Export Control and transfer of data

LES Benelux - 18 November 2020
Online meeting Software Specific Challenges in licensing

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Program

1. Data - information - knowledge
2. Export Control
3. Transfer of non-personal data
4. Transfer of personal data
Data

recorded expressions of factual observations or creative activity
Einde van het papieren plafond?

Polo van der Putt & Puck Polter


De Tijdelijke Noodwet COVID-19 geeft gemengde signalen.

1. Inleiding
Information

data in context and with meaning attached
Knowledge

the understanding of a phenomenon based on extensive experience dealing with information on a subject
Export control

The area of legislation that regulates the export of goods, software and technology
14. **COMPLIANCE**

14.1 The Client acknowledges that the provision of the Services to the Client and any Authorised User may be subject to import, export and re-export restrictions and sanctions imposed by the European Union, United States and/or other relevant governments ("Export Law"). The parties agree that it is the Client’s sole responsibility prior to use of the Services in any country to obtain all necessary licences/permits and to comply with all record-keeping obligations in relation to the use of the Services for the Purpose (including the transfer of any Client Data), and the Client agrees that it shall not, and shall procure that all Authorised Users shall not, access the Services from or use the Services in any country or in any circumstance which is or could be in contravention of any Export Law. Should it be determined by Supplier or a relevant authority that Supplier is the importer, exporter or re-exporter, the Client acknowledges and agrees that the provision of the Services is subject to Supplier obtaining all necessary import, export and re-export licences and permissions. The Client agrees to provide all supporting documentation including but not limited to International Import Certificates and Letters of End-use necessary for Supplier to procure such import, export and re-export licences.
REGULATION (EC) No 428/2009*

control of transfer (including transmission) of dual-use items (listed in annex, legislation or subject to embargo regime)

-> export permit necessary

* But also see delegated regulation (EU) 2019/2199
Oracle Corporation Binary Code License Agreement

for the JAVA SE DEVELOPMENT KIT (JDK), VERSION 6

3. RESTRICTIONS. Software is confidential and copyrighted. Title to Software and all associated intellectual property rights is retained by Oracle and/or its licensors. Unless enforcement is prohibited by applicable law, you may not modify, decompile, or reverse engineer Software. You acknowledge that Licensed Software is not designed or intended for use in the design, construction, operation or maintenance of any nuclear facility. Oracle Corporation disclaims any express or implied warranty of fitness for such uses. No right, title or interest in or to any trademark, service mark, logo or trade name of Oracle or its licensors is granted under this Agreement. Additional restrictions for developers and/or publishers licenses are set forth in the Supplemental License Terms.
Dual use items

items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices
Software

a collection of instructions to carry out a process in, or convertible into, a form executable by an electronic computer

Exempted: general available “easy to use” software
Technology

specific information necessary for the development, production or use of goods, such as instructions, skills, training, blueprints, plans, diagrams, models, formulae, tables, etc.
Encryption

2. For the purposes of 5A002.a., ‘described security algorithm’ means any of the following:

   a. A "symmetric algorithm" employing a key length in excess of 56 bits, not including parity bits;

   b. An "asymmetric algorithm" where the security of the algorithm is based on any of the following:
      1. Factorisation of integers in excess of 512 bits (e.g., RSA);

      2. Computation of discrete logarithms in a multiplicative group of a finite field of size greater than 512 bits (e.g., Diffie-Hellman over $\mathbb{Z}/p\mathbb{Z}$); or

      3. Discrete logarithms in a group other than mentioned in paragraph b.2. in excess of 112 bits (e.g., Diffie-Hellman over an elliptic curve); or

   c. An "asymmetric algorithm" where the security of the algorithm is based on any of the following:
      1. Shortest vector or closest vector problems associated with lattices (e.g., NewHope, Frodo, NTRUEncrypt, Kyber, Titanium);
REGULATION (EU) 2018/1807

- free flow of non-personal data in the European Union
- Data localisation requirements shall be prohibited, such as requirements imposed on banks by financial supervisors
REGULATION (EU) 2016/679 (GDPR)

Transfer of personal data outside EU is prohibited, unless
US transfers

• Schrems I (C-362/14): CJEU invalidates safe harbour decision
• Schrems II (C-311/18): CJEU invalidates privacy shield decision
Export restrictions?

No restrictions to export software, technology, or data, unless:

- Possible military or nuclear use (including encryption keys)
- Specific boycotts
- Personal data
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