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Seeking Harmonisation: European Space Export Control at the Crossroads

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Situated at the crossroads of defence, security and civil applications, space does not generally enjoy a specific export control regulation, but it is rather subject to both dual use and defence export control provisions. While EU Council Regulation 428/2009 governs the control of exports of dual use goods, Directives 2009/43/EC on intra-EU transfers of defence products and 2009/81/EC on the coordination of procedures for the award of contracts in the field of defence and security could also partially affect the space sector. Intended to strengthen the European industrial and technological base, these two directives underpin the extension of the single market rule to a strategic domain where national prerogatives and restrictions are traditionally predominant. While in the dichotomy between free trade and security issues the protection of national industrial interests plays an important role, there is a risk that an inhomogeneous enforcement of the new provisions hampers the growth and integration of the space sector in Europe.

1. Introduction

Situated at the crossroads of defence, security and civil applications, international trade in space assets and components is subject to the European framework of dual use export controls. In addition to this, it is expected to be affected by the newly implemented EU directives on the transfer and procurement of military equipment. Lacking specific regulations for space export control at the European level, the space industry, including manufacturing, launching and operating satellites, or commercialising applications and services, will have to take into account two different regulatory frameworks, one specifically designed for dual-use items, and the other generally referring to defence and security, as implemented in national export regulation rules.

The control of exports of dual use space goods is subject to Council Regulation n. 428/2009, which is directly applicable in the national legal systems of the EU Member States. Directives 2009/43 (on intra-EU transfers of defence products) and 2009/81/EC (on the coordination of procedures for the award of contracts in the field of defence and security) instead, require further transposition in the national systems, which is still underway, although it had to take place before June and August 2011 respectively.

The aim of the Directives is to extend the benefits of the single market to the cross-border procurement of defence and sensitive non-military security equipment, resulting in a simplification of the intra-community transfer and a more efficient intersection between demand and supply. Although specific provisions apply to international cooperation, national space programmes could benefit from the new legal framework. However, the main political issue remains the effective harmonisation of export controls. There is still a risk that these Directives will be applied to very different extent among EU member states, as it is the case with export controls of dual use goods. The institution of a truly common regulatory framework in Europe, even for the most sensitive assets, would be essential in order to foster industrial cooperation, create a common investment area for all European companies involved, and reduce costs.

2. EU Dual Use Export Control Regulations

Since space assets do not attract specific export control regulations, European companies mainly

referred to the regime for the control of exports of "dual-use" goods and technology, as it is set up by EU Regulation 428/2009[1]. Most space assets are regarded as "dual use", including products and technologies that are normally used for civilian purposes, but which may have military applications. The Regulation includes a definition of dual use goods in its art. 2 par. 1 as "items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices"[2].

Regulation 428/2009 aims to a greater harmonized framework, where dual use items, including space assets, can circulate freely in the EU.

Consequently, space products and technologies are included in several of its categories, namely in "telecommunications and information security", "sensors and lasers", "navigation and avionics" and, above all, "aerospace and propulsion"[3]. This regime recast former Regulation 1334/2000 to establish a wider harmonised framework, according to which dual use items could in principle circulate without a license within the EU, being subject to control only when they are to be exported to third countries[4]. A restriction is foreseen for some items -listed in Annex IV- that are regarded as "sensitive" or "most sensitive", and are therefore subject to prior authorisation[5].

Four types of authorisations are available under the dual-use regulation: three of them (individual, global and national general export licenses) are issued by member states, while the "EU General Export Authorisation" is issued by the European Union Commission and is valid throughout the Community. The use of National General Export licenses is of particular relevance: it facilitates the export of items in low-risk situations, therefore reducing the administrative burden on European companies.

However, the inherent multiple use of space assets, underlined by the European Commission since the White paper on space of the year 2003, puts "space qualified assets" in a peculiar condition, where the various systems, although developed in a civil framework, have important potential for defence and security applications or could represent demonstrators or precursors in this sense[6]. This makes space products and technologies an important strategic asset. Consequently, the issue of export controls is particularly complex for space, and entails a difficult trade-off between trade and security reasons.

3. Space and the "EC Defence Package"

While most space products and components are generally considered as "dual-use", defence procurement covers items that are specifically designed for military purposes and even civilian products that are equally sensitive. Adopted by the European Commission in 2009, the new regulatory framework is meant to enhance the competitiveness of EU industries dealing with the European Defence Equipment, ranging from defence related items to dual use goods or non-military goods that are equally sensitive[7].

