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a significant broadening of the
catch all clause

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On 24 September 2026, Advocate General Capeta delivered her Opinion in Case C-528/25 Flugzeugherstellerin, addressing the concept of “dual-use items” in Article 2(1) of Regulation (EU) 821/2021 (the “Dual-use Regulation”). That provision defines dual-use items as “items, including software and technology, which can be used for both civil and military purposes”, and, for the first time the Court of Justice has been asked to interpret that meaning.

The Advocate General proposes a broad reading of “dual-use items”, considering that whether an item can be used also “for military purposes” turns solely on its objective physical and technical characteristics at the time of export. Any link between the item’s potential uses and the armed forces of a third country is enough, no substantial contribution to military capabilities is required. However, who the end-user is, the situation of the country of destination and the risk of diversion are irrelevant at that stage, as they only matter to the separate question of whether a Member State may require an authorisation or prohibit the export under Article 9 of the Dual-use Regulation.

1. Background

The applicant is an Austrian developer and manufacturer of two-seat training aircraft designed for pilot training for general aviation and for aerobatics. The aircraft was not specifically designed for use by the military nor equipped with military components.

In June 2018, the applicant applied to the Austrian authorities for authorisation to export six aircraft, a flight simulator, technology for the construction of the aircraft, and finished aircraft parts to a civilian trading company in Myanmar, with the Myanmar Air Force as end-user. A one-year authorisation, subject to conditions, was granted in June 2019 but in May 2020, when the applicant applied for a further authorisation to cover the goods not yet exported, the authorities refused on the ground that the licensing criteria laid down in the AWG (the Austrian Law on Foreign Trade) were not met.

That refusal, and a subsequent one, were set aside by the Federal Administrative Court, notably because the authorities had not explained why the export of the goods at issue could conflict with the criteria laid out in the AWG. In July 2024, the authorities adopted a new decision prohibiting the export on the “reasonable suspicion” that (i) the items in question could be used for the training of military pilots, (ii) the aircraft could technically be repurposed for a different (military) use, including reconnaissance and visual surveillance, (iii) the end-user is accused of persistent and systemic

human rights violations, and (iv) there was sufficient evidence suggesting that the goods, and in particular the know-how, could be used or diverted for undesirable purposes.

The applicant challenged that decision before the Federal Administrative Court, arguing in particular that the aircraft and related items were not designed for military purposes and could not be converted to military use without additional technical data and adapted avionics.

2. The questions referred

The items in question are not listed in Annex I to the Dual-use Regulation, nor are they covered by the EU Common Military List or by restrictive measures against Myanmar. The Austrian authorities therefore relied on Article 9 of the Dual-use Regulation to justify the decision, which allows a Member State to prohibit, or make subject to authorization, the export of non-listed dual-use items for reasons for public security or human rights (the so called ‘catch-all’ clause). Whether a good is “dual-use” is decisive in determining whether Article 9 can apply.

The referring court asked, first, what circumstances are relevant in assessing whether a non-listed item can be used “for military purposes” within the meaning of Article 2(1) of the Dual-use Regulation. More specifically, the referring court wondered whether: (a) an item need to be able to make a substantial contribution to the capabilities of the armed forces, or is it enough that it can be used for the basic training of military personnel, where that training is no different from civilian training; and (b) account must be taken of the military capabilities of the end-user or recipient in the third country concerned, the situation in that third country, the possibility of re-purposing and the risk of diversion.

Second, the court asked whether Article 207 of the Treaty on the Functioning of the European Union, read with Article 10 of Regulation (EU) 2015/479 on common rules for exports, or any other provision of EU law, permitted a national provision under which the export of an item to a third country may be examined and prohibited on human rights grounds regardless of whether it is a dual-use item.

The Court only asked the Advocate General to address the first question. Relying on the historical context and objective of the export controls on dual-use items. The Advocate General concludes that a broad interpretation of the term “dual-use items” is necessary.

