

An overview of Irish export controls



John Menton outlines the Republic of Ireland's export control regime, detailing the regulations which control both exports of dual-use items and military goods, along with those to countries subject to UN or EU sanctions.

Ireland, like most countries/jurisdictions, has a variety of regulations/laws controlling the export of certain products, technologies and services. Broadly speaking, this article will provide a general overview of the Irish regulations/laws which control (i) exports of dual-use goods (i.e. goods with both a military and civilian use); (ii) exports of military goods; and (iii) exports to countries that are subject to a UN/EU trade embargo/sanctions.

This article sets out an overview of the export controls in Ireland (many of which are derived from European Union law and European Union 'controlled' lists of military goods, dual-use goods and sanctioned countries). It does not cover the other categories of goods/services that can be subject to Irish export restrictions: for example, there are also Irish laws and regulations which control categories of goods such as agricultural and food products, cultural artefacts, drugs, counterfeit or pirated goods, video recordings, endangered species etc.

Who regulates exports from Ireland?

The Export Licensing Unit of the Department of Jobs, Enterprise and Innovation (the 'Irish Regulator') is

responsible for enforcing and managing controls on exports of dual-use items, military items and items destined for countries to which trade sanctions apply.⁴ Irish export control legislation covers the three main types of control mechanism: items on a control list; activities on a control list (e.g. brokering and the catch-all clause); and entities on a control list (via trade sanctions, embargos).

Irish export control legislation

The primary export control laws in Ireland derive from (i) European Union regulations/directives; (ii) Irish

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primary legislation – the Control of Exports Act 2008 ('Export Act'); and (iii) statutory instruments ('SI's') issued by the applicable Irish minister pursuant to the terms of the Export Act (or the Minister for Finance in respect of financial sanctions). The following is a brief summary of the main

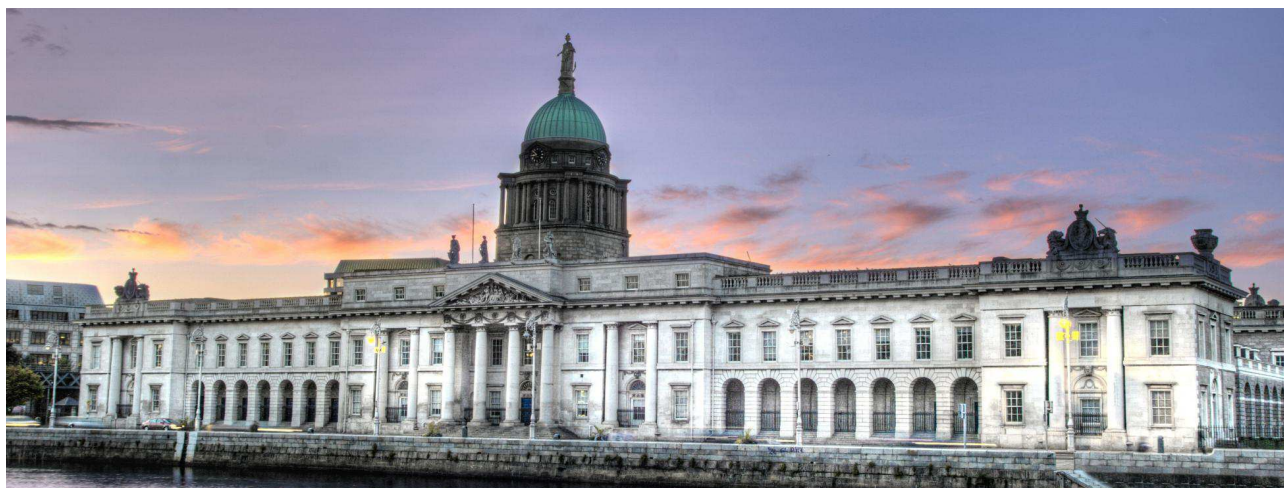
legislation, regulations and SI's that apply to exports from Ireland:

Primary legislation – Control of Exports Act 2008

This is the primary piece of Irish legislation that deals with export controls in Ireland. The Export Act includes controls on certain brokering activities, the provision of technical assistance and the export of 'intangibles', i.e. exports including the transfer by electronic means of software and technology and the exportation of goods brought into Ireland for re-export.

Penalties for breach of the Export Act (and any SI's issued pursuant to the terms of the Export Act) include (i) on summary conviction, a fine of up to €5,000 and/or six months in prison and (ii) on conviction or indictment, a fine of up to €10,000,000 or three times the value of the goods or technology concerned and/or up to five years in prison.

