Brexit and Strategic Trade Controls: key implications

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Introduction

On 24/25 April, a small group of government officials, academics, and industry practitioners were invited by the University of Liège and King's College London to debate the implications of Brexit on strategic trade controls. The workshop was conducted under Chatham House rules with participation in private capacities.

The main finding of the workshop was that the exit of the UK from the European Union strategic trade control system would have an impact that goes far beyond trade control law regulations and procedures. Much attention was given to the implications of the trading arrangements that will replace the UK's access to the 'single market'. Concerns abound that board tariffs will be adopted by both the EU and UK. However, while the issue of export controls will likely receive scant public attention, inadequate arrangements could have a negative impact that is even more significant than the effect of tariffs. The EU, and perhaps separately the UK, must devise mechanisms to ease transfer and, more specifically, licensing of dual-use goods after Brexit. It is unclear, presently, whether the EU will have the capacity to take the steps required, while also conducting an unrelated review of its own dual-use items export control Regulation (here after Regulation 428/2009)[1]. Considering the usual two years delay necessary to finalise the process to adopt a regulation, it is strongly recommended to integrate already the Brexit into the review process.

During the course of the workshop, six areas of implications have been identified that will be analysed separately in the present document:

- The legal basis;
- The Norway issue;
- Harmonisation of controls and competition;
- Information sharing;
- Licensing conditions;
- Technical capacities.

1. The legal basis

Before addressing other issues related to Brexit, an answer is needed on what legal basis the UK will use to implement export controls in the future, considering that presently most of it international export commitments are implemented through EU Regulations and CFSP Council Decisions. Seeing the UK Government Policy Paper, the principle regarding EU Regulation will be to convert EU laws into UK law: "our approach of converting EU law into

[1] Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal of the EU 29.5.2009, L 134 (as updated and amended).

domestic law maximises certainty and stability while ensuring Parliament is sovereign (….). The Government considers that, unless and until domestic law is changed by legislators in the UK, legal rights and obligations in the UK should, where possible, be the same after we have left the EU as they were immediately before we left".[2]

Some provisions of Regulation 428/2009 – like catch-all clause, brokering, types of authorisations, sanctions - have been already interpreted and implemented by UK as long as this Regulation leaves for those provisions large margin of interpretation to Member States. Most of those provisions - like criteria, list of items, licence templates - could be converted following the principle of direct conversion into UK law as long as it will not be impacted by the content of the Brexit agreement. E.g. the EU list of items to be controlled consists in a compilation of the lists of the five main international export control regimes and the UK's participation to those regimes is not due to its EU membership and will not be called into question.

Finally, provisions - like scope and territorial validity of licence or EUGEA - could not be converted into UK law as long as it will have to be reconsidered in function of the results of the Brexit negotiations and status that UK will obtain regarding the access to the single market e.g.

Therefore, it seems likely that the UK will have to adopt a new national legislation implementing the requirements of the international export control regimes. Moreover, this new legislation will also be needed in the specific field of UN sanctions. Presently, UN and EU sanctions are implemented through EU legislation which is brought into effect within UK law via the European Communities Act 1972. Therefore, to preserve the ability of the UK Government to impose and implement sanctions like travel bans, assets freezes and broader financial and trade restrictions, it is necessary to grant it powers similar to those it will lose by repealing the ECA. In this regard, the UK Government has launched public consultation on proposals for new legal powers needed for imposing and implementing sanctions after Brexit[3].

2. The Norway issue

The risk that UK and EU trade controls can thus diverge over time after Brexit, it is not negligible. The alternative would be for the UK to align systematically its national provisions to the EU Regulation 428/2009, perhaps following the path of Norway.

From an EU perspective, the situation of Norway is not fundamentally different from the US, Canadian, South Korean or Swiss one. It benefits from an EU General Export Authorisation (EUGEA 001) allowing the export of most of dual-use items and Member States have the possibility to issue a National General Authorisation for certain items not covered by the EU one.

[2] See 2.7 in https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union.
[3] See https://www.gov.uk/government/consultations/public-consultation-on-the-united-kingdoms-future-legal-framework-for-imposing-and-implementing-sanctions.

