

The Dual-Use Trade Controls: Poland Beyond Materiality and Borders

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Introduction to the Polish law on export control

Before presenting the details of controls of intangible technology transfers in Poland and of relevant extraterritorial provisions, a certain number of comments shall be made on the Polish export control law and its relation to the European regulations. In 2012, this law underwent a legislative review, which accommodated substantive amendments to have impact on the extraterritorial aspects of control.¹

Poland, as a Member of the European Union, is subject to the European law on the trade in dual-use goods. The provisions of the Council regulations are directly applicable in the Polish legal system, whereas the provisions of the Joint Action need to be transposed into national legislation. Polish national law on export control is based on the Act of 29 November 2000 *on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security*.² In many aspects, especially in case of the definitions, it refers directly to the provisions of the Council Regulation 428/2009. It contains however some additional and detailed stipulations, including on extraterritoriality, which refer to the import and end-user certificates.

¹ Journal of Laws of The Republic of Poland, 2012, No. 229, position 707. One of other important aspects of the amendment was the cancelation of the obligatory implementation of the Internal Compliance Programmes in the dual-use trading companies.

² Referred to, hereafter, as “the Polish Law on export control”. Journal of Laws of the Republic of Poland, 2004, No. 229, position 2315. On the details of the Polish export control system see: Kołakowska, I., “Poland” in Michel, Quentin (ed.), *Sensitive Trade the Perspective of European States*, Brussels, P.I.E. Peter Lang, 2011.

Another important factor is that the Polish law on export control regulates not only the trade in dual-use goods but also in arms. Therefore, the provisions on ITT and on extraterritoriality concern both types of goods.

Intangible technology transfers (ITT)

The export of intangible technology from Poland is subject to controls envisaged in the Council Regulation, being the same for “typical tangible” goods and intangible ones. The definitions in the Polish export control law for dual-use items, export and exporter refer directly to the definitions contained in Article 2 of the Regulation.

There is no special licencing procedure for ITT in the Polish law. ITT applications undergo standard proceeding foreseen for “regular” exports. The “technologies” that are subject to controls are defined in the General Technology Note in the Annex I of the Regulation and no reference to them can be further found in the Polish law. “Oral forms of assistance“, when provided in person without use of any electronic means of communication, are not addressed in the Polish law either.

A difference exists between the Polish law and the Council Regulation with respect to the provisions on technical assistance. The Regulation does not include the technical assistance in the scope of controls and it is only by means of the Council Joint Action 2000/401/CFSP that the Member States are requested to ensure controls on this type of trade. Whereas the Polish law on export control explicitly indicates that this activity is subject to authorisation. The Polish definition of the technical assistance matches exactly the definition given by Article 1(a) of the Council Joint Action 2000/401/CFSP.

There are different kinds of export licences for “export” (of both tangible or intangible goods) or “technical assistance”, although the procedures to obtain them are similar. There is no difference either between the procedures on exports of ITT in dual-use goods and the exports of ITT in arms. An exporter may apply for an individual, global or general licence using the standard procedure. After the export has taken place, respective data records must be kept by the exporter for a period of five years and are subject to compliance controls. There is no specific provision on the record keeping and compliance controls for ITT, which would have taken account of the different characters of these transfers. Due to the obvious characteristic of ITT, this kind of export cannot be subjected to control by customs at the State border. However, as mentioned above, ITT are subject to compliance controls by the export control authority in exporting companies. So far, the Ministry of

Economy – the Polish export control authority – has not performed compliance controls focused only on ITT.³

There is no specific regulation on academia in the Polish law on export control. Nevertheless, the control authority organises on a regular basis awareness-raising seminars for the academic society. Further progress in this field is expected with the continuing implementation of the *New lines for action* by the EU against the proliferation of WMD, approved by the EU Council in December 2008. The *New lines*, being EU “soft law”, foresee additional efforts aimed at raising awareness among industry, scientific and academic circles. Moreover, the implementation of the *New lines for action* should lead to the establishment of additional measures to combat intangible transfers of knowledge and know-how, including mechanisms of cooperation on consular vigilance. The latter may help ensuring that the expertise relevant to chemical, biological, radiological and nuclear technologies is not transferred to unauthorised scientists within European universities.