The Export Act includes additional enforcement rights for the Irish Customs and Excise service and the Minister for Jobs, Enterprise and Innovation to ensure compliance with the Export Act. Most of the Irish SI's listed below are issued pursuant to a provision contained in the Export Act.



This article is reprinted from the April 2013 issue of WorldECR, the journal of export controls and compliance. Visit www.worldecr.com for further details.

Controls on the exports of dual-use items

1) Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items² as amended by Regulation (EU) No 388/2012 of the European Parliament and of the Council of 19 April 2012 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items ('Dual-Use Regulations') are the main controls on the export of dual-use goods from Ireland as well as intangible transfers of dual-use technology or software from Ireland.³

2) Catch-all clause (part of Dual-Use Regulations) – An Irish export authorisation may be required for the export of non-listed dual-use items (i.e. goods that are not actually listed in the Dual-Use Regulations), if the exporter is aware or has been advised by the Irish Regulator that its products may be intended, in their entirety or in part, for use in connection with weapons of mass destruction or the production of missiles capable of delivering such weapons. In addition to the catch-all clause, the Irish Regulator may impose a licensing requirement in other cases; for example, where it believes the goods are intended as parts or

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components of military goods illegally exported, or if the purchasing country or country of final destination is subject to an arms embargo and the goods may be intended for a military end use.

3) Control of Exports (Dual Use Items) Order 2009 (S.I. 443 of 2009) This SI was issued in connection with the Dual-Use

Trade sanctions

The EU restrictive measures (sanctions) in force (regulations based on Article 215 TFEU and decisions adopted in the framework of the Common Foreign and Security Policy) summarise the sanctions that apply to exports from Ireland ('EU Sanctions'). The Irish Regulator is responsible for implementing trade-related sanctions. The Irish Regulator does not administer financial sanctions. Financial sanctions and related asset-freezing restrictions are a matter for the Irish Department of Finance and, at an operational level, are handled by the Irish Central Bank. The Irish Minister for Finance will typically implement an SI (usually pursuant to section 3 of the European Communities Act, 1972 (No. 27 of 1972)) to give full effect to any financial sanctions contained in the applicable EU Sanctions.

The current version of EU-wide sanctions (that applies to Ireland) can be found at:

http://eeas.europa.eu/cfsp/sanctions/docs/measure_en.pdf

The sanctions range from comprehensive trade sanctions against countries, arms embargoes, financial sanctions, sanctions against individuals and limited sector specific sanctions.

The following is a sample list of countries that are subject to some form of restrictive measures on exports: Afghanistan, Belarus, Bosnia and Herzegovina, Burma, China, Democratic Republic of Congo, Cote D'Ivoire, Egypt, Eritrea, Republic of Guinea (Conakry), Guinea-Bissau, Haiti, Iran, Iraq, Ivory Coast, Democratic People's Republic of Korea (North Korea), Lebanon, Liberia, Libya, Moldova, Myanmar (Burma), North Korea, Serbia and Montenegro, Somalia, South Sudan, Sudan, Syria, Tunisia, Yugoslavia (Serbia and Montenegro) and Zimbabwe.

Regulations. The SI designated the Irish Minister for Jobs, Enterprise and Innovation as the 'competent authority' for Ireland for the purposes of the Dual-Use Regulations and also provides that an 'authorised officer' (i.e. from the Irish Regulator) will exercise any of the functions of the minister to enforce the provisions of the Dual-Use Regulations. This SI also includes controls on brokering activities in respect of dual-use goods listed in the Dual-Use Regulations.

What constitutes an export of dual-use goods?

The Dual-Use Regulations apply to any transfer of a dual-use item from Ireland to a destination outside the EU. Controls on dual-use goods listed in the Dual-Use Regulations do not generally apply to shipments between Ireland and other EU Member States (with exceptions for certainly highly sensitive items; e.g. some explosives, sonar equipment, and 'cryptanalytic' items used for breaking encryption). The method of transport outside of the Ireland does not matter in determining whether an 'export' has taken place. For example, physical shipment,

regular mail, delivery by hand, downloading software from an Internet site, and transmission of software or technology via e-mail can all constitute an export from Ireland. Likewise, controls generally apply regardless of the purpose for export – temporary exports (i.e. of items that will return to the EU), gifts, contributions to research projects, shipments to a subsidiary outside Ireland – all of these can constitute an export which may be subject to Irish/EU export controls.

