

## **Explanatory note on the control of "export" for "dual-use items", including technology transfers, under Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items**

This note is meant to support both applicants submitting proposals, as well as evaluators dealing with the ethical issues of proposed projects. It could be read jointly with the note explaining the concept of “exclusive focus on civil applications” of research activities. The aim is to inform applicants and evaluators about the requirements that may apply to research concerning certain dual-use items, explain what the rules are, and clarify what non-compliance with Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items implies for project proposers.

### ***Dual-use items and the EU economy***

Dual-use items represent a significant portion of EU trade with strategic partners. The EU dual-use sector brings together thousands of small, medium and large companies, including research centers and communities, providing high value-added jobs across a wide range of key sectors of the EU economy. Dual-use export controls affect research and development (R&D), production and trade of typically high-tech, advanced products across a wide-range of civil industries, for example: energy, aerospace, security, lasers and navigation, telecommunications, life sciences, chemical and pharmaceutical industries, material-processing equipment, electronics, semiconductor and computing industries, medical and automotive. EU export controls are thus crucial to the EU's drive towards innovation and competitiveness.

### ***Dual-use items and international security***

The export of certain goods and technology can be a threat to regional or international security and might contribute to the proliferation of arms and Weapons of Mass Destruction (WMD). Therefore, with the aim to contribute to international peace and stability the EU has set up a regime to control the export, transfer, brokering and transit of so-called "dual-use items".

### ***EU Regulation of trade in dual-use items – the legal framework.***

Dual-use items are defined in Article 2(1) of Regulation 428/2009 and are goods, software and technology normally used for civilian purposes but which may have military applications, or may contribute to the proliferation of WMD. A non-exhaustive list of dual-use items can be found in the Annex I of Regulation 428/2009, but it should be noted that non-listed items may also be subject to control when there are indications that they may contribute to WMD proliferation or have a military end-use. Certain technologies, goods or software (foreseen to be) concerned by research projects applying for H2020 funding may fall within the scope of the Community regime for dual-use items.

The following, non-exhaustive, provisions are of particular notice:

- Article 3(1) of Regulation 428/2009 stipulates that an authorisation is required for the export of all dual-use items listed in Annex I of the Regulation. Items are grouped in ten categories: (0) nuclear materials, facilities and equipment, (1) special materials and related equipment, (2) materials processing, (3) electronics, (4) computers, (5) telecommunications and information security, (6) sensors and lasers, (7) navigation and avionics, (8) marine, (9) aerospace and propulsion. In certain cases an authorisation may also be required for the export to all or certain destinations of certain dual-use items not listed in Annex I. This is for example the case when the exporter has been informed by the competent authorities of the Member State in which he is established that the items in question 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 explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons, or if the purchasing country or country of destination is subject to an arms embargo. Articles 4 and 8 of Regulation 428/2009 list under which circumstances authorisations are required for the export of dual-use items which are not mentioned in the Annex.
- Pursuant to Article 5(1) of Regulation 428/2009, an authorisation shall be required for brokering of services of dual-use items listed in Annex I of Regulation 428/2009 if the broker has been informed by the competent authorities of the Member State in which he is resident or established that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4(1) of Regulation 428/2009 (i.e. 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). Member States may also require authorisations for brokering of services of non-listed dual-use items and dual-use items for military end use and destinations referred to in Article 4(2) of Regulation 428/2009.
- According to Article 6 of Regulation 428/2009 the transit of non-Community dual-use items listed in Annex I of Regulation 428/2009 and non-listed dual-use items may be prohibited by the competent authorities of the Member State where the transit occurs if the items are or may be intended, in their entirety or part, for uses referred to in Article 4(1) of Regulation 428/2009. Transit of dual-use items for military end use and destinations referred to in Article 4(2) may also be forbidden. Article 6(2) stipulates that authorisation requirements may be imposed in individual cases for the specific transit of dual-use items listed in Annex I, if the items are or may be intended, in their entirety or part, for uses referred to in Article 4(1) of Regulation 428/2009.
- As stated in Article 9 of Regulation 428/2009 authorisations are in principle granted by the competent authorities of the Member State where the exporter is established. They can be individual, global or general authorisations. For certain exports, listed in

Annexes IIa - III of Regulation 1232/2011 which amends Regulation 428/2009, a Union General Export Authorisation may apply to the export, under the terms and conditions stipulated therein.

