

Dual-Use Items: AG Backs Broad Test in Case C-538/25

On 24 September 2026, Advocate General Tamara Čapeta delivered her Opinion in Case C-538/25 (*Flugzeugherstellerin*). This is the first case asking the Court of Justice to interpret “dual-use items” under Article 2(1) of the **Dual-Use Regulation** (Regulation (EU) 2021/821). This matters for any EU company that exports goods, software or technology abroad. The Advocate General proposes a broad interpretation of the “dual-use items” concept: an item is dual-use if it is objectively capable of any military use, judged solely on its physical and technical characteristics at the time of export, regardless of its civilian design or intended purpose.

Her Opinion is not binding, but it is likely to influence the Court’s eventual ruling and, with it, how national authorities assess export licence applications across the EU. If the Court follows the Opinion, a wide range of civilian goods could fall within the scope of the Regulation. National authorities could then subject their export to authorisation, or prohibit export, on security or human rights grounds

If the Court follows the Advocate General’s Opinion, exporters of civilian goods with any conceivable military application would be:

- **Exposed to dual-use classification based solely on an item’s objective physical and technical characteristics at the time of export**, regardless of its intended civilian design or marketing.
- **Unable to rely on the absence of a product** from Annex I to the Dual-Use Regulation, the EU Common Military List or national control lists to rule out an authorisation requirement.
- **At risk of a reassessment of previously authorised exports**, as security and human rights considerations are assessed on a case-by-case and ongoing basis.
- **Entitled to case-specific reasons, and judicial review**, whenever an export is restricted on security or human rights grounds.

Key conclusions: *The Advocate General proposes that **virtually any link to a military use, however marginal, is enough to classify an item as dual-use**. If upheld, this broad, item-focused test means exporters cannot rely on a product’s civilian design or purpose to escape the Dual-Use Regulation and must build export classification into their compliance programmes independently of end-user screening.*

Background

The case concerns the aerobatic model of a two-seat civilian training aircraft made by an Austrian manufacturer. That model is designed for pilot training in general aviation and aerobatics, and neither specifically designed for military use nor equipped with military components.

In 2019, the Austrian authorities authorised export of six aircraft, a flight simulator, construction technology and

parts to the Myanmar Air Force, subject to conditions. Part was delivered within the one-year period authorised. After two refusals of the remaining exports were annulled on procedural grounds, a July 2024 decision prohibited the export, on the basis that the goods could train military pilots, be repurposed for reconnaissance and surveillance, and be linked to human rights violations by the end-user. As the goods are not listed in Annex I to the Dual-Use Regulation, the EU Common Military List

or the Myanmar sanctions regime, the authorities relied on Article 9 of the Dual-Use Regulation, which allows restrictions on non-listed dual-use items for security or human rights reasons.

Under Article 2(1) of the Dual-Use Regulation, an item is “dual-use” if it “can be used for both civil and military purposes”. Being capable of use also “for military purposes”, alongside its civil use, is therefore the statutory prerequisite for an item to qualify as dual-use.

The Austrian Federal Administrative Court referred two questions to the Court of Justice for a preliminary ruling, asking:

1. which circumstances determine whether an item can be used “[also for] military purposes”, in particular, whether the item must substantially contribute to military capabilities, and whether the end-user, destination country and repurposing or diversion risk are relevant;
2. whether a Member State may prohibit an export on human rights grounds even where the item is not a dual-use item.

The Advocate General’s Opinion focuses on the first question.

The Advocate General’s Opinion

The applicant manufacturer argued for a narrow reading, warning that a broad one would capture everyday goods and make export controls unpredictable; the Austrian, Belgian, Greek, Spanish, French and Netherlands Governments and the Commission argued for a broad reading. The Advocate General agrees with the latter, referring also to the need for an effective export controls framework. She considers that an item does not need to make a substantial, significant or even relevant contribution to the military capabilities of the end-user (in her view, the value of such a contribution, made in relation to the armed forces of a third country, would in any event be difficult or impossible to assess). It is enough that there is some link (“any link”) between the item’s potential uses and the armed forces of the third country concerned. The fact that an aircraft is capable of use for the basic training of military pilots therefore suffices, even where that training is identical to civilian pilot training.

Whether an item is dual-use depends solely on its objective capabilities, namely its physical and technical characteristics at the time of export, including the objective possibility of repurposing. At this stage, authorities do not need to consider the end-user’s military capabilities, the situation in the destination country, the possibility of repurposing by the end-user, or diversion risk.

These factors are not irrelevant, however. The Advocate General thus identifies a two-step process with two separate tests, governed by different criteria:

- **Whether an item is a dual-use item at all**, which depends solely on its objective capabilities, as explained above.
- **Whether its export should in fact be authorised or prohibited under Article 9**, which permits restrictions only for security or human rights reasons, and is where the end-user, destination and diversion-risk considerations come into play.

What this means for exporters

The Opinion is not binding but may indicate the Court’s direction. If followed, these points will matter for EU exporters:

- **Civilian design does not exclude dual-use status.** Goods designed and marketed for civilian use may still be dual-use items if objectively capable of some military use, including training.
- **Control lists are not the end of the analysis.** Absence from Annex I, the Common Military List or national control lists does not rule out an authorisation requirement or prohibition under Article 9.
- **Past approvals offer no guarantee for future exports.** Authorities may reassess the security or human rights risks of previously cleared goods over time.
- **Destination and likely end-use remain central at the authorisation stage.** They play no role in classification, but determine whether authorisation is required or an export is prohibited.

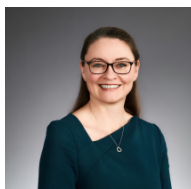
What next

The Court’s judgment will follow in due course and will bind the Federal Administrative Court in Austria, as well as other national courts facing the same question. In the meantime, exporters should revisit how their compliance programmes classify borderline goods, ensure those programmes reflect the two-step test described above, and seek legal advice before relying on a narrow reading of “dual-use” for products with any conceivable military application.

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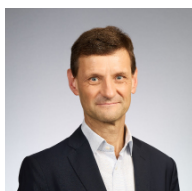
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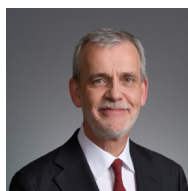
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