Military goods

1) Control of Exports (Goods and Technology) Order 2012 (SI 216 of 2012)

This SI generally controls the export from Ireland of goods or technology specially designed or modified for military use (which includes components and unfinished goods) outside of the EU and any such export will require an authorization from the Irish Regulator. The military goods and technology listed in this SI are from the Common Military List of the EU.⁴

2) European Communities (Intra-Community Transfers

Potential pitfalls: U.S. and European encryption controls case study

Given the size of the software/internet industry in Ireland it is not surprising that a significant number of export-related queries arise in connection with the software/internet sector particularly where strong encryption is deployed. The Irish software industry is in large part dominated by international corporations, with many software corporations using Ireland as their EMEA headquarters for exporting software/computer services (total exports from Ireland in 2011 for computer services amounted to \$32 billion).

EU/Irish dual-use export controls apply to the export of goods from Ireland by subsidiaries of multinational corporations, so without an understanding of EU/Irish export controls, international corporations risk inadvertent violations, even if it is otherwise in compliance with the export laws of their home country. Problems can occur in unlikely circumstances. In particular there can be a difference of approach between the practical implementation of the U.S. and EU dual-use controls on the same products. A sample case study is

set out below which highlights a key difference between EU and U.S. export controls as they apply to the export of certain encryption products that are controlled by the EU Dual-Use Regulations.

It is important to note that U.S. export control law can also apply to many re-exports of U.S.-origin goods from Ireland, and that U.S. economic sanctions and trade embargoes can also apply to conduct in Ireland (particularly where U.S. companies and individuals are involved). These controls under U.S. law are not the focus of this article, but U.S. companies must of course consider them in respect of their Irish-based operations, alongside EU/Irish controls.

Non-mass market encryption products

In general, U.S. companies should expect that goods subject to U.S. dual-use export controls will be subject to similar EU dual-use controls when exported from the EU/Ireland. But there are some important exceptions.

For example, EU exports of non-

mass market encryption products (i.e. those not meeting the requirements of the EU Cryptography Note) having a U.S. ECCN of 5A002 and 5D002 generally require an export licence (unless the Union General Export Authorization or a general licence applies). A common pitfall that we have encountered, particularly since the liberalisation of U.S. encryption controls in 2010, is that such products can often be exported from the U.S. under licence exception ENC of the U.S. Export Administration Regulations, with limited filing requirements. However, there is currently no comparable broad exception applicable under EU/Irish law, so that significant EU/Irish licensing requirements can sometimes apply to such encryption products that have largely been freed from U.S. controls. In many cases this has proven to have been a hidden 'trap' for companies that have (wrongly) assumed that the fact that a U.S. export licence is not required for a particular category of export from the U.S. means that an EU/Irish export licence is not required either.

of Defence Related Products) Regulations 2011 (SI No. 346 of 2011)

This SI regulates the transfer of defence-related products from Ireland to another EU Member State (which requires an Irish authorization). These regulations implement Directive 2009/43/EC1 of the European Parliament and of the Council of 6 May 2009 simplifying the terms and conditions of transfers of defence-related products within the EU. SI No. 87 of 2013 was recently introduced (March 2013) to update the list of military products, as per Directive 2012/47/EU – European Communities (Intra-Community Transfers of Defence Related Products) (Amendment) Regulations 2013.

3) Control of Exports (Brokering Activities) Order 2011 (SI No. 86 of 2011)

This SI prohibits a person from

carrying on or otherwise engaging in any brokering activities relating to controlled goods (which are listed in the schedule to this SI and cover 'military goods') unless a licence has been granted by the Irish Regulator in respect of each brokering activity carried on.

Licensing regime in Ireland: some highlights

UGEAs

The Union General Export Authorizations are (EU-wide) export authorizations for dual-use goods included in the Dual-Use Regulations and cover five different versions (EU001, EU002, EU003, EU004 and EU005).⁵

The EU001 UGEA (which replaces the old CGEA) covers most dual-use exports to Australia, Canada, Japan, New Zealand, Norway, Switzerland and the U.S. In order to use the UGEA, an Irish exporter must register with the

Irish Regulator. In Ireland, an exporter (once registered with the regulator) must notify the Irish Regulator in writing of his/her name and the address where the export records may be inspected and the notification must be made before, or within 30 days of, the first such export. Additional conditions for use of the UGEA are specified within the authorisation itself.

