



EUROPEAN
COMMISSION

Brussels, XXX
[...](2016) XXX draft

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

setting up a ~~Community Union~~ regime for the control of exports, transfer, brokering,
technical assistance and transit of dual-use items

(Recast)

EN

EN

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

In May 2009, the Council of the European Union adopted Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items¹ (hereunder "the Regulation"). In line with Article 25(2) of the Regulation, the Commission presented in October 2013 a comprehensive report to the European Parliament and the Council² on the implementation of the Regulation. The report concluded that the EU export control system provides solid legal and institutional foundations but cannot remain static and must be upgraded in order to face new challenges. In April 2014, the Commission adopted a Communication³ setting out concrete policy options for the review of the EU export control regime and its adaptation to rapidly changing technological, economic and political circumstances. In 2015, the Commission conducted an impact assessment of the review options outlined in that Communication to identify the most suitable regulatory and non-regulatory actions to bring them into effect. This proposal has been prepared in light of the conclusions of the impact assessment.

The export control policy review has been identified as an initiative under the Regulatory Fitness and Performance Programme (REFIT) in consideration of its potential regulatory simplification and burden reduction.

Council Regulation (EC) No 428/2009 has been amended on several occasions. Since further amendments are to be made, it should be recast in the interests of clarity and readability.

• Consistency with existing policy provisions in the policy area

The proposal aims at supporting the overall policy objectives of the Union, as laid out in Article 3 of the Treaty on European Union, i.e. "contribute to peace and security, as well as free and fair trade and the protection of human rights". The proposal will contribute to the European Security Strategy⁴, and in particular responds to the 2013 Council Conclusions on the new challenges presented by the proliferation of weapons of mass destruction (WMD)⁵. The proposal will also ensure that the EU and its Member States effectively comply with their international obligations, in particular with respect to WMD non-proliferation. Moreover, the proposal will enhance the EU's efforts to prevent non-state actors from gaining access to sensitive items and will thus contribute to the fight against terrorism, in line with e.g. Framework Decision 2002/475/JHA setting out rules on terrorist offences and related penalties⁶. Lastly, in light of the increasing blurring between the civilian and defence sectors, the proposal forms part of the EU's efforts to counter hybrid threats⁷.

The proposal is fully in line with EU trade policy's aim to foster competitiveness and reduce distortions to trade, and with the 2015 "Trade for All" Communication⁸ which announced "*an ambitious modernisation of the EU's policy of export controls of dual-use goods, including*

¹ OJ L134, 29.5.2009, p.1

² COM(2013) 710 final, 16.10.2013

³ COM(2014) 244 final, 24.4.2014

⁴ The European Security Strategy was adopted by the European Council on 12 December 2003.

⁵ Council Conclusions on ensuring the continued pursuit of an effective EU policy on the new challenges presented by the proliferation of weapons of mass destruction (WMD), 21 October 2013.

⁶ OJ L164/3, 22.06.2002.

⁷ Joint(2016)18 of 6 April 2016.

⁸ COM(2015) 497 of 14 October 2015.

Formatted: English (U.K.)

Formatted: English (U.K.)

the prevention of the misuse of digital surveillance and intrusion systems that results in human rights violations”.

- **Consistency with other Union policies**

The proposal – and in particular provisions relating to the control of cyber-surveillance technologies – will contribute to the protection of human rights globally, in line with the 2015 Human Rights Action Plan⁹ and the EU Guidelines for Freedom of Expression¹⁰, which explicitly call for tightening controls on the export of such technologies.

The proposal will also support the digital single market strategy, as the introduction of controls on cyber-surveillance technology aims at addressing risks associated with digital trade. Since the proposal aims, in particular, to reduce administrative burden by making EU law simpler and less costly, it also serves the objectives of the REFIT programme.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Dual-use export controls form an integral part of the Common Commercial Policy under Article 207 TFEU.

- **Subsidiarity**

Trade in dual use items must be based on common principles in compliance with Article 207 of the Treaty on the Functioning of the European Union (TFEU), while respecting Member States' prerogatives in the area of security. Moreover, EU intervention is necessary as the security objectives pursued can only be achieved collectively, if competent authorities act in close collaboration and in accordance with the same principles. Action at EU level is also necessary to address distortions of competition within the Single Market and to promote the convergence of controls with third countries and a more level playing field globally.

EU intervention is justified in light of the Charter of Fundamental Rights, since a number of human rights have been identified as potentially affected by exports of certain dual-use items, in particular in relation to exports of cyber-surveillance technology.

- **Proportionality**

The provisions in this proposal are limited to what is necessary in order to attain the objectives of the Regulation and therefore comply with the principles of proportionality.

The proposal consists mostly of amendments to existing provisions of Regulation (EC) No 428/2009, where they are duly justified in order to enhance the effectiveness or the consistency of controls throughout the EU. Amendments are also proposed that aim at simplifying the administration of controls and reducing the burdens for operators across the Single Market.

The proposal however also introduces new provisions to control the export of certain specific cyber-surveillance technology, in order to fill a regulatory gap identified during the export control policy review, i.e. the insufficient legal basis for control in this area.