Between 2008 and 2012, approximately 15 licenses have been issued each year on ITT or technical assistance, although these have been mostly for arms. Most of the applications concerned transactions within the scope of cooperation between different branches of international consortia. The means of these intangible technology transfers were mostly emails with blueprints and engineering details of tangible goods or phone calls. In the licence applications, the exporters declared the expected number of hours of conversations and assessed the value per hour.⁴

³ Information presented by a representative of the Ministry of Economy during an interview undertaken by the author in November 2012.

⁴ In the field of trade in dual-use items, an interesting case may be given. The Ministry of Economy received an application from a company providing engineering services. Its offices in Poland were to be visited by representatives of its foreign branch and during the visit they were to have access to software, on servers located in Poland, containing dual-use technology. The Polish export control authority, when consulted by the Polish company, decided that it was necessary to apply for a licence on ITT export.

Table 1: Identified gaps in ITT controls

Gaps to be addressed by the European or national legislations	
Academia	No control of knowledge sharing if it is undertaken within EU territory
Consular vigilance	No control in case of temporary immigration to the EU
Cloud computing	No clear application of control when servers are out of EU territory
Control of assets of a dual-use company by foreigners	No control when data are accessed to in the EU

Conclusions

Complementarily, the Polish and the EU legislations on export control provide a good basis for the control of ITT as they cover a broad scope of modern forms of technology transfers, including emails, Intranet and web servers. However, the very complex nature of data exchanges and the globalisation of the world economy make it difficult to effectively apply controls. Therefore, additional guidance for exporters or companies dealing with dual-use technologies, together with advice on how to proceed in specific cases such as “cloud computing” would be desirable. This could take the form of either an explanatory note by the European Commission or by the national control authorities. Such guidelines would help the entities in applying the law when transferring technology *via* modern communication technologies. Increased outreach efforts for raising awareness of the industry would also be an advantage in this regard. Due to the intangible nature of such transfers, the national enforcement measures are called to play an important role in disguising illegal trade. Enforcement measures and intelligence would be even more important if the European Union or the national authorities decided to introduce less stringent procedures for cross-border transfers of intangible technology undertaken within international entities. For these particular economic entities, this would lead to decreasing administration burden and operation costs.

Awareness-raising efforts are equally important for the academia, although these shall be undertaken in a very delicate manner as the scientific circles often express concerns regarding the freedom of research and the sovereignty of academia. As regards consular vigilance, the establishment of cooperation procedures between consular services and the export control authority may be promoted at the European level. One possible model to this end could be to make an assessment of the visa applications of concern through consultation procedures similar to the applications for export of dual-use items.

Extraterritorial provisions

Through the 2012 amendment of the Polish Law on export control, important changes have been introduced regarding the proactive and reactive extraterritorial provisions.⁵ With these changes, additional rights and obligations of the Polish export control authority were listed in the law, dealing with restrictions expressed in import and end-user certificates on handling of the goods. The provisions, hereunder described, are relevant for trades in both dual-use goods and arms.

Reactive provisions, the control of trade in imported goods

In the process of confirming an end-user certificate (EUC) issued by a Polish exporter, the Polish export control authority may decide to accept restrictions and conditions, set forth by the foreign control authority, relating to further trade of these items.⁶ The scope of these conditions is not enlisted in the law and is decided on a case-by-case basis. According to the law, the importer is also obliged to inform the end-user on the restrictions on further trade of these goods. These provisions answered a need to establish the practice of accepting conditions set forth by the American or the French export control authorities.

