

The brilliant US definition "Specially designed"

Begreppet Särskilt utformad för militär användning (Specially designed)

**I have a
dream...**

Agenda

- Export classification- Corner stone of trade compliance
- Background, Export Control Reform, ECR
- Alignment between ITAR and EAR
- Brilliant? - The release clauses
- European Commission alignment?
- Swedish ISP Guidance

Export Classification

Corner stone of trade compliance

- Export classification of items is a corner stone in the field of Export Control.
 - Without an export classification of the item, it is very difficult to assess if a license is required for export/transfer.
- Have you ever tried to determine if an item (hardware, software or technology) is subject to export control?
- In most export regulations there is a frequently used term called “specially designed”.
 - What does it mean?
 - How can you decide/determine if the item you are reviewing is Specially designed?
 - Wouldn't it be great if there was a clear and common definition?

Background

Export Control Reform, ECR, 2013

- Export Control Reform, ECR - Major rework of US export control regulations
- ITAR (USML)
 - Before ECR - captured every US Military item (Screws, nuts, bolts etc. used in a military application)
 - After ECR- positive list, capturing only the most sensitive items, including certain specially designed parts and components
- EAR (CCL)
 - Before ECR– captured only dual use items
 - After ECR– two new item series, 500- and 600-series, capturing less sensitive spacecraft and military items respectively, including certain parts and components.
- Hence, many items transferred from ITAR (USML) to EAR (CCL).
- Some items even transferred all the way out of the CCL. Classified as EAR99.

Alignment between ITAR and EAR

- During the ECR in 2013 the ITAR and EAR had to become more aligned.
 - One important alignment was the definition of Specially Designed which was rewritten in both ITAR and EAR to align with each other.
- The definition can be found in ITAR [22 CFR 120.41](#) and in [EAR Part 772](#).
- The definition language is aligned and equal/very similar in both regulations
- It consists of a catch/release mechanism.
 - This mean that the first part “catches” an item and the second part could release an item.
- Part one (catch)
 - Catches an item which fulfil criteria of a defense item.
 - This part is actually very similar to the old definition in the ITAR.
- Second part (release):
 - Releases an item if it fulfils one or more criteria which defines a non-sensitive item.

Definition “Specially designed” (catch- release)

- Many ITAR and EAR categories use the definition “specially designed”.
 - Determine whether the item would meet the criteria of either paragraphs (a)(1) or (a)(2) of the “specially designed” (catch):
- a(1) and a(2):
 - **(1)** As a result of “development” has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph; *or*
 - **(2)** Is a “part,” “component,” “accessory,” “attachment,” or “software” for use in or with a commodity or defense article ‘enumerated’ or otherwise described on the CCL or the USML.
- If these “Catch clauses” are not applicable, then the item is not “specially designed”.

Definition “Specially designed” (catch- release)

- If the item meets the criteria of either paragraph (a)(1) or (a)(2) of the “specially designed” definition, then it can still be released if any of the provisions of paragraph (b) of the “specially designed” definition would apply. (release):
- b(1) through b(6)*:
 - (1) Has been identified to be in an ECCN paragraph that does not contain “specially designed” as a control parameter or as an EAR99 item in a commodity jurisdiction (CJ) determination or interagency-cleared commodity classification (CCATS) pursuant to § 748.3(e);
 - (2) Is, regardless of ‘form’ or ‘fit,’ a fastener (e.g., screw, bolt, nut, nut plate, stud, insert, clip, rivet, pin), washer, spacer, insulator, grommet, bushing, spring, wire, solder;
 - (3) Has the same function, performance capabilities, and the same or ‘equivalent’ form and fit, as a commodity or software used in or with an item that:
 - (i) Is or was in “production” (i.e., not in “development”); and
 - (ii) Is either not ‘enumerated’ on the CCL or USML, or is described in an ECCN controlled only for Anti-Terrorism (AT) reasons;
 - (4) Was or is being developed with “knowledge” that it would be for use in or with commodities or software (i) described in an ECCN and (ii) also commodities or software either not ‘enumerated’ on the CCL or the USML (e.g., EAR99 commodities or software) or commodities or software described in an ECCN controlled only for Anti-Terrorism (AT) reasons;
 - (5) Was or is being developed as a general purpose commodity or software, i.e., with no “knowledge” for use in or with a particular commodity (e.g., an F/A-18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool); or
 - (6) Was or is being developed with “knowledge” that it would be for use in or with commodities or software described (i) in an ECCN controlled for AT-only reasons and also EAR99 commodities or software; or (ii) exclusively for use in or with EAR99 commodities or software.
- If so, then the item is also not “specially designed”.

Note

- One needs only review the “release” provisions in paragraph (b) of the “specially designed” definition if paragraph (a) of the “specially designed” definition applies to the item in a “control” paragraph of an ECCN that uses the term “specially designed.”
- This mean that you only need to check the “specially designed” clause if the ECCN in question uses the term “specially designed”

Brilliant?

