

SANCTIONS & EXPORT CONTROLS

New Control of Exports Act set to be commenced

The long-awaited **Control of Exports Act 2023** (the **2023 Act**) was signed into law by the President on 25 October 2023 and is expected to be commenced early next month (June 2024).

Once commenced, the 2023 Act will repeal and replace the existing Control of Exports Act 2008 (the **2008 Act**) to become the primary piece of Irish legislation governing the export of controlled items (both military and 'dual-use') from Ireland.

11 MIN READ

Irish export controls are grounded in EU law and there are two key EU instruments of relevance to the 2023 Act:

- EU Council Regulation 2021/821 (the **Dual-Use Regulation**) setting up the EU wide framework for the control of exports, transfer, brokering and transit of 'dual-use' items (being items that can be used for both military and civilian purposes). This has what is termed "*direct effect*" in Irish law, meaning that it applies and must be complied with in the same way as domestic legislation. However, (i) enforcement and penalties remain a national competence which must be legislated for at Member State level; and (ii) the Dual-Use Regulation allows Members States discretion on certain matters, such as introducing controls on additional items to those controlled under the Dual-Use Regulation. Consequently,

the 2023 Act does not (and could not) attempt to change the provisions in the Dual-Use Regulation but rather operates to supplement their application in Ireland and provide for enforcement.

- Council Common Position 944 of 2008 defining common rules for the control of exports of military technology and equipment (the **Common Position**). The Common Position sets out eight criteria to assess applications for authorisations to export military technology and equipment listed on the EU Common Military List. Unlike the Dual-Use Regulation, the Common Position does not have direct effect in Ireland; military trade remains a national competence governed by Irish national law. The 2023 Act provides a framework for the development of a national military export control list (the **National Military List**).

The commencement of the 2023 Act looks set to mark a new departure in Irish export controls; the 2023 Act is significantly more detailed than its predecessor (sixty-one pages versus ten), and introduces several new compliance monitoring, information gathering and enforcement tools. Taken together, the new compliance and enforcement tools should facilitate a significantly more stringent compliance and enforcement environment than that provided for under the existing (and outdated) 2008 Act.

Notwithstanding the significant changes to be introduced under the 2023 Act, it is worth noting that the new legislation does not go as far as it perhaps could have, particularly with regard to enforcement. It had been anticipated at the early stages of the bill that provision would be made for the imposition of administrative sanctions for export control breaches, in keeping with the growing trend of late to confer

such powers on regulators. However, no such powers were ultimately given to the regulator of export controls, the Department of Enterprise, Trade and Employment (the **DETE**) overseen by the Minister for Enterprise, Trade and Employment (the **Minister**), pursuant to the 2023 Act. This may be a missed opportunity given the inadvertent nature of many export controls breaches which may be more appropriately dealt with by way of fines than criminal prosecution. That said, the 2023 Act does introduce a new enforcement tool in the form of compliance notices and overall is a substantial piece of legislation that looks set to bring about significant changes to the export controls compliance and enforcement environment.

This article focuses on key provisions of the 2023 Act related to authorisations under export controls, compliance monitoring and information gathering powers of the DETE and enforcement tools.

A / AUTHORISATIONS AND APPEALS

Authorisations

The 2023 Act permits the DETE to grant authorisations to undertake certain activities relating to dual-use and military items, similar to the current authorisation system under the 2008 Act. However, the 2023 Act is far more prescriptive on the process for reviewing and adjudicating on applications, including grounds for refusal. In particular, the DETE may refuse to grant an authorisation where false information has been provided in purported compliance with the 2023 Act, or where granting an authorisation would be inconsistent with national security policy or human rights considerations. Interestingly, the DETE will not be obliged to provide reasons for a decision where doing so would create a risk to the security or public order of the State to the extent necessary to avoid or minimise such risk.

The 2023 Act also imposes an explicit requirement on authorisation holders to keep records related to the use of the authorisation.

Appeals

The current Control of Exports (Appeals) Regulations 2018 (pursuant to the 2008 Act) provides for a right of appeal to an appeals officer up to 28 working days after an application for an authorisation under the 2008 Act is denied or revoked by the Minister.

Similar to how appeals currently operate, under the 2023 Act, an applicant will be able to request an internal review of a determination of their application within 14 days of it being communicated to them, and the review will be conducted by an internal reviewer (not the original decision maker). The decision must be communicated to

the applicant within 21 days of the internal reviewer's decision.