The aim is to extend the rule of the single EU market to a domain that has traditionally been a national prerogative of member states, and is therefore characterised by fragmented and uncoordinated procedures. Recognising the blurred limits between defence and security, Directive 2009/81/EC addresses the issue of coordinating procedures for the award of

1 With the exception of France, since the adoption of the "Law on Space Activities" no. 2008-518 of 3rd June 2008.

2 Council of the European Union. Regulation (EC) No 428/2009 setting up a Community Regime for the Control of Exports, Transfers, Brokering and Transit of Dual-Use Items (Recast). Official Journal of the European Union L 134/1, 29 May 2009 http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143390.pdf.

3 Sánchez Aranzamendi, Matxalen. Economic and Policy Aspects of Space Regulations in Europe, Part 2: Space Related Regulations- On Track for Space Technologies and Space Based Services. Report 36, June 2011, pp. 20-21 http://www.espi.or.at/images/stories/dokumente/studies/ESPI_Report_36.pdf.

4 "EU Export Control on Dual Use Items" Export.gov June 2010, 31 August 2011 http://export.gov/europeanunion/static/MR-151%20EU%20Export%20Control%20on%20Dual%20Use%20Items_Latest_eg_eu_036947.pdf

5 Part I of the list explicitly refers to "space launch vehicles capable of delivering at least a 500kg payload to a range of at least 300 km", "liquid rocket propulsion systems (..) usable for space launch vehicles" and "solid rocket propulsion systems usable for space launch vehicles". Council of the European Union. Regulation (EC) No 428/2009 setting up a Community Regime for the Control of Exports, Transfers, Brokering and Transit of Dual-Use Items (Recast), *cit.*

6 Brauer Gerhard and Del Monte L., European Space Research and Development for the Security and Military Sectors (Abstract) http://www.sse.gr/NATO/EreunaKaiTexnologiaNATO/34.Integration_of_space_based_assets_within_full_spectrum_operations/RTO-MP-SCI-150/MP-SCI-150-07.pdf

7 See also Commission of the European Communities. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A strategy for a Stronger and More Competitive European Defence Industry. COM (2007) 764 final of 5 December 2007. Brussels: European Union.

contracts in the field of defence and security. It applies not only to arms, munitions, or war materials, but also "to certain particularly sensitive purchases in the field of non-military security" (recital 9) and "products initially designed for civilian use and later adapted to military purposes" (rec.10) making explicit reference to "border protection, police activities and crisis management missions"[8]. Directive 2009/81 refers to a "1958 list" of items, adopted as Council Decision 255/58, but recommends that it shall be interpreted "in a broad way in the light of the evolving character of technology (..), which leads to the development of new types of equipment, for instance on the basis of the Common Military List of the Union". The latter makes an explicit reference to "space qualified assets" as "products designed, manufactured and tested to meet the special electrical, mechanical or environmental requirements for use in the launch and deployment of satellites or high altitude flight systems operating at altitudes of 100 km or higher".

The Directive could therefore have an impact on transactions regarding certain types of space assets as well[9]. Introducing new procurement rules, specifically tailored to procurement in the defence and security sectors, the new regulations should open up the European market to EU wide competition, giving birth to a larger "internal" market. Specific provisions concern cooperative programmes based on research and development, therefore, once implemented, the Directive could find an application in national programmes, while the cooperative ones, including ESA cooperation, will continue to be subject to their peculiar rules.

Recital 26 of Directive 2009/81/EC states, indeed, that the directive should not apply when "the awarding of contracts which derive from international agreements or arrangements between Member States and third countries apply" but also not "to contracts awarded by international organisations for their purposes or to contracts which must be awarded by a Member State in accordance with rules that are specific to such organisations" somehow recalling ESA procurement practice[10].

The "EC Defence Package" is completed by EU Directive 2009/43 on Intra-EU Transfers of Defence products. The objective is to simplify the rules and procedures applicable to the intra-Community transfer of defence-related products in order to "ensure that the internal market is not distorted". While the Directive does not apply to defence-related products which only transit through the territory of the Community, it covers "all the defence-related products which correspond to those listed in the Common Military List of the European Union, including their components and technologies".

