



ZERO



NGI Zero PET and Discovery Legal To-Dos

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 sometimes 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.

Please note, **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. Future improvements will be incorporated in new iterations of the document. 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 accommodate evolving security risks and rapid developments in technology. The export control regime in the European Union has been revised and consolidated in September 2021 by the [Regulation \(EU\) 2021/821](#).

It is also relevant to highlight that export of certain goods and technology, including software may be prohibited owing to various sanctions levied in the nature of either:



Embargoes: These are economic sanctions imposed on a state which either partially restricts or completely prohibits foreign trade with this state.

Personal sanctions: These sanctions apply irrespective of a foreign/domestic element, and prohibit making funds or assets of any kind (economic resources) available, directly or indirectly, to natural or legal persons included in the sanction list. These could be in the form of the following:

a. Financial sanctions: These are sanctions that restrict the capital movements and payments of a state or individual persons.

b. Terrorist lists: The EU lists persons and organisations against which the restrictive measures to combat terrorism are applied which are based on the resolutions of the United Nations. Therefore, exporters must be cautious that persons/ entities/ states with whom they enter into cooperation are not included in the above-mentioned sanction lists.

What are “dual-use” items?

Dual-use items are goods, software and technology that can be used for both civilian and military applications. The EU controls the export, transit brokering and technical assistance of dual-use items according to [Regulation \(EU\) 2021/821](#), which is an updated version of the Regulation 428/2009, entered into force on 9 September 2021. Items listed in Annex I of the regulation are considered Dual-use goods. 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 authorisation (see [Annex IV](#) of the Regulation). The list of dual-goods is updated regularly. On 6 January 2022, the European Commission published the Delegated Regulation (EU) 2022/1, updating the list of dual-use items contained in [Annex I to Regulation \(EU\) 2021/821](#).

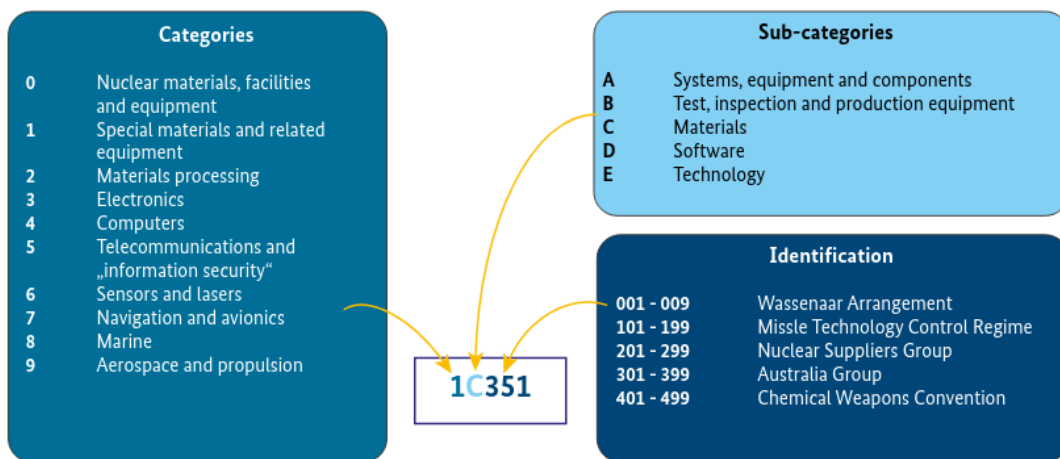
Dual-use items can transferred between EU countries and third-countries?

Dual-use items may be traded freely within the EU except for those listed in [Annex IV to Regulation \(EU\) 2021/821](#) which are subject to prior authorisation. 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 authorisations](#).

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 \(EU\) 2021/821](#). Software is listed in the sub-category “D”.

Figure 1: Numbering system in the control lists¹



Which rules apply to export control in the EU?

Applicable in all EU countries, the EU export control regime is governed by [Regulation \(EU\) 2021/821](#) which set up a community regime for the control of exports, transfers, brokering, technical assistance, transit and transfer 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, the Missile Technology Control Regime and The Chemical Weapons Convention. 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 authorisation.

1 German Federal Office for Economic Affairs and Export Control (BAFA). **Export Control and Academia Manual**. Eschborn, 2019. Available at: https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/ec_academia.html?jsessionid=61119733A53F643660428CE3318CD18E.2_cid387



What are export authorisations?

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

- *EU General Export Authorisations (EUGEAs)*: cover exports of controlled items of dual-use items to certain destinations under certain conditions (see Annex II of the Regulation). Each EUGEA sets out the destinations to which exports are permitted, the items that may be exported to those destinations and the conditions of use. The new Regulation provides for two new GEAs i.e the general authorisation of exports of certain encryption items such as certain transfers of dual use software and technology (EUGEA 008) and the general authorisation for intra-group transmission of software and technology (EUGEA 007) under certain conditions.

Broadly, some of the most important exceptions to these authorisations include the export of the following items:

- i. Specially designed or intended for the end-use by the government;
 - ii. For use in connection with development, production or maintenance of chemical, biological or nuclear weapons or devices;
 - iii. For use in connection with violation of human rights, democratic principles or the freedom of expression as defined by the Charter of Fundamental Rights of the EU.
- *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 II G 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 authorisation?

Exporters intending to export or transfer any software or technology must bear the responsibility to check whether its products are on the export list in order to establish whether the exporter is subject to a permit requirement. Licenses are issued by National Authorities. You can check the responsible agency in your country in the [European Commission's website for Trade Policy](#).



