
- \* Slides highlighting key concepts
- \* Searchable, comprehensive e-Manual

Visit [www.LearnExportCompliance.com/e-Seminars](http://www.LearnExportCompliance.com/e-Seminars) or call +1 540 433 3977 (USA) for details or registration.

Use Promo Code ECR-10 for 10% e-Seminar discount!

policy and the arbitrariness of its authorities.

Along with this proposal, a better way of information sharing between Member States is recommended. This should result in Member States increasing the amount of information being shared, as well as providing detailed information about their decisions to deny, issue or not require an export authorisation, all of which would benefit a common approach. Currently, Member States are obliged to share information about export denials, but only obliged to share information on notifications and authorisation requirements when they deem that to be ‘appropriate’. The

current system allows Member States to impose additional national requirements if the exporter has grounds for suspecting an illicit end use. However, it does not oblige a Member State to notify other Member States about the details of the additional export requirements it imposes. This further undermines the idea of a common application of catch-all controls. It would certainly contribute to harmonised controls if Member States were obliged to inform each other about such additional requirements and the underlying argumentation. However, this would require Member States to set aside any possible reservations they might have regarding sharing specific information they deem valuable for their national interests. The Dual-use Electronic System, which is used to share information about licensing denials, has been suggested as a possible tool for sharing and processing information about additional export requirements, allowing consistent and harmonised controls.<sup>10</sup>

A further challenge lies in harmonising standards for self-assessment of non-listed items. It is perfectly acceptable that exporters be required to have detailed knowledge about an item to be exported and its possible end use. However, it should not be acceptable for an exporter to be forced to make this self-assessment without prior consultation on how to do so, let alone be sanctioned should he make a misjudgement in this respect. Clear EU guidance would improve legal certainty for exporters and – again – contribute to an improved level playing field.

Finally, the need for legal certainty becomes even more important when it comes to enforcement and penalties in the case of possible violations of the Catch-all Clause. The Dual-use Regulation is directly applicable in the EU Member States, which means that in order to ensure its uniform application throughout the EU it does not need to be implemented into national law. However, its enforcement is decentralised and the sanctioning of its infringements is a national competence. According to the Dual-use Regulation, Member States are required to determine ‘effective, proportionate and dissuasive’ penalties in the event of breach of its provisions.<sup>11</sup> However, despite the direct applicability of the Catch-all Clause,

these rather vague requirements stand in the way of its harmonised enforcement,<sup>12</sup> mainly because there is no common interpretation of what is meant by ‘appropriate measures’ or ‘effective, proportionate and

***Should new controls be proposed, they should be adequate, risk-based and, above all, equally applied throughout the entire EU.***

dissuasive’. Nor has there been any attempt to align the practice of national authorities on how they respond to violations. A possible solution to this problem would be the creation of a platform which allowed national authorities to exchange their enforcement experiences in cases of violations, thereby making it possible to discuss specific cases and learn from each other’s practices.<sup>13</sup>

### Conclusion

Much has been said and written about the EU catch-all controls and with the outcome of the Review not far off, there are concerns as to what changes the Commission will propose.

Should new controls be proposed, they should be adequate, risk-based and, above all, equally applied throughout the entire EU. This is not a matter of imposing more or broader rules, but rather one of making the existing rules more effective. Harmonised implementation and interpretation should prevent divergence and differing national policies. Improved information sharing and processing would support this. Clear guidelines would provide legal certainty for exporters when making a self-assessment about the intended end use of the item they wish to export and contribute to a safer world.

*Sebastiaan Bennink is a partner at B&A Law in Amsterdam.*

*Gonnie van Dam is an independent tax lawyer who specialises in customs law and the law on excise duty.*

sebastiaan.bennink@balaw.nl

gonnie@gonnievandam.nl

### Links and notes

<sup>1</sup> European Commission, Communication from the Commission to the Council and the European Parliament on the review of export control policy: ensuring security and competitiveness in a changing world, COM (2014) 244 final, 24 April 2014, p7.

European Commission, Review of the EU dual-use export control regime – Regulation 428/2009, Roadmap, February 2015, p1.

<sup>2</sup> European Commission, Communication from the Commission to the Council and the European Parliament on the review of export control policy: ensuring security and competitiveness in a changing world, COM (2014) 244 final, 24 April 2014, p2 and European Commission, 2015 Export Control Forum, 7 December 2015, p4.

<sup>3</sup> Article 4, paragraph 1, 2 and 3 Catch-all Clause.

<sup>4</sup> Article 4, paragraph 4 and 5 Catch-all Clause.

<sup>5</sup> Article 4, paragraph 6 and 7 Catch-all Clause.

<sup>6</sup> Also read: Sibylle Bauer, *WMD-related dual-use trade control offences in the European Union: penalties and prosecutions*, Non-Proliferation Papers, No. 30 July 2013.

<sup>7</sup> Article 4, paragraph 3 Catch-all Clause.

<sup>8</sup> Article 4, paragraph 4 Catch-all Clause.

<sup>9</sup> Article 4, paragraph 6 Catch-all Clause.

<sup>10</sup> Sibylle Bauer and Mark Bromley, *The Dual-Use Export Control Policy Review: Balancing security, trade and academic freedom in a changing world*, Non-Proliferation Papers, No. 48 March 2016, p5.

<sup>11</sup> Article 24 Dual-use Regulation.

<sup>12</sup> Sibylle Bauer, *WMD-related dual-use trade control offences in the European Union: penalties and prosecutions*, Non-Proliferation Papers, No. 30 July 2013 and WorldECR, *Dual-use Export Controls of the European Union*, November 2015.

<sup>13</sup> Sibylle Bauer and Mark Bromley, *The Dual-Use Export Control Policy Review: Balancing security, trade and academic freedom in a changing world*, Non-Proliferation Papers, No. 48 March 2016, p7.