Federal Ministry for Economic Affairs and Energy

Catch-all Efforts in Germany

Dr. Irina Kerner

Irina.Kerner@bmwi.bund.de

26th ASIAN EXPORT CONTROL SEMINAR

Overview

1. German Catch-all Approach
2. European Union (EU) Discussion on Cyber Surveillance Goods
3. Putting Policy into Practice

Federal Ministry
for Economic Affairs
and Energy

1. German Catch-all Approach

1. German Catch-all Approach

EU Dual-Use Regulation and national German legislation:

(1) Catch-all provision for WMD proliferation cases

An authorisation (licence) is required for the export of non-listed dual-use items if the items are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.

Federal Ministry
for Economic Affairs
and Energy

1. German Catch-all Approach (2)

(2) Catch-all provision for conventional military cases

An authorisation shall also be required for the export of non-listed dual-use items if the purchasing country or country of destination is subject to an arms embargo and if the items in question are or may be intended, in their entirety or in part, for a military end-use.

'Military end-use' means

(a) incorporation into 'listed military items'

(b) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of listed military items; or

(c) use of any unfinished products in a plant for the production of listed military items.

Federal Ministry
for Economic Affairs
and Energy

1. German Catch-all Approach (3)

Distinct legal scope:

(1) Catch-all provision for WMD proliferation use concern
- **broad base:** development, production, handling, operation, maintenance, storage, detection, identification or dissemination of CBRN weapons or the development, production, maintenance or storage of missiles
- **no limited country list**

(2) Catch-all provision for conventional military use concern
- **narrow base:** 'Military end-use', ie. incorporation into 'listed military items' or use of production, test or analytical equipment for the development, production or maintenance of listed military items
- **limited country list: Arms embargo countries only**

Federal Ministry
for Economic Affairs
and Energy

1. German Catch-all Approach (4)

Other Catch-all provisions:

- intra-EU transfers of non-listed goods from the EU or transit of third country goods if destined for non-EU country
- services: brokering, technical assistance (very narrow scope)
- extraordinary interdictions

Federal Ministry
for Economic Affairs
and Energy

2. European Union (EU) Discussion on Cyber Surveillance Goods

2. EU Discussion on Cyber Surveillance Goods

General background:

- human rights responsibilities ('human security')
- use of cyber surveillance items by repressive regimes to spy on journalists, human rights defenders and opposition figures
- public awareness

German position:

- enact restrictions on the export of certain critical information and communication technologies
- **but** not undermine cyber security and security research
- foreseeable and practical for both licensing authorities and business
- list-based approach preferred

2. EU Discussion on Cyber Surveillance Goods (2)

Recent efforts in the EU dual-use regulation reform : A new human rights catch-all for cyber surveillance?

On-going discussion:

- European Commission proposal: wide catch-all for all dual-use goods with potential human-rights abuse
- European Parliament position: catch-all for cyber surveillance goods with potential human rights abuse in countries where serious human rights violations have been identified
- Member States in Council still divided: possible new Annex V (a list with subjective elements)?

Federal Ministry
for Economic Affairs
and Energy

2. EU Discussion on Cyber Surveillance Goods (3)

Way forward: Intra-Council proposal of a list-based human rights catch-all?

- Intra-Council Draft Annex V **lists** certain items of 'sensitive cyber surveillance technology'

- Only state-owned catch-all: proposal text requires **positive notification of the exporter by the licensing authority** that the listed items are or may be intended for purposes that the competent authority considers critical with regard to foreign and security policy including aspects of repression and commission of violations of human rights

- licensing authority could for example consider the potential of the items to be misused for violations of the right to privacy, freedom of speech and freedom of assembly and association

Federal Ministry
for Economic Affairs
and Energy

2. EU Discussion on Cyber Surveillance Goods (4)

Next steps:

- reach a common position in the EU Council
- re-launch the legislative process of the Dual-use Regulation after European parliamentary elections in May 2019, adoption in 2020
- issue guidelines for business on the application of the new rules on cyber surveillance items

Further challenges beyond cyber:

- US initiative on emerging technologies
- tackling human rights and security interests by other means than export control: investment screening, visa screening, outreach

3. Putting Policy into Practice

3. Putting Policy into Practice

Catch-all triggered by 'knowledge':

- German exporter has knowledge of catch-all facts (see above: WMD proliferation or conventional military end use)

- Licensing authority BAFA has knowledge (e.g. classified information) and informs the exporter

3. Putting Policy into Practice (2)

Method

▶ "Plausibility check": Is the stated end-use plausible?

Investigation

▶ Information given by the applicant: Complete and conclusive?

▶ Verification: Evaluation of all information available (or further enquires to other government authorities)

▶ Comparison with information provided by applicant

Result

▶ An application is plausible if

▶ Information by applicant is substantiated and conclusive

▶ No information casts doubt on the correctness of the applicant's data

Decision

▶ Denial or Approval

3. Putting Policy into Practice (3)

Common case scenarios:

1) (non-listed) spare parts or non-listed goods and technology of equal potential if prior denials for related (listed) goods and technology

2) items for research & development (e.g. laboratory equipment)

Federal Ministry
for Economic Affairs
and Energy

3. Putting Policy into Practice (4)

Existing challenges:

- lack of verified information/ intelligence

- manufacturing/ infrastructure: link to final products

- military end use: link to a specific listed military item

Future challenges:

- new technologies: dual-use potential, military impact difficult to determine

- pace of international export control regimes

Federal Ministry
for Economic Affairs
and Energy

Thank you for your kind attention