



# Aware of ... Grounds for suspecting

## ...Continuation of our Series on Catch-all: Parts 3 and 4



### 3 - ... An information to the Government and/or a license may be required

There are different actions, depending on whether the operator wants to export a product, or provide brokering services or technical assistance.

#### Export

In case of an export of non-listed **dual-use items**, awareness in any of the 5 catch-all situations shall oblige the exporter to file an information to the Luxembourg Government. The same applies if the exporter has grounds for suspecting, and an authorisation may then be imposed by the licensing authorities.

The table is not so complete when it comes to non-listed **military equipment**. The Luxembourg lawmakers have here until now not implemented the "cyber-surveillance" catch-all case. There are, as well, blanks in the legislative framework for the information coming from the Government with regard to the "public security" catch-all. Awareness will result for the exporter in an obligation to report to the Government, and grounds for suspecting will directly result in an authorisation requirement - a solution that is difficult to understand when "awareness" (with evidences, compared to simple grounds for suspecting) results in a weaker requirement. Grounds of suspecting, on their side, will not oblige the exporter to any action in the 4th (military end-use) and 5th (use as parts or components of defence-related products exporter without license) catch-all cases.

EXPORT	Defence-related products, not listed			Dual-use items, not listed		
	Exporter		Government	Exporter		Government
Chemical, biological, nuclear weapons, missiles	Awareness L2018, 34(2) -> Info Gov	Gr. suspecting L2018, 34(1)1* ->Authorisation	Information L2018, 34(1)3° ->Authorisation	Awareness RUE2021, 4(2) L2018, 45(1)al2 -> Info Gov	Gr. suspecting RUE2021, 4(3) L2018, 45(1) -> Info G/Aut.	Information RUE2021, 4(1)(a) ->Authorisation
Public security, incl. terrorism Safeguarding of Human Rights	Awareness L2018, 34(2) -> Info Gov	Gr. suspecting L2018, 34(1)2* ->Authorisation		Awareness RUE2021, 9(1) L2018, 45(2)al2 -> Info Gov	Gr. suspecting RUE2021, 9(1) L2018, 45(2)al1,2 -> Info G/Aut.	Information RUE2021, 10(1) ->Authorisation
Military end-use	Awareness L2018, 34(2) -> Info Gov		Information L2018, 34(1)4° ->Authorisation	Awareness RUE2021, 4(2) L2018, 45(1)al2 -> Info Gov	Gr. suspecting RUE2021, 4(3) L2018, 45(1) -> Info G/Aut.	Information RUE2021, 4(1)(b) ->Authorisation
Use as parts or components of defence-related products exported without authorization	Awareness L2018, 34(2) -> Info Gov		Information L2018, 34(1)5° ->Authorisation	Awareness RUE2021, 4(2) L2018, 45(1)al2 -> Info Gov	Gr. suspecting RUE2021, 4(3) L2018, 45(1) -> Info G/Aut.	Information RUE2021, 4(1)(c) ->Authorisation
Cybersurveillance items, with a use implicating internal repression and/or violation Human Rights or humanitarian law				Awareness RUE2021, 5(2) L2018, 45(1)al2 -> Info Gov	Gr. suspecting RUE2021, 4(3) L2018, 45(1) -> Info G/Aut.	Information RUE2021, 5(1) ->Authorisation

Note: In the table below, "L2018" refers to the Luxembourg Export Control Law of 27 June 2018. "RUE2021" refers to the EU Dual-Use Regulation 2021/821.

## Brokering

Brokering of dual-use items means (a) the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to another third country, or (b) the selling or buying of dual-use items that are located in third countries for their transfer to another third country. The provision of ancillary services (like transportation, financial services, insurance or re-insurance, or general advertising or promotion) are excluded from this definition.

Brokering of defence-related products is defined in a broader way than for dual-use items, as it covers also auxiliary services (Law of 2018, art. 31(2)). There are however, currently, no catch-all provisions for brokering of non-listed military equipment, as the Grand Duchy of Luxembourg has not decided to go into that direction in the Export Control Law of 2018.

In the field of dual-use items, which for the seek of completeness comprises listed and not listed items, there are currently no catch-all provisions for brokering services, in the "public security" and "cyber-surveillance" cases.

In the three other catch-all cases, awareness of the provider of technical assistance must result in an information to the Government, but only if the dual-use items are listed.

Grounds of suspecting are, at the current state, clearly resulting in a license requirement if the dual-use items are non-listed.

Luxembourg law however foresees a general provision (art. 42(1)), not updated after the entry into force of EU Regulation 2021/821, that puts a general authorisation requirement for brokering with listed and non-listed dual-use items if the end-use will be of any of these 3 catch-all situations. There is no mention if this requirement only applies if the Government has informed the provider, or if the provider is aware, or has grounds of suspecting. Prudence will therefore require providers to apply for a license in any case, or, at least, enquire with the Government for clarification before

proceeding with the provision of the brokering services, in case they are aware (for non-listed items) or have grounds of suspecting (for listed items).



### **Technical assistance**

Technical assistance in relation to dual-use items is defined as any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical services. This may take forms such as instruction advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance.

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In the field of dual-use items, which for the seek of completeness comprises listed and not listed items, there are currently no catch-all provisions for brokering services, in the "public security" and "cyber-surveillance" cases.

In the three other catch-all cases, awareness of the provider of technical assistance must result in an information to the Government, but only if the dual-use items are listed.

No legal rule without exceptions! There are 6 types of exceptions to the obligation pointed out in paragraph here before. One of them only concerns authorities or State agencies. For providers of the private sector, the five remaining exceptions are the following:

1. technical assistance provided within or into the territory, or towards a resident, of one of the following States: Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland including Liechtenstein, UK and United States of America;
2. technical assistance taking the form of transferring information that is in the public domain or basic scientific research;

3. technical assistance provided for the armed forces of an EU Member State on the basis of the tasks assigned to them;
  4. technical assistance provided for one of the following purposes: (a) pursuant to a contractual relationship placed by the European Space Agency (ESA) or that are transferred by ESA to accomplish its official tasks, (b) pursuant to a contractual relationship placed by an EU Member State's national space organisation or that are transferred by it to accomplish its official tasks, (c) pursuant to a contractual relationship placed in connection with an EU space launch development and production programme signed by two or more EU governments, and (d) to a State-controlled space launching site in the territory of an EU Member State, unless that Member State controls such transfers
  5. technical assistance that is the minimum necessary for the installation, operation, maintenance (checking) or repair of items for which an export authorisation has been issued.
- Grounds of suspecting are, at the current state, not resulting in an obligation to inform the Government. Luxembourg lawmakers have not used, until now, the option foreseen by the EU regulation.



#### 4 - Act now! Passivity does not protect ...

To implement sufficient catch-all controls, exporters and providers of brokering services and technical assistance in relation with non-listed dual-use items or military equipment should do the following:

1. know the actual and potential **end-use** of their products;
2. implement a **"know-your-customer" policy** with regular screenings and due diligence;
3. proceed by a **catch-all risk assessment**, case-by-case on the spot of each transaction;
4. **document** if they are (or are not) aware of, or have (or have not) grounds of suspecting, that their products may be used for a critical or sensitive end-use;
5. **inform the Government** and/or apply for an authorisation in case such a requirement results from the implementation of the catch-all provisions;
6. generally, in order to apply and control internal processes, have an **Internal Compliance Program** in place for export control compliance.

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