Mass market/retail exemption

The export controls set out in the Dual-Use Regulations apply to certain encryption products, but include an exemption for exports of 'mass market' items under the Cryptography Note included in the Dual-Use Regulations.⁶ Under the Cryptography Note, the export controls set out in 5A002 and 5D002 of the EU Dual-Use Regulations do not apply to exports of goods or software that meet all of the following:

- a) Generally available to the public by being sold, without restriction, from

stock at retail selling points by means of any of the following:

1. Over-the-counter transactions;
2. Mail order transactions;
3. Electronic transactions; or
4. Telephone call transactions;

- b) The cryptographic functionality cannot easily be changed by the user;
- c) Designed for installation by the user without further substantial support by the supplier; and
- d) When necessary, details of the goods are accessible and will be provided, upon request, to the competent authorities of the Member State in which the exporter is established in order to ascertain compliance with conditions described in paragraphs a. to c. above.

Licensing

For exports of dual-use items that are not within the UGEA, the Cryptography Note or another exception from export controls, an appropriate export licence from the Irish Regulator is generally required (it may not be available if an embargo applies). The following are a summary of the main Irish export licences/authorisations which the Irish Regulator can issue:

- **Global dual-use licence:** covers exports of dual-use goods to multiple countries (minus embargoed countries or countries which the Irish Regulator deems inappropriate to participate in a 'global licence' – usually in consultation with the Irish Department of Foreign Affairs & Trade) and a large group of recipients. Global licences require an application to the Irish Regulator. These licences cover the export of multiple controlled items to a list of approved countries. The

Torture

The Commission Implementing Regulation (EU) No 1352/2011 of 20 December 2011 amending Council Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment applies in Ireland ('EU Torture Regulation').

The European Communities (control of trade in goods that may be used for torture) (Amendment) Regulations 2012 (SI No. 339 of

2012) and **European Communities (control of torture in goods that may be used for torture) Regulations (SI No. 366 of 2006)** are the Irish regulations that implement the EU Torture Regulation and prescribe a range of offences that are committed including where a person (i) exports or supplies technical assistance in relation to goods to which the EU Torture Regulation applies contrary to article 3 of the EU Torture Regulation or (ii) exports goods to which the EU Torture Regulation applies without an authorization.

validity period for these licences ranges from three to 12 months. Exporters in receipt of this type of licence are required to adhere to a set of conditions as well as providing the Irish Regulator with reports outlining details of all exports that have taken place within the validity period of the licence.

- **Individual dual-use licence:** covers specified dual-use exports to specified recipients, often in a single country, and, like general licenses, requires an application. These licences cover the export of a stated quantity and value of controlled items to a stated end-user, and are valid for 12 months. In addition, 'consolidated individual export licences' can also be sought from the Irish Regulator where there is a significant volume of individual licences for dual-use exports required.
- **Military licence:** required for the export of any items defined in the Control of Exports (Goods and Technology) Order 2012 to any destination outside the EU. The licence is valid for 12 months.
- **Brokering activities licence:** the

Control of Exports (Brokering Activities) Order 2011 (SI No. 86 of 2011) imposes a licensing requirement in respect of brokering activities involving persons and entities negotiating or arranging transactions that may involve the transfer of items listed on the EU Common Military List, or who buy, sell, or arrange the transfer of items listed on the EU Common Military List that are in their ownership.

- **Global transfer licence: Directive 2009/43/EC:** The purpose of this directive is to simplify the terms and conditions of transfers of defence-related products within the European Union and an authorisation is required from the Irish Regulator for any such transfers.

Voluntary disclosure

Companies that discover violations of Irish export controls frequently have questions about voluntary disclosure procedures (like those under the U.S. Export Administration Regulations). Ireland (in common with many EU Member States) does not have explicit voluntary disclosure procedures, although it would be typical for companies that discover an export violation to provide a voluntary disclosure to the Irish Regulator.

Links and notes

- ¹ Contact details for the Irish Regulator are: Department of Jobs, Enterprise and Innovation, The Licensing Unit, 23 Kildare Street, Dublin 2.
See <http://www.djei.ie/trade/marketaccess/exports/> for more information on the Irish export regulator.
- ² See <http://www.djei.ie/trade/marketaccess/exports/EC428of2009.pdf>
- ³ See <http://www.djei.ie/trade/marketaccess/exports/EU388of2012.pdf>
- ⁴ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:085:0001:0036:EN:PDF>
- ⁵ See <http://www.djei.ie/trade/marketaccess/exports/ugea.htm> for a copy of the UGEA.
- ⁶ The Cryptography Note is a standard exception provided by the Wassenaar Arrangement on dual-use export controls.

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This article is reprinted from the April 2013 issue of WorldECR, the journal of export controls and compliance. Visit www.worldecr.com for further details.