3. A broad interpretation of the concept of dual-use items

3.1. Listed and non-listed items: a two-step process

The Dual-use Regulation distinguishes between listed and non-listed dual-use items. Items listed in Annex I to the Dual-use Regulation automatically require an export authorization. For non-listed items, the EU legislature left it to the Member States to decide whether to restrict exports, and for what reasons. They may do so either by adopting national control list or on an ad hoc basis, under Article 9(1) of the Dual-use Regulation, for reasons of public security or human rights. The present case concern such situation of ad hoc control.

The Advocate General stresses that an ad hoc restriction involves a two-step process, governed by different criteria. First, the national authority must establish that the item is a “dual-use item” within the meaning of Article 2(1) of the Dual-use Regulation. Only then may it assess whether the export of that item raises security or human rights concerns justifying an authorization requirement or a prohibition. The classification of an item as dual use is therefore a preliminary question, which can be challenged before the national courts.

The Advocate General also identifies what is not a dual-use item. At one end are items specifically designed and developed for military purposes, which fall under the Common Military List and Council Common Position 2008/944/CFSP. At the other end are purely civilian items, which can never be of use for military purposes (no list of such goods exists). Where the line falls between purely civilian and dual-use items depends on whether “also for military purposes” is read broadly or narrowly.

3.2. A broad interpretation

The applicant argued for a narrow reading, on the grounds that otherwise even the most basic civilian items - such as rulers, notepads, cable or glue – would be dual-use items, creating uncertainty for operators. The Austrian, Belgian, Greek, Spanish, French and Netherlands Governments, as well as the European Commission, argued for a broad reading instead, so that the authorities can respond to foreign policy, security and human rights developments.

While the Advocate General acknowledges that there are arguments for the narrow interpretation, she opted for a broad reading instead, on the grounds that the Court must interpret the law in its current context. She observed that security concerns and preparedness for defense have pushed the arguments on free trade into the background. That shift is visible in the recitals of the different versions of the Dual-use Regulation: the 1994 Dual-use Regulation opened with the preservation of the internal market, with security considerations following later, while the 2021 Dual-use Regulation opens with foreign policy and security considerations and mentions the internal market in recital 27. According the Advocate General, only a broad reading allows the concept to capture the full range

of strategic and security concerns that may arise, and allows the authorities to adjust their assessment as circumstances change over time.

However, a broad reading does not give the Member States unfettered discretion to introduce obstacles to free trade. Rather, the broad interpretation is counterbalanced by the limited grounds on which they may act, that is for security or human rights considerations only (Article 9).

3.3. The answer to the first question

No threshold on “substantial contribution” to the armed forces

The applicant argued that an item must have clear military technical component, or a military use at least as significant as its civilian use, for a certain product to be considered “for military purposes”. The Netherlands Government required a significant contribution to the capabilities of the armed forces. The European Commission considered that the contribution needed to be relevant. The Greek, Spanish and French Governments considered that any link to a military context suffices.

The Advocate General sided with the last view. Article 2(1) of the Dual-use Regulation contains no contributory threshold and requiring one would undermine the effectiveness of the export control framework. In any event, it would be difficult to measure an item's contribution to a third country's armed force. Therefore, the Advocate General proposes that an item is capable of use “also for military purposes” wherever there is any link between its potential uses and the armed force in a third country. As such, the use of an aircraft for the basic training of military pilots suffices, even where that training is identical to the training of civilian pilots.

Only the item's objective characteristics matter

The wording of Article 2(1) of the Dual-use Regulation, in the various language versions, turns on whether an item can be used for military purposes. There is therefore no need for evidence of who will use the item or how. What matters is whether the item is objectively capable of being used for military purposes. It follows that the assessment must be based solely on the item's physical and technical characteristics at the time of export.

Factors such as the military capabilities of the end-user, the situation in the country of destination, the intended end-use or the risk of diversion capabilities of the end-user are not to be considered. All those factors belong to the second step: whether the export of the item should be made subject to authorization or prohibited. It is for the national authorities to determine whether specific

exportation should be prohibited for security and/or human rights considerations, after having determined that a specific item is dual-use.

4. Conclusion

The Advocate General concludes that to determine whether an item is “also for military purposes” only the objective capabilities of the item should be considered. The item does not need to substantially contribute to the capabilities of the armed forces and there is no need to assess the military capabilities of the end-user, the situation in the third country, the possibility of repurposing and the risk of diversion.

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