Contrary to what might have been expected, the common commercial policy is not included in European Economic Area[4]. Consequently, Norway is not, in principle, committed to integrate in its national legislation the EU dual-use Regulation and its Commission implementing acts, even if certain elements of EU dual-use trade control system could be indirectly considered[5].

From a Norway perspective, trade control of dual use items is ruled by the Royal Decree 967 of December 1987 relating to control of the export of strategic goods, services and technology and its implementing legislation. Appendix II of the Regulation, establishing the list of dual-use items subject to trade control provisions, is referring directly the EU list by mentioning that "this list corresponds to Annex I to Council Regulation 428/2009". However, if Norway and the EU have the same scope of control, export to the EU does not seem to beneficiate similar facilitations that the EU has granted to Norway with the EUGEA001.

Since the common commercial policy is not included in the EEA, the single market and, more specifically, the movement of items and technology is ruled by the Agreement. It constraints Norway to integrate and implement the EU legislation without deciding on its elaboration even if it has the possibility of providing input at various stages of the procedure. In consideration of the four freedoms of the single market, intra-EU transfers, including Norway, of dual-use items should not be submitted to restrictions except for items listed by Annex IV of the EU Regulation. This exception should have been the only exception of movement of dual-use items within this single market. Therefore, contrary to the present situation, the EU dual-use Regulation 428/2009 should not be applied to transfer of items to the EU from the Norway and from the EU to Norway. Due to consequences that the respect of the principle might have involved – in particular relying on a third State trade control system to preserve the efficacy of the EU one - another political choice has obviously prevailed.

In this regard, Norway is not in a different situation than Switzerland, except that Norway directly references the EU lists, while the path followed by Switzerland seems to be a cut and paste of the same list.

To conclude, the added value for the United Kingdom and the EU to get inspiration from the present Norway example seems far from being innovative unless they agree to reconsider their interpretation of the single market. However, even if a more open interpretation is retained, it will not open to UK, as it is the case presently for Norway, a participation in the EU' working groups on export controls allowing the possibility to defend its views when the

[4] The EEA brings together the 27 EU Member States, Iceland, Liechtenstein and Norway in a single market. The EEA Agreement provides for the inclusion of EU legislation covering the four freedoms — the free movement of goods, services, persons and capital — throughout the 31 EEA States.

[5] Transfers of items and technology between Galileo programme States partners are indirectly concerned (see Decision No. 1104/2011/EU of the European Parliament and the Council of 25 October 2011 on rules for access to the public regulated service provided by the global navigation satellite system established under the Galileo programme (32011D1104))

regulation is amended or updated. Moreover, Norway is excluded from information sharing arrangements.

3. Harmonisation of controls and competition

There is a real possibility that the EU and the UK export controls will diverge post-Brexit and that this could result in unhealthy competition and a 'race to the bottom' in terms of controls. More than forty years of integration have built industrial networks intimately connected with facilities established on both side of the channel. The development of the nuclear sector strongly supported by several provisions of the Euratom Treaty constitutes a perfect example. Starting in the Fifties, almost from scratch, nuclear peaceful industry was developed via the establishment of several ambitious common research programmes, Joint undertakings (private, public or mix), an EU supply agency, a common nuclear market supported by an EU wide safeguarding system. Untie what has been established will be particularly challenging for UK industries, in particular for trade control measures even if Annex IV of Regulation 428/2009 submits to authorisation intra-EU transfers of certain nuclear items. Those EU internal authorisations might even be transformed in an EUGEA, if the recast proposal of the Commission will be adopted.

This might result in an increase in undesirable transactions, for example. It could also distort markets, particularly if the EU moves forward with the adoption of an autonomous control list in relation to human security issues, as proposed by the European Commission under the recast review, which the UK did not adopt.

4. Information sharing

Trade facilitations between States and effective implementation of trade controls are contingent on various types of information being shared between States' authorities. Most of the international trade control regimes are exchanging information among participating States about licence denials, mostly to avoid the risk to be undercut by another State Member of the same regime. They usually have regular meetings of information exchange as well an internal database compelling information on end-user countries, licences granted and other useful information for licensing authorities[6]. The UK, like most of EU Member States, does participate in those regimes and Brexit will not change the situation.