Directives 2009/81/EC and 2009/43/EC represent a new additional regulatory framework specifically designed for defence and security.

The result should be a more harmonised European licensing system, based on a "pre-approved" authorisation framework. Four new types of general licenses should allow exporters based on the territory of the Union to avoid systematically asking for a specific export authorisation for each part or component that has to be exported. This can be particularly important, especially when a European company is active in several Member States. A certification system will identify enterprises in a Member State that are allowed to be supplied with defence-related products[11].

Intergovernmental cooperation programmes should also benefit from facilitating provisions, since the Directive envisages the possibility to publish a general transfer licence for transfers of defence-related products to recipients in other participating Member States as necessary for the execution of that sort of programme.

4. Seeking Harmonisation: EU Export Control Implementation Into National Laws

While Council Regulation 428/2009 is directly applicable in the national law of the Member States, transposition into national law is required for the new directives. In the case of Directive 2009/43, this had to take place by 30th June 2011, while for Directive 2009/81 by 21st August.

8 IAI, IRIS, Manchester 1824, Study on the Industrial Implications in Europe of the Blurring of Dividing Lines Between Security and Defence. Final Report, 15.06.2010, p.122 http://ec.europa.eu/enterprise/sectors/defence/files/new_defsec_final_report_en.pdf.

9 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the field of defence and security, and amending Directives 2004/17/EC and 2004/18/EC. Official Journal of the European Union L 216/76, 20 Aug 2009 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:01:EN:HTML.

10 Directive 2009/81/EC, *cit.*

11 "EU Defence Procurement & Export Control Policies", Export.gov 28 July 2011 http://export.gov/europeanunion/defenseprocurement/index.asp

Their transposition is still underway and it is mandatory in all EU member states, although some elements can differ, at the discretion of national governments. While only few of the 27 EU member states have met the deadline to amend their national legislation in compliance with the new transit and defence procurement rules[12], their practical implementation could create considerable divergences among the different member states, consequently creating an unequal investment environment in the European defence procurement field. Moreover, Art. 346 TFEU continues to provide for derogation to the application of the Procurement directive, whenever "the protection of the essential interests of security" of a member state is at stake. Although intended to be applied in exceptional cases only, it has been already used quite often in the past[13]. Furthermore, the definition itself of what constitutes an essential security interest is the sole responsibility of the member states.

Although directly applicable and enforced in all EU Member States, even Regulation 428/2009 has left room for asymmetries in its application. The national sovereignty of member states remains the baseline, as the authorisation process and procedures remain a prerogative of the member states[14]. According to the Regulation, each state could decide to keep in place certain specific national rules, e.g. imposing additional controls (art. 4 and 8) or requiring goods to be checked at specific customs offices (art. 17). It could also decide to prohibit the transit of specific non EU goods through their national territory. In spite of the fact that art. 12 includes a list of criteria to assess authorisation requests, there is still room for different interpretations. While the four types of licences are supposed to simplify trade in dual use products, it is up to the national member state to decide which type of authorisation to use in a certain case[15]. Additionally, only seven member states made national general export authorisations available to their exporters. The final result is complex and insufficiently transparent frameworks that can lead to incapacitating the very objectives of the Regulation, creating competition distortions and hindering cooperation between businesses located in different member states.

It is to avoid such side-effects that on 30th June the European Commission issued a Green Paper entitled "The dual use export control system of the European Union: ensuring security and competitiveness in a changing world". The document takes note of the lack of clear harmonised procedures for intra EU export authorisations and launches a public debate with interested stakeholders with the objective to achieve a "fully integrated internal market for dual use items". The results will form the basis for the report the Commission will complete by the end of 2012, where it shall consider pan European tools to minimise any significant divergence in the practical implementation by the member states[16].