EU Export Control Regime and Free Software

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

Yes. 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. An extensive definition of terms such as 'software' and 'technology' can be found at the end of the list of goods in [Annex I of the EU Regulation \(EU\) 2021/821](#). 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 \(EU\) 2021/821](#). 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. This covers all means of software sharing, including publishing Free Software on GitHub, offering cloud services and sending software via email.

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

The EU export regime provides exceptions to export license requirements for goods and technology delineated under category 0-9 in the [Annex I of the EU Regulation \(EU\) 2021/82](#). As for software, export control requirements do not apply to products for user's personal use and the items conforming to the conditions mentioned under the Cryptography Note (also discussed in the following sections) in the Regulation. Controls on technology transfers do not apply to information used for "basic scientific research" or that was released in the "public domain" or "for minimum necessary information for patent applications". These 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 \(EU\) 2021/821](#).

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, i.e. under “public domain” as defined by the Regulation. It does not relate solely to the software license (i.e. GPL) but the software must be made available to third parties publicly. 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 \(EU\) 2021/821](#) relaxes controls on software encryption provided all of the following conditions are met:

Cryptography Note

5A002, 5D002.a.1., 5D002.b. and 5D002.c.1. do not control items as follows:

a. Items that meet all of the following:

1. Generally available to the public by being sold, without restriction, from stock at retail selling points by means of any of the following:

- a. Over-the-counter transactions;
- b. Mail order transactions;
- c. Electronic transactions; or
- d. Telephone call transactions;

2. The cryptographic functionality cannot easily be changed by the user;

3. Designed for installation by the user without further substantial support by the supplier; and

4. When necessary, details of the goods are accessible and will be provided, upon request, to the competent authorities of the EU Member State in which the exporter is established in order to ascertain compliance with conditions described in paragraphs 1. to 3. above;

b. Hardware components or 'executable software', of existing items described in paragraph a. of this Note, that have been designed for these existing items, meeting all of the following:

1. "Information security" is not the primary function or set of functions of the component or 'executable software';
2. The component or 'executable software' does not change any cryptographic functionality of the existing items, or add new cryptographic functionality to the existing items;
3. The feature set of the component or 'executable software' is fixed and is not designed or modified to customer specification; and
4. When necessary as determined by the competent authorities of the EU Member State in which the exporter is established, details of the component or 'executable software' and details of relevant end-items are accessible and will be provided to the competent authority upon request, in order to ascertain compliance with conditions described above.

Technical Note:

For the purpose of the Cryptography Note, 'executable software' means "software" in executable form, from an existing hardware component excluded from 5A002 by the Cryptography Note.

Note: 'Executable software' does not include complete binary images of the "software" running on an end-item.

Note to the Cryptography Note:

1. To meet paragraph a. of Note 3, all of the following must apply:

- a. The item is of potential interest to a wide range of individuals and businesses; and
- b. The price and information about the main functionality of the item are available before purchase without the need to consult the vendor or supplier. A simple price enquiry is not considered to be a consultation.

2. In determining eligibility of paragraph a. of Note 3, competent authorities may take into account relevant factors such as quantity, price, required technical skill, existing sales channels, typical customers, typical use or any exclusionary practices of the supplier.



Further, the EU General Export Authorisations (EUGEAs) issued for dual use encryption items shall be valid only if it meets the following conditions:

(a) the items use only published or commercial cryptographic standards that have been approved or adopted by internationally recognised standard bodies;

(b) the items do not use cryptographic standards specially designed for government use (e.g. the cryptographic standards used in public safety radio systems, such as TETRA, TETRAPOL and P25); and

(c) any cryptographic functionality used by the items 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 the above Cryptography Note applies to one of your products, you can consider applying for an export license. You can check the responsible agency in your country in the [European Commission's website for Trade Policy](#).

Cyber-surveillance items

The [Regulation \(EU\) 2021/821](#) in art. 2(20) provides for a definition of 'cyber-surveillance items' to mean dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems. The Regulation mandates the exporter to seek an authorisation for all export of cyber-surveillance items not listed in Annex I that can be used for the commission of serious violations of human rights or international humanitarian law or can pose a threat to international security or the essential security interests of the Union and its Member States, upon becoming aware of it or being informed by the competent authority². The exporter is bound by a notification obligation towards the competent authority if upon due diligence, the exporter becomes aware that the cyber-surveillance items are used for the above-mentioned purposes.

By referring expressly to the exporter's "due diligence findings," the Regulation lays down an expectation that EU parties that export cyber-surveillance items will implement internal compliance controls to detect potential restricted end uses in connection with those exports,

2 Article 5 of Regulation (EU) 2021/821.



without prescribing any standards for due diligence under the Regulation. The Regulation also seeks to promote coordination among the Member States in imposing new cyber-surveillance controls.

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.

Keep detailed registers or records of the exports

The [Regulation \(EU\) 2021/821](#) brings an additional responsibility for all exporters of dual-use items to keep detailed registers or records of their exports, in accordance with the national law or practice in force in the Member State concerned. The retention period for these registers and records is now increased from three to five years.

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 in the [European Commission's website for Trade Policy](#).

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](#)
- [List of persons, groups and entities subject to EU financial sanctions](#)
- [Germany's BAFA Export Control Manual](#)
- [Linux Foundation's Understanding Open Source Technology & US Export Controls](#)