Since 2000, the EU has established a consultation mechanism constraining a Member State considering an export application for a transaction essentially identical to one denied by another Member State, within the previous three years, to consult the one which issued the denial. If following consultations, the Member State nevertheless decides to grant an authorisation, it shall inform the other Member States and the Commission, providing all relevant information to explain the decision. If the result of the consultation is not binding, Member States usually do not undercut the decision. This is not surprising as long as they are implementing the same criteria and condition defined by the Regulation 428/2009. Moreover, regular meetings of licensing authorities within the Council Dual-use Working

[6] See e.g. NSG Information Exchange Meeting (IEM): (http://www.nuclearsuppliersgroup.org/en/organisation-information).

Party and the Dual-use Coordination Group create an efficient network and enhance confidence among participants. This is also supported by an EU common repository (DUeS) compiling denials and other reports on implementation[7]. After Brexit, UK licensing authorities will not be constrained by the common trade control system and will have no access to the EU information exchange mechanisms. Therefore, in the mid-term, potential divergences in the implementation of dual-use trade control between the EU and the UK could not be excluded, in particular considering that UK was one of the main provider of information. The difficulty lays also in the competition aspect, as dual-use trade is often related to high competitive economic activities and potentials suppliers and recipients are not necessary numerous.

5. Licensing conditions

The UK is to leave the single market which will mean that the transfer of all strategic items will require licensing to and from the UK and not only a limited number, as it is the case presently with Annex IV of Regulation 428/2009 and certain add-on required by a small number of Member States[8]. This will affect a substantial range of goods and sectors and submitting each transfer to individual licence will represent a real burden for industries and licensing authorities. Considering the amount of transfers of dual-use items between UK and the EU, it might represent thousands of licences to be issued. Moreover, proliferation risks of those transactions are rather low. A solution to allow such items to be easily transferred while minimising the burden might well be for the UE to add UK on existing EU General Export Authorisation 001 and for UK to create a 'general' or 'open' licence for the EU. However, this would generally require companies to report transfers to authorities and be subject to audit, which might in itself be a substantial burden for industry and licensing authorities. Additionally, if a majority of dual use items are illegible for the EUGEA 001, the list is not equivalent to the present situation. Some items like natural uranium, genetic modified do not get the benefit of this licence.

A possibility, to maintain the situation nearly equivalent to the present one, will be for the EU and the UK to create two "mirror general licence". This will include all Annex I items and a provision submitting to notification/authorisations a short list of items similar to ones listed in Annex IV. It could be completed by the creation of some new mechanisms intended to record transfers in a low-burden way.

6. Technical capacity

Presently, the UK plays a major role for the annual update of Annex I of the dual-use Regulation and more generally to the drafting of technical annexes of EU embargoes decisions and regulations. Except on nuclear, the Commission, which detains the power of initiative to review annexes, has limited internal technical expertise covering all the other

[7] COM(2016) 521 final - REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use itemshttp://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154929.pdf

[8] Essentially Germany, France and UK.

dual-use categories and has to rely on expertise provided by Member States. This is done for example within the EU Pool of Experts on Dual-use coordinated by the European Commission's Joint Research Centre, of which the UK is one of the major providers of expertise and advice to EU Member States in assessing technical parameters of certain items. Whether the UK might still be in a position to provide such support post-Brexit, or the EU in a position to accept the support of a third State for the implementation of its strategic trade control system is rather unclear. The EU27 might nonetheless need contingency plans.

Final considerations

Two important final questions have to be considered.

The first concerns how the EU will devise a response to the issues outlined above. Even if the UK succeeded to maintain its access to the EU single market, transfers between both entities will not be exempted automatically from the necessity to obtain an authorisation. Due to the complexity of the topic, it seems apparent that only a group of officials, such as the Council's Dual-use Working Party or the Dual-use Coordination Group, will have the necessary expertise to examine these issues in depth and devise a policy for future dual-use trade between the EU and UK.

The second question, which is related, is whether it is feasible to advance both Brexit and the recast of the Regulation 428/2009 in parallel. Given the sheer volume of the dual-use trade implications of Brexit and the fact that the recast, which has now been underway for more than 4 years, is the main way in which the EU could adopt a new or amended general export licence for the UK, it seems at the least that it would be useful to consider Brexit issues as part of the recast.