For dual-use items listed in Annex IV an authorisation shall be required for intra-Community transfers. Items listed in Part 2 of Annex IV shall not be covered by a general authorisation.

It should be noted that, in exceptional cases, additional restrictions may apply at national level; these requirements should also be respected.

The control of "export" under Regulation 428/2009 extends to transfers of technology for the development production or use of dual-use items - so-called "intangible technology transfers" (ITT) - including technical information via electronic means and the transfer of knowledge and skills by persons. Applicant-beneficiaries may be considered as "exporters" under Regulation 428/2009, where they transmit controlled technology to a destination outside the EU.

### ***EU dual-use export controls and H2020 applications***

Dual-use export controls may thus apply to research projects concerning dual-use items. Applicants should therefore carefully check if their research concerns the development, production or use of any of dual-use items, technologies or software and, as appropriate, ensure compliance with the relevant controls in the case of "export". Since all research and innovation activities funded by H2020 must comply with applicable national, international and EU legislation<sup>1</sup>, it is of essential importance that legal requirements for the control of dual-use items are fulfilled.

### ***Practical implications – a few examples***

If a proposal foresees the "export" of dual-use items, applicants should check for the applicable control and, as appropriate, contact the competent authorities in their Member State(s) and apply for a licence

#### ***Example 1- Authorisation Required for Transfer of Equipment***

*A project was planning some testing activities in an EU accessing country. These particular tests needed an item regulated under Regulation 428/2009 and therefore an authorisation. In the case concerned the license request to the national authority of the "exporting" country was submitted late and the required authorisation was not granted in due time for the test, The project could not export the equipment and had to choose between: (i) re-planning the testing activities in an EU-Member State at its own costs or (ii) buying new equipment locally.*

<sup>1</sup> Article 19(1) of Regulation (EU) No 1291/2013 of the European Parliament and the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC states: "All the research and innovation activities carried out under Horizon 2020 shall comply with ethical principles and relevant national, Union and international legislation, including the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and its Supplementary Protocols."

Furthermore, project proposers should be aware that in certain exceptional cases publication of research findings (for instance a scientific article in a journal from outside the EU), because considered as an Intangible Technology Transfer (ITT), may require an authorisation, and that such authorisations may not always be granted.

*Example 2 – Authorisation Required for Publication of Research*

*One Member State, invoking Article 3 of Regulation 428/2009, demanded a prominent virologist to obtain an export licence, before publishing the results of his research on a certain virus, as this could be construed as contributing to the proliferation of biological weapons. The researcher challenged this obligation before the national court, arguing that his work did not fall within the scope of the article and claiming that the requirement would hamper scientific progress and create legal inequality between states. The court ruled that in this case the demand for an authorisation was justified and explained that in the light of the importance of non-proliferation any exceptions should be interpreted strictly.*

***Instructions for applicants***

Applicants planning research that may concern the development, production or use of dual-use items, software, technologies should tick the box in the ethics table in part A and then clearly express in part B of their proposal which items could be subject to legislation, and how they will ensure compliance. Additionally, they have to describe in the risk table under the management section of their proposal potential mitigation measures in case an authorisation is not granted by the responsible national authority. Evaluators will assess this section based on the “management” criteria mentioned in the proposals’ evaluation procedure and may downgrade the mark if these criteria are not properly dealt with.

An optional article (Article 37.3) stating that non-compliance with Regulation 428/2009 constitutes breach of contract will be included in the Grant Agreement of project dealing with dual-use items or other items subject to export, transfer, brokering and transit controls.

**Further information**

More information on EU dual-use export controls may be found at:

[http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/index\\_en.htm](http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/index_en.htm)