When an end-user applies for an export licence for goods previously imported to Poland on the basis of such EUC, the Ministry of Economy may refuse to grant a licence for re-export if this would be in contradiction with the restrictions imposed by the State of origin of the goods.⁷

If the Polish authority believes that a Polish end-user would not guarantee the “conformity with the law” and might attempt to re-export

⁵ Author will not describe here the EU provisions on consultations among the Member States, which could nevertheless be considered, from a practical point of view, as introducing extraterritorial applications of law, namely obligations to take into account concerns of other States (Common Regulation 2009/428: Article 11.1, Article 11.3, Article 16.4.

⁶ Article 22.1(a) of the Polish law: “If required by competent authorities in the country of the foreign exporter, the trade control authority may, while confirming an end user statement, undertake to accept restrictions and conditions set forth by those authorities and relating to trade in items of strategic importance”. The notion of “trade” covers in the Polish law the export, intracommunity transfer, brokering, technical assistance, import and transit.

⁷ Ibid., Article 22.1(b). The trade control authority may refuse to issue an authorization for foreign trade in items of strategic importance covered by the statement of the end user having its registered office or residing in the Republic of Poland, if the conditions and restrictions set forth by competent authorities of the country of the foreign exporter are not met.“

the goods and thereby violate the export control procedures, the authority can refuse the EUC. The Ministry may also ask the importer to provide additional assurances concerning the safety of the imported goods, such as the consent of the importer or the end-user for a “compliance visit”. Such stipulation is included in all import certificates (IC) issued by the Polish authority, which include also a provision on the no-further export of goods without the consent of the export control authority. The IC explicitly states that the members of the controlling team may be accompanied by representatives of the government – e.g. a diplomat – of the State of origin of the goods. Six months after the new law was put in force, no such inspection had been conducted.

Table 2: Summary of reactive provisions in the Polish export control law

Reactive provisions – obligations of Poland regarding imported items	
Form:	Statement on obligations of the Authority on the EUC
Scope of obligations:	To be decided on a case-by-case basis
Procedure:	Individual decision of the Authority, or following a non-compulsory interagency consultation
Practice:	Consultations with the Ministry of Interior and Counterintelligence Agency, others if needed

Proactive provisions, the conditions on export from Poland

Beside reactive measures, proactive ones are also performed through the relevant assurances in the EUC or IC.⁸ When applying for an export licence, an exporter is obliged to provide the Polish export control authority with an import certificate or an end-user certificate (Article 23 of the Polish Law on export control), in which an importer or an end-user agrees on restrictions on further handling of the goods. The documents have to be endorsed by the authority of the importing or end-use foreign State. The exporter must provide an IC or an EUC containing the provisions foreseen by the Polish export control authority.⁹ The recent amendment to the law additionally introduced a

⁸ The Polish Authority may also request from the exporter to submit a delivery verification certificate (DVC), which shall be issued by a competent authority of the importing State. At the same time, a company exporting goods to Poland, which has received an import certificate, is entitled to obtain a DVC from the Polish customs. The certificate proves that the goods were imported to Poland in conformity with relevant regulations.

⁹ Article 23.2: “An end user statement shall be issued by a foreign end user and shall contain information required by the trade control authority”.

list of compulsory clauses. Most of them concern the dual-use goods and the arms. One, applicable to arms transfers only, relates to the consent of the importer, recipient and/or end-user not to re-export military equipment to States under arms embargoes.

The obligatory clauses to be included in the EUC on arms and dual-use transfers are:

- The consent of the end-user, recipient and/or importer on the no re-export without prior consent of the Polish control authority,
- The confirmation by the foreign control authority of the above-mentioned obligations for the importer, recipient and/or end-user and of their rights to possess the imported goods,
- The statement by the foreign authority that, without its consent, no handling of goods other than indicated in the EUC will occur,
- The statement of the importer, recipient and/or end-user that, without consent of the Polish authority, there will be no change of the end-user.