One of the innovations of the 2023 Act is the addition of a new further avenue of appeal. The decision of the internal reviewer may be appealed to an independent adjudicator, being a practicing solicitor or barrister or former judge of the Circuit Court, High Court, Court of Appeal or Supreme Court. This further appeal must be brought within 30 days of the receipt of notice of the internal reviewer's decision. In terms of procedures, the Adjudicator may determine the appeal in the absence of an oral hearing, save where needed to properly and fairly determine the appeal. Where there is an oral hearing, the adjudicator may require a person to attend, give evidence and produce any documents within the person's possession, control or procurement.

Evidence will be given on oath or affirmation and persons in attendance may be examined and cross-examined. The adjudicator's decision will be final except where the High Court grants leave to appeal on a point of law within 30 days of the decision.

As in the case of the original decision on the authorisation request, the 2023 Act permits restrictions in relation to disclosure of information of relevance to the security or public order of the State throughout the appeal process. The provisions regarding sensitive material and evidence in the 2023 Act are apparently the result of "extensive consultations with the Office of the Attorney General in developing the Bill" to strike a balance between "transparency and fairness, and the need to protect sensitive information".¹

¹ Select Committee on Enterprise, Trade and Employment debate - Wednesday, 28 Jun 2023 (oireachtas.ie)

B / INFORMATION GATHERING POWERS

Powers of Search and Seizure

As under the 2008 Act, the Minister is empowered under the 2023 Act to designate an individual as an “*Authorised Officer*” (an **Officer**) upon whom a number of powers are conferred. Whilst the powers provided to Officers in the 2023 Act largely mirror those already in existence under the 2008 Act, there are certain new and more detailed provisions on powers to note.

The 2023 Act also provides for various ways in which an Officer may access and gather information when carrying out an investigative function. For example, an Officer entering a premises will be empowered to require any person there to give the Officer access to any electronic information system; require any person at the premises to answer questions that the Officer may ask; and detain or remove a vehicle for inspection.

Additionally, the 2023 Act allows an Officer to operate or cause to be operated any computer (or other “data equipment”) and

compel a person whom the Officer believes may be able to facilitate access, to assist the Officer in doing so. This includes the provision of records to the Officer in a legible form, the provision of any necessary password, and otherwise enabling the Officer to examine the records in a legible and comprehensible form. Where an Officer takes records and proposes to retain them for more than 14 days, the Officer must, where requested, provide copies of the records to the person who would otherwise be entitled to them.

In line with recent Irish case law², an Officer may compel the disclosure of legally privileged information and seize it provided this is done by means where the confidentiality of the information can be maintained (as against the Officer), pending a High Court review of whether the information is indeed privileged legal material. This provision aims to address the ability of regulators exercising search powers to seize material at the scene on the one hand, while also respecting legal privilege on the other.

The 2023 Act also contains a formidable new power whereby the Officer may, by notice, require a person reasonably believed to be engaged in a relevant activity under the 2023 Act to furnish certain information and documents. Where appropriate, the Officer can require the person to attend in person to answer questions about relevant matters, and to make a declaration of truth in respect of the answers provided to those questions.

Officers will retain the ability under the 2008 Act to apply to the District Court for a warrant to enter a dwelling accompanied by such other authorised Officers, customs officers or Gardaí as the judge considers necessary. The current 30-day time limit for exercise of the warrant has not been replicated in the new legislation.

Provision of false or misleading information

The 2023 Act expands the application of the offence of providing false or misleading information, seen currently in the 2008 Act, to encompass the provision of information:

(i) to the Minister that is false or misleading in a “*material particular*” and (ii) to an Officer that is false or misleading in “*any material respect*”. In the case of the offence relating to the Minister, the standard of proof includes recklessness as well as knowledge, whereas actual knowledge is required in respect of the equivalent offence relating to an Officer.

Reporting obligations

The 2023 Act introduces new reporting obligations for holders of authorisations provided by the Minister. Under the 2023 Act, the Minister (in practice, an Officer on the Minister’s behalf) may request an authorisation holder to provide a report detailing the activities undertaken pursuant to the authorisation. In addition, an authorisation holder is required to inform the Minister, as soon as practicable, in the event of learning of any “*material matter*”. This term is defined broadly under the 2023 Act (including an error, change in circumstance or relevant information).

