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## NGI Zero PET and Discovery Legal To-Dos

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EU Export Control Regime and Free Software



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## EU EXPORT CONTROL REGIME AND FREE SOFTWARE

Free Software (also known as Open Source) development is, in most of the times, a cross-boundaries activity. A project can receive contributions from developers around the globe. Making Free Software products available in several jurisdictions require some times additional steps to satisfy obligations under local laws. This document provides NGIO projects a basic and general overview on the European Union's export control aspects related to Free Software technologies your project may develop.

Please note that **this document is not legal advice**. Exporting controlled technology requires an extensive compliance program. This document provides only a limited introduction and should not serve as substitute for seeking professional legal advice. This document is still in the working phase and future improvements will be incorporated in new iterations. In case you need more information about export control for your project, feel free to contact us directly.

### EU Export Control Regime

#### What is Export Control?

Export control relates to rules that regulates the export of technology considered potentially harmful for the interests contrary of the exporting country. These items are considered to be "*controlled*". Because of their technical characteristics or composition, a number of goods can be used not only in the civil domain but also for military purposes. Such goods are termed "*dual-use items*". They include, in particular, items from the fields of sensitive electronics, telecommunications and information technology, but also data processing software or other technologies (such as design drawings). Such goods may be the subject of restrictions within the European Union, even when transmitted by online media. Export controls are rules constantly updated and changed to accomodate evolving security risks and rapid developments in technology.

#### What are "dual-use" goods?

Dual-use items are goods, software and technology that can be used for both civilian and military applications. The EU controls the export, transit and brokering of dual-use items according to [Regulation 428/2009](#). Dual-use items may be traded freely within the EU, except



for some particularly sensitive items, which transfer within the EU remains subject to prior authorization (see Annex IV of the Regulation). The list of dual-goods is updated regularly.

### Dual-use goods can transferred between EU countries and third-countries?

Dual-use items may be traded freely within the EU except for those listed in [Annex IV to Regulation 428/2009](#), which are subject to prior authorization. If your project is planning to export, you need to contact competent national authority of your country. For third countries, please check the section referring to [export authorizations](#).

### What is EU ECCN?

An ECCN - Export Control Classification Number - is used to identify items which may be subject to export control. Software categories, including operating, process and encryption, are subject to export controls in the EU are listed in [Category 5 Part 2 of Annex I of the EU Regulation 428/2009](#).

### Which rules apply to export control in the EU?

Applicable in all EU countries, the EU export control regime is governed by [Regulation 428/2009](#) which set up a community regime for the control of exports, transfers, brokering and transit of dual-use items. The Regulation incorporates the international export control regimes which are at the origin of the control list implemented in the EU, as the the Australia Group, the Wassenaar Arrangement, the Nuclear Suppliers Group and the Missile Technology Control Regime. In certain cases, EU countries may put extra controls on non-listed dual-use items because of public security or human rights considerations. Under the EU regime, controlled items may not leave the EU customs territory without an export authorization.

### What are export authorizations?

Under the [EU export control regime](#), controlled items may not leave the EU customs territory without an export authorization. There are four types of export authorizations:

- *EU General Export Authorisations (GEAs)*: cover exports of controlled items of dual-use items to certain destinations under certain conditions (see Annex II of the Regulation). Each GEA sets out the destinations to which exports are permitted, the items that may be exported to those destinations and the conditions of use;



- *National General Export Authorisations (NGEAs)*: NGEAs may be issued by EU countries if they are consistent with existing EUGEAs and do not refer to items listed in Annex IIg of the Regulation;
- *Global licenses*: Such licenses are granted by national authorities to one exporter and cover one or more items to one or more countries/end users;
- *Individual licenses*: These licenses are granted by national authorities to one exporter and cover exports of one or more dual-use items to one end-user in a third country.

### Who is responsible for granting authorization?

Projects commercializing software has the responsibility to check whether its products are on the export list in order to establish whether the company is subject to a permit requirement. Licenses are issued by National Authorities. You can check the responsible agency in your country [here](#).