The release clauses (b(1) through b(6)) are very cleverly thought through.

- *b(1): Has been identified to be in an ECCN paragraph that does not contain “specially designed” as a control parameter or as an EAR99 item in a commodity jurisdiction (CJ) determination or interagency-cleared commodity classification (CCATS) pursuant to § 748.3(e);*
- Basically this mean that if you can find this item in a ECCN which does not contain “specially designed” as control parameter. It cannot be specially designed.
- Example of an ECCN which does not include “Specially designed”:
 - ECCN 5A002.a.1: “Designed or modified to use ‘cryptography for data confidentiality’ having a ‘described security algorithm’, where that cryptographic capability is usable, has been activated, or can be activated by any means other than secure “cryptographic activation. Items having “information security” as a primary function.”
- Likewise, if the item has been cleared, either via CJ or CCATS (US agency classification reviews), it is also not specially designed.

Brilliant?

The release clauses (b(1) through b(6)) are very cleverly thought through.

- *b(2): Is, regardless of 'form' or 'fit,' a fastener (e.g., screw, bolt, nut, nut plate, stud, insert, clip, rivet, pin), washer, spacer, insulator, grommet, bushing, spring, wire, solder;*
- This releases all form of fasteners etc. from control in USML and CCL.
 - All these US items are EAR99
- Equivalent release of bolts, nuts, etc.is also present in Swedish guidance. I will come back to this later.

Brilliant?

The release clauses (b(1) through b(6)) are very cleverly thought through.

- *b(3): Has the same function, performance capabilities, and the same or 'equivalent' form and fit, as a commodity or software used in or with an item that:*
 - *(i) Is or was in "production" (i.e., not in "development"); and*
 - *(ii) Is either not 'enumerated' on the CCL or USML, or is described in an ECCN controlled only for Anti-Terrorism (AT) reasons;*
- This release clause releases less sensitive items that does not make sense to control as they are also used in civil applications (EAR 900-series).
 - For example parts and components in a military application which is also used civil aerospace, ECCN 9A991.
 - As they are in production and used in a 9A991 application they can also not be controlled as military.
- NOTE: important to be able to “prove” equivalence

Brilliant?

The release clauses (b(1) through b(6)) are very cleverly thought through.

- *b(4): Was or is being developed with “knowledge” that it would be for use in or with commodities or software (i) described in an ECCN and (ii) also commodities or software either not ‘enumerated’ on the CCL or the USML (e.g., EAR99 commodities or software) or commodities or software described in an ECCN controlled only for Anti-Terrorism (AT) reasons;*
- This release clause also releases many items that does not make sense to control.
 - Items developed with knowledge that it will be used in a civil application (EAR 900-serie)
 - For example aerospace parts and components, developed with knowledge for use in both a military aircraft engine and a civil aircraft engine ECCN 9A991.
 - As they are/were designed with knowledge of use in a civil application (9A991) they are not specially designed, even if used in a military application.
- NOTE: important to be able to “prove” the item was not designed for other purposes.

Brilliant?

The release clauses (b(1) through b(6)) are very cleverly thought through.

- *b(5): Was or is being developed as a general purpose commodity or software, i.e., with no “knowledge” for use in or with a particular commodity (e.g., an F/A-18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool);*
- This release clause also releases many items that does not make sense to control.
 - Items developed for general purpose without knowledge of potential use in military application
 - Similar general purpose items as fasteners etc. released in b(2)
- NOTE: important to be able to “prove” the item was developed for a general purposes without knowledge of military use.

Brilliant?

The release clauses (b(1) through b(6)) are very cleverly thought through.

- *b(6): Was or is being developed with “knowledge” that it would be for use in or with commodities or software described (i) in an ECCN controlled for AT-only reasons and also EAR99 commodities or software; or (ii) exclusively for use in or with EAR99 commodities or software.*
- This release clause also releases many items that does not make sense to control.
 - Items in development for use in a civil application (EAR 900-serie) and later also used in a military application.
 - For example Parts and components for aircraft engines, 9A991. If they are/were developed with knowledge that they will be used in civil application, 9A991, they can also not be controlled as military.
- NOTE: important to be able to “prove” the item was developed for AT only or EAR99 items.

Still unsensitive items which are specially designed?

- BIS has realised that even with a brilliant definition there are still items which are “specially designed” for military and space which are unsensitive. For example:
 - Specific Military aircraft parts:
 - Tires, Analog gauges, Crew rest equipment, etc.
 - Military Aerospace engine parts:
 - Oil tanks, Oil lines, Fuel filters, Identification plates and name plates etc.
 - Spacecraft parts that have been identified in an interagency-cleared commodity classification (CCATS) as warranting control in 9A515.y
- These items are put in a separate sub-paragraph “.y” in the respective 500 and 600 series in EAR (for example 3A611.y, 7A611.y, 9A515.y, 9A610.y, 9A619.y).
- These items can be exported “No License Required” to most countries
 - Generally only controlled by (AT) Anti-Terrorism and (RS) Regional Stability only to certain countries (China, Venezuela and Russia).