² *CRH Plc, Irish Cement Ltd and Séamus Lynch v Competition and Consumer Protection Commission* [2017] IESC 34

C / ENFORCEMENT

Compliance Notice

The 2023 Act introduces an option of issuing a “*Compliance Notice*”. This broadens the tools available to Officers to secure compliance with the legislation, presenting a practical alternative to the binary options of prosecution or no prosecution currently available.

An Officer may issue a Compliance Notice to any person that the Officer suspects of contravening a provision of the 2023 Act, and the Compliance Notice may require that the recipient takes certain measures to cease the contravention by a specified date. Compliance Notices may be appealed to the District Court no later than 28 days from the date upon which the Compliance Notice is given. Failure to comply with a Compliance Notice constitutes an offence.

A Compliance Notice does not preclude prosecution in respect of the contravention in question, and the issuance of a Compliance Notice and a prosecution in respect of the subject matter of the

Compliance Notice are not intended to be mutually exclusive. In practice however, it appears likely that the DETE would reserve their power to refer potential breaches to the Gardaí for more serious contraventions.

Criminal liability

Helpfully, the 2023 Act increases the threshold for criminal liability for companies and those within senior leadership (any director, manager, secretary or other officer) positions of an offending company. It provides that where an offence is committed by a body corporate and is proven to have been “*committed with the consent, connivance or approval of, or was attributable to any wilful neglect on the part of any director, manager, secretary or other office of the body corporate*” liability will arise for the body corporate and the individual.

The term “*any neglect*”, previously seen in the 2008 Act, is replaced in the 2023 Act by the test of “*any wilful neglect*”. This new standard raises the bar for liability to a higher threshold

in requiring the State to prove that an offence is attributable to the wilful or intentional neglect of a company officer. The Law Reform Commission has previously set out that “*wilful neglect*” is an intentional neglect of a duty, whereas simple “*neglect*” of a duty does not have a requirement of awareness. It appears that the higher threshold is the appropriate standard for the imposition of criminal liability.

Penalties

Whilst the maximum penalties under the 2023 Act largely mirror those under the 2008 Act, a greater range of offences is provided for under the 2023 Act, expanding the risk for businesses operating in this sector.

Those found guilty of the majority of offences under the 2023 Act will be liable following conviction on indictment to maximum fines of €10,000,000 or three times the value of the relevant items in respect of which the offence is committed or to imprisonment for up to five years or both.

The potential prison sentence of five years means that these offences are arrestable offences under criminal law, meaning that the Gardaí may arrest persons without warrant where they have reasonable cause to believe the person is guilty of such an offence, and detain them for up to 24 hours for questioning.

In respect of less serious offences, including failure to keep records, failure to provide information requested by the Minister and failure to adhere to a Compliance Notice, a conviction on indictment can lead to a fine of up to €50,000 or three-years imprisonment of both.

Interestingly, conviction on indictment of contempt of the adjudication proceedings can attract a fine of up to €250,000 or a three-year term of imprisonment or both.

The EU Common Military List is currently implemented into Irish law pursuant to the 2008 Act and an Irish statutory instrument, the Control of Exports (Brokering Activities, Goods and Technology) Regulations 2021.

D / MILITARY LIST

The 2023 Act outlines the criteria under which dual-use items may be added to the National Military List. Grounds upon which the Minister can add items to this list include where the item is included on the EU Common Military List or the item has been specially designed, developed or modified significantly for military purposes. Thus the National Military List will likely incorporate the EU Common Military List, with additional items perhaps included.

Comment

Given the passage of 15 years since the 2008 Act was introduced and the speed and sophistication of technological developments in the meantime, the 2023 Act is well overdue. We are not aware of any prosecutions having been brought under the 2008 Act. However, the enhanced information gathering powers and range of enforcement tools will modernise and enhance the existing Irish export controls regime, equipping the DETE with broader and more effective tools to supervise export controls. That said, the 2023 Act also includes provisions that should ensure greater fairness, including the raising of the threshold for criminal liability for officers from simple neglect to wilful neglect, and the introduction of an external appeals procedure in respect of export authorisations.

The 2023 Act is likely to be commenced in early June 2024. Businesses operating in any sector affected by export control regulation should prepare themselves (and their internal compliance programs) for a more stringent compliance and enforcement regime.

For further information on this topic, please contact [Kate Harnett, Of Counsel](#) or [Lucy Heery, Solicitor](#) or any member of [ALG's Sanctions and Export Controls team](#).

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