National approaches in enforcement led to a series of differences that the Green Paper categorises as: "administrative", "substantive" and "operational". According to the document, "a new export control model" is necessary to effectively respond to challenges brought about by a quickly developing world, ensuring at the same time that various approaches among the Member States do not jeopardise competitiveness. Such a model requires efforts towards the removal of intra EU transfer controls for dual use items through a more trade-oriented approach, including *inter alia* greater use of post-shipment verification mechanisms and lists of certified end users in the EU.[17]

5. Recommendations

Space has been historically a sector of convergence between defence and civilian applications, representing a strategic industry where national prerogatives and security issues

12 Anderson, Guy, "EU countries drag feet over defence procurement legislation", 20 July 2011.IHS Jane´s: Defence & Security Intelligence & Analysis, 28 July 2011 http://www.janes.com/products/janes/defence-security-report.aspx?ID=1065930077. See also Hale Julian, "3 EU Members Set to Meet Procurement Deadline", Defence News, 19 Aug 2011, www.defensenews.com/story.php?i=7432205

13 "Interview with Dr Christian Scherer-Leydecker, Partner in CMS Hasche Sigle", 31 March 2011. Defence Professionals, 28 July 2011 http://www.defpro.com/daily/details/785/ However, art. 17 of Directive 2009/81 recalls that "in accordance with the case-law of the Court of Justice of the European Communities, the possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond that which is strictly necessary for the protection of the legitimate interests that those Articles help to safeguard". Directive 2009/81/EC, cit.

14 Frans von der Dunk, "Europe and Security Issues in Space: the Institutional Setting", in "Space and Defense" (winter 2010) 4(1), the Eisenhower Center for Space and Defense Studies, p.88, http://digitalcommons.unl.edu/spacelaw/58

15 Frans von der Dunk, "Europe and Security Issues", cit.

16 Sopinska, Joanna "Commission consults on dual-use export control system", 01 July 2011. Europolitics, 28 July 2011 http://www.europolitics.info/external-policies/commission-consults-on-dual-use-export-control-system-art308894-46.html

17 European Commission. Green Paper. The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world.COM (2011) 393 final of 30 June 2011. Brussels: European Union.

inevitably play an important role, but at the same time can significantly affect competitiveness. Therefore the issue of export controls needs to be addressed, in order to ensure that international cooperation and global competitiveness are not hampered by excessive nationalism and bureaucratic and regulatory burdens.

While export controls are a function of trade and security, space assets are critical technologies that inevitably entail national industrial interests and concerns of "technological sovereignty", as a fundamental component of the independence of a state and a strategic tool for its political ambitions[18] . A dichotomy between national industrial and security interests and enhanced transparency and efficiency of the market naturally arises when such sensitive issues are at stake. Yet, it is essential to find a more stable equilibrium in the longer term. While the strategic nature of space assets may motivate space actors to pursue strategic non-dependence, this cannot result in restrictions to intra-EU transfers the same way as it happens in the general international trade, where it is sometimes essential to avoid to contribute to the possible enhancement or development of the capabilities of the receiving state.

A proper European space industrial policy should include a strengthening of the European policy that takes into account the different national capacities and at the same time is able to impose a regulation that is inspired by a common policy. Consequently, export licences should be policed in a way as to resolve the conflict between the need to open markets and the temptation for states to use security as a pretext to assist their own industries, which paves the way to useless duplication of efforts while reducing competitiveness.

While differences in space export controls –in terms of documentation required, licence fees, length of time to get a licence, as well as duration and validity of the licence[19]-should be avoided, European -and not national- lists should provide a unique reference for European exporters, in this way enhancing transparency and legal certainty. If the states have a right to maintain a strong industrial sector for strategic and employment needs, boosting Europe's global competitiveness is essential to reach a technological leadership in some sectors and a sufficient autonomous European capacity in critical components, ensuring a stable and balanced development of the European industrial base that includes small and medium enterprises (SMEs).

The market approach should gain more relevance in Europe. Measures in that direction should include a higher degree of harmonisation of regulations, but also "pan-European" tools to ensure the uniform enforcement of rules and the adoption of a space industrial policy that stimulates common production projects and technology transfers. In such a context, reducing regulatory burdens and opening-up the market of space goods is not only in the interest of the market, it is also a necessity for the member states. Therefore, achieving a greater harmonised enforcement of the European Regulations and Directives affecting the space industry is an important occasion to let Europe present itself as a single actor, with a strong single intra-European market.

[18] Rosa Rosanelli, Le attività spaziali nelle politiche di sicurezza e difesa. *Quaderni IAI*, No. 1 (September 2011), p. 77.

[19] Frans von der Dunk, "The 'S' of 'Security': Europe on the road to GMES", Soochow Law Journal vol. 4 n.2 (2007), p.7.

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