## EU Export Control Regime and Free Software

### Is software in general subject to export control in the EU?

The EU export control regime applies to all dual-use items and may control the export or transfer of such items. For the purposes of this Regulation dual-use items shall mean items, including software and technology, which can be used for both civil and military purpose. Software categories, including operating, process and encryption, are subject to export controls in the EU are listed in [Category 5 Part 2 of Annex I of the EU Regulation 428/2009](#). All items on the list require a license for export outside the EU unless they qualify for an exemption.

### What is software export?

An export of controlled product (software/technology) occurs when the software is actually shipped, transferred or transmitted (physically or electronically) out of the EU. In addition, releases/disclosures of software source code to a foreign national in the EU or out of it, and releases/disclosures of encryption source code and technology in a foreign country to a foreign national are also governed by EU export control laws.

### Is Free Software (Open Source) exempt from export control?

The EU export regime provides exceptions for goods and technology used in “basic scientific research” or that was released is in the “public domain”. Both terms originate from the



international export control regimes and are broadly defined on purpose in order to apply to the wide range of technology including [Category 5 Part 2 of Annex I of the EU Regulation 428/2009](#).

According to the Regulation, “public domain” is defined as means technology or software which has been made available without restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain). Information is not in the public domain if it is available to only a restricted group of persons. This includes information that is only made accessible after an individual decision has been taken by the information carrier. In this case, not everyone has the possibility to access the information. It should also be considered that information is only in the public domain once it has been published. The fact that copyright restrictions do not remove technology or software from being in the public domain is important considering that open-source software is distributed under copyright.

For export control objectives, Free Software can be considered software where the source is made publicly available. Therefore, the current understanding is that, “software in the public domain” i.e. software that has been made available without restriction (excluding copyright restrictions) is not subject to export control. Downstream redistributors of modified project code, or products derived from it, where the source code is not publicly available would still need to evaluate their own compliance with the export control laws.

Please note that “public domain” exemption does not apply to “information security” items, i.e. controlled cryptography products.

## Encryption products and EU export control regime

Current EU export control regime covers most products capable of encryption (‘cryptographic products’). Strictly, the controls apply to those using symmetric algorithms with a key length over 56 bits or asymmetric algorithms with a key length over 512 bits. The controls are not restricted to hardware but include components, software and technology such as design data. Software or technology that is carried or transmitted outside the EU (e.g. sent by email or by remote access of a server) is also subject to control.

The so-called “Cryptography Note” – Category 5 Part 2 of Annex I of the EU Regulation 428/2009, relaxes controls on software encryption that that:

- can be easily acquired by the general public;
- require little or no support to install;
- where the cryptographic functionality cannot be easily changed by the user.



Please note that exporters are responsible to determine if the items are subject to control under the Cryptography note. Exporters are advised to request guidance from the Competent authority or to notify it of the results of their assessment for further confirmation, according to national regulations or practices. If you're not sure whether Note 3 applies to one of your products, you can consider applying for an export license. You can check the responsible agency in your country [here](#).

## Compliance with EU Export Control Regime

### Keep information public and open

It is fundamental for projects to make information available transparently and publicly in order to meet the “public domain” criteria. Information related to security issues can be kept public upon availability of fixes. This kind of information should not be kept confidential only to a disclosure list.

### Make sure the source code is publicly available

Making your source code available is a requirement from Free Software licenses. But for export control policy, in case you are distributing publicly available encryption software in object code form, then you will also want to ensure that it is publicly available in source code form as well.

### Contact the National Authority of your country

In case you planning to export encryption Free Software Exporters, you are advised to request guidance from the Competent authority or to notify it of the results of their assessment for further confirmation. If you're not sure whether the encryption exception applies to one of your products, you can contact us or the National Authority of your country. You can check the responsible agency in your country [here](#).

## Further information on EU Export Control Regime

Below you can find additional information on export control rules for software in the EU, UK and US.

- [European Commission FAQ on controls of 'Information Security' items and implementation of the Cryptography note exemption](#)





- [List of EU Member States' Competent Authorities for Export Control](#)
- [Germany's BAFA Export Control Manual](#)
- [UK Government's Notice to exporters 2018/07: guidance on the 'Cryptography Note'](#)
- [Linux Foundation's Understanding Open Source Technology & US Export Controls](#)