EU Commission alignment?

- One could wish for a similar alignment within the EU commission member states on a definition of “specially designed”.
- The term Specially designed is being used extensively both in the [EU dual use regulation](#) (509 times) and the [COMMON MILITARY LIST OF THE EUROPEAN UNION](#) (150 times), examples below:

9A004 Space launch vehicles, "spacecraft", "spacecraft buses", "spacecraft payloads", "spacecraft" on-board systems or equipment, terrestrial equipment, and air-launch platforms as follows:

N.B. SEE ALSO 9A104.

- a. Space launch vehicles;
- b. "Spacecraft";
- c. "Spacecraft buses";
- d. "Spacecraft payloads" incorporating items specified in 3A001.b.1.a.4., 3A002.g., 5A001.a.1., 5A001.b.3., 5A002.c., 5A002.e., 6A002.a.1., 6A002.a.2., 6A002.b., 6A002.d., 6A003.b., 6A004.c., 6A004.e., 6A008.d., 6A008.e., 6A008.k., 6A008.l. or 9A010.c.;
- e. On-board systems or equipment, **specially designed for** "spacecraft" and having any of the following functions:
 1. 'Command and telemetry data handling';

Note: For the purpose of 9A004.e.1., 'command and telemetry data handling' includes bus data management, storage, and processing.
 2. 'Payload data handling'; or

Note: For the purpose of 9A004.e.2., 'payload data handling' includes payload data management, storage, and processing.
 3. 'Attitude and orbit control';

Note: For the purpose of 9A004.e.3., 'attitude and orbit control' includes sensing and actuation to determine and control the position and orientation of a "spacecraft".

N.B. For equipment specially designed for military use, SEE MILITARY GOODS CONTROLS.

ML4 **Bombs, torpedoes, rockets, missiles, ~~other~~ explosive devices and charges and related equipment and accessories, as follows, and specially designed components therefor:**

N.B.1: For guidance and navigation equipment, see ML11.

N.B.2: For Aircraft Missile Protection Systems (AMPS), see ML4.c.

- a. Bombs, torpedoes, grenades, smoke canisters, rockets, mines, missiles, depth charges, demolition-charges, demolition-devices, demolition-kits, "pyrotechnic" devices, cartridges and simulators (i.e. equipment simulating the characteristics of any of these items), specially designed for military use;

Note ML4.a. includes:
 - a. Smoke grenades, fire bombs, incendiary bombs and explosive devices;
 - b. Missile or rocket nozzles and re-entry vehicle nosetips.
- b. Equipment having all of the following:
 1. Specially designed for military use; and
 2. Specially designed for 'activities' relating to any of the following:
 - a. Items specified by ML4.a.; or

- In 2018 there was a survey to create a common guideline for “specially designed for military Use” which was withdrawn in December 2021.
- However, there is still no common description/guideline of specially designed.
 - Individual National export authority has the authority to give guidance on “specially designed”.

Swedish Guidance/“Definition”

Clarification of “särskilt utformad för militär användning”

- In 2021 ISP issued a Clarification of grounds for classification ([förtydligande av klassificeringsgrunder](#))
 - This clarification was issued at a request from SOFF (Säkerhets och Försvars Företagen) in 2019.
- It is a nine page document in juridic language which aims at explaining ISP:s view of “specially designed” (“särskilt utformad för militär användning”) preferably in a military context.
- It is relatively/very difficult for a for a Swedish exporter to know or determine if an item is specially designed based on this clarification.
 - A conservative approach could lead items having a Swedish military classification which is also EAR99 in the US regulations as its released from specially designed by one of the release clauses b(3), b(4) or b(5).
 - This could lead to inconsistency in how a European entity treat such items wrt to system support etc.

What's next?

- Hopefully, EU and other Wassenaar states can agree on a common definition/guideline of what is meant by Specially designed.
- Hopefully, this definition is common wrt BOTH dual use and military items
- Hopefully, this definition is similar or in alignment what is already used in the US.
- Or – Nothing will be changed.
 - There is no requirement to align on definitions that do not exist.

- The US definition of Specially designed is aligned between the EAR and ITAR and is an efficient tool to determine if an item is deemed specially designed.
 - Determination can be easily made by the exporter (justification still important)
- EU have no common definition of Specially designed and it is up to each national authority to give guidance.
- Lack of clear guidance from National authorities results in uncertainty for Swedish companies when determining classification of their items which in worst case could lead to inconsistency and mistakes .

Questions/thoughts?

Thanks!