Although their application is compulsory, the law gives the Polish control authority a right to grant the document in case of omission of some of these clauses in case of export to reliable countries (except the one on no re-export to embargoed states). This is possible when the following conditions are met:

- The end-use State has implemented an export control system and is a party or a member of the NPT, CWC, BTWC, AG, MTCR, ZC, NSG, WA, HCoC, and
- The goods are not advanced, technologically speaking, and are not lethal or are not important components of a lethal one or the end-user is a State agency, *e.g.* a ministry of defence or interior.

There is no legal definition of the term “technologically advanced” or of the lethality of goods. According to the Ministry of Economy, the level of advancement of the items can be assessed against the background of the recipient’s needs and technological capacities. When it comes to “lethality”, a decisive criterion is the main function of the item.¹⁰

The authenticity of the authorisation of a EUC by the foreign government and its compliance with the end-user’s national law shall be also be confirmed by the Polish consular services. This requirement applies only to arms exports to States other than the EU members or States listed in Annex IIa part 2 of Council Regulation 428/2009

¹⁰ Information presented by a representative of the Ministry of Economy during an interview done in November 2012.

(Australia, Canada, Japan, New Zealand, Norway, Switzerland, Liechtenstein and USA). A certain connection is made, therefore, between arms and dual-use goods exports.

Table 3: Proactive provisions in the Polish export control law

Proactive provisions – obligations of foreign authorities regarding exported items	
Form:	Statement on the obligations of the end-user, recipient or importer on the EUC
Scope of obligations:	<ul style="list-style-type: none"> - No re-export to sanctioned States (arms only; obligatory), - No re-export without prior consent of the Polish control authority, - Confirmation from the foreign authority that the end-user agrees on the restrictions, - Statement of the foreign authority that without its consent no handling of goods other than indicated in the EUC will occur, - Statement of the end-user that without consent of the Polish authority no change of end-user will occur - Any other requested by Polish control authority
Procedure:	IC or EUC is attached to a licence application
Practice:	After an opinion of an other advisory body or on its own, the Authority may request from the exporter to submit an EUC with the relevant clauses

Conclusions

The provisions in the Polish law dealing with the extraterritorial aspects of export control are mainly those concerning the import certificate, the end-user certificate and the delivery verification certificate. The conditions applicable to the IC and EUC are rather detailed. They seem to be complex in comparison to those existing in the EU regulation on dual-use export control.¹¹ On the other hand, these provisions, although some of them were introduced in the Polish law only recently, legitimise long-standing practices in the European export control. They formally empower the Polish control authority to accept the no re-export clauses and other requirements of foreign control agencies. Moreover, they offer to the Authority the legal instruments to assure cooperation and compliance of national importers with the restrictions, such as the right for a representative of a foreign government to be present during a compliance visit in an importing company. With this faculty, the commitment of the Polish Authority to

¹¹ See Article 9.2 of the Council Regulation 2009/428.

control the goods when they are on its territory becomes more credible. This should be seen as an advantage for the Polish entities in the context of the international cooperation in advanced technologies. Nevertheless, it is yet too early to evaluate the practical impact of the new changes.

The Polish law offers a certain level of flexibility to the Authority when it comes to formal requirements concerning EUC and IC. It gives a margin to the authority for deciding on softer controls when dual-use goods or arms are being exported to states with credible control system, to a reliable end-user and when the goods themselves are not lethal. This flexibility was designed for application in cases of long-term technological cooperation between foreign companies.

This serves the needs of businesses in the era of globalisation and reflects the position of Polish government on the opening of the economy. Poland exports dual-use items and arms generally to the recipients of two categories. On the one hand, Polish companies develop strong trade relations with the most advanced economies of world. Those are credible recipients with strong export systems. On the other hand, with regard to the export to States with lower levels of credibility or when transferred goods are considered sensitive, the authority may request additional safeguards to be introduced in the EUC. Hence, the full scope of actions fine-tuned to individual cases is available.