As illustrated by the impact assessment, other instruments such as guidelines, could usefully complement and support the implementation of legislative changes, but would not address the lack of legal clarity of some provisions of the Regulation or the lack of sufficient control of

⁹ JOIN(2015) 16 of 28 April 2015

¹⁰ Foreign Affairs Council, 12 May 2014.

cyber-surveillance technology. Amendments to the Regulation are therefore necessary to this effect.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Results of ex-post evaluation

In 2011, the Commission issued a Green Paper¹¹, inviting stakeholders to express their views about the EU export-control regime and the potential need for its review. Exporters, business associations and authorities from the Member States, as well as research institutes and other civil society organizations took part in the consultation. The Commission reported on the outcome of this process in the Staff Working Document "Strategic export controls: ensuring security and competitiveness in a changing world – A report on the public consultation launched under the Green Paper"¹². The Staff Working Document concluded that stakeholders called for various adjustments to the EU export control system in order to adapt it to rapidly changing technological, economic and political circumstances. The Staff Working Document formed the basis for the presentation of a Report from the Commission to the Council and the European Parliament on the implementation of Regulation (EC) No 428/2009¹³ which opened the way to the review of EU export control policy.

• Stakeholder consultations

The Commission conducted wide-ranging stakeholder consultations to support the EU Export Control Policy Review and the preparation of this proposal. The consultation strategy included regular dedicated conferences - such as the December 2015 'Export Control Forum' - and outreach to key stakeholders in order to develop a dialogue with dual use industry, civil society and Member States.

The Impact Assessment also involved dedicated stakeholder consultations. A 'data collection study' was commissioned in 2014-2015, which included targeted surveys of industry associations and companies, national administrations, academia and non-governmental organizations. Also as part of the impact assessment, the Commission conducted an open online public consultation in July-October 2015 with a view to collecting stakeholders' input regarding review options and their impact¹⁴. Stakeholders generally agreed that a review of current rules would improve the export control system, in particular with regards to its capacity to address evolving security risks such as WMD proliferation and terrorism and to respond to rapid scientific and technological developments, and could also enhance the efficiency of export control administration and EU companies' competitiveness. On the other end, many stakeholders raised concerns regarding the potential economic impact of options to control exports that could be misused for human rights violation in third countries.

• Collection and use of expertise

In the absence of official statistics on dual-use production or trade, the Commission has developed, since 2013, a statistical methodology to assess dual-use trade flows, and also makes use of licensing data shared by Member States.

¹¹ COM(2011)393, 30.6.2011.

¹² SWD(2013)7, 17.1.2013

¹³ COM(2013)710 final, 16.10.2013

¹⁴ http://trade.ec.europa.eu/consultations/index.cfm?consul_id=190

Formatted: English (U.K.)

Formatted: English (U.K.)

Formatted: English (U.K.)

Formatted: English (U.K.)

Formatted: English (U.K.)

The data collection study commissioned as part of the impact assessment validated the methodology developed by the Commission and provided further details e.g. on dual-use related trade flows and on specific sectors.

Data obtained from the private sector through interviews and surveys, as well as open sources and specialised research, provided additional insights into dual-use controls and the characteristics of dual-use trade.

- **Impact assessment**

The impact assessment report was presented to the Regulatory Scrutiny Board (RSB) in March 2016 and received a positive opinion, including recommendations on further improvements. The Board's opinion is available on the Europa website at http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm. The impact assessment report is attached to this proposal.

Besides the baseline scenario (no policy change), the impacts of four other scenarios were assessed, including Option 2 "Implementation and Enforcement Support" (consisting in soft law and guidance), Option 3 "EU System Upgrade" (consisting of adjustments to the regulatory framework), Option 4 "EU System Modernisation" (focusing on cyber-surveillance technologies and human rights) and Option 5 "EU System Overhaul" (implying full centralisation of controls and the establishment of a licensing agency at EU level).

A thorough analysis was conducted to assess the impact of the different review options identified and, as a result, a combination of Option 3 and 4 was selected as the 'preferred option'. Option 3 "EU System Upgrade" appears as the most efficient and effective option to address problems identified and when comparing the advantages and disadvantages in light of economic and social (security and human rights) impact criteria. Option 4 "EU System Modernisation" was also retained in spite of concerns expressed by some stakeholders. It is recognised that, in terms of economic and trade impact, option 4 could result in a higher administrative burden for operators and authorities, since a new category of goods and technology would be subject to control. It also involves a risk that distortions of competition be introduced at global level, as it cannot be assured that other key technology suppliers will also introduce similar controls. However, option 4 is expected to have a significant positive impact on security and human rights: it appears as an indispensable condition to prevent human rights violations resulting from the export of EU items to third countries and to address security risks, to the EU and its citizens, associated with new cyber-surveillance technologies. In light of this assessment, the proposal sets out a two-fold approach. Firstly, it provides for the control of very specific technologies, which are precisely identified in a list attached to the proposal, including a detailed description of the technical parameters in order to ensure that only items of special concern are captured by the control. The proposal provides for a list defined at EU level, based on the expertise of Member States and other stakeholders. Secondly, the proposal also provides for a so-called "targeted catch-all mechanism", whereby non-listed dual-use items, and in particular cyber-surveillance technology, could be subject to control in case this is needed in light of the objectives of the Regulation. The "targeted catch-all mechanism" would allow to focus controls on specific exports in specific situations, characterised by conflict or internal repression, where there is evidence of concerns of particular urgency and gravity regarding violations of human rights. The precise design of those new controls would ensure that negative economic impact will be strictly limited and will only affect a very small trade volume.

In spite of its positive long term impact, Option 2 appeared relatively costly to implement in the short and medium term and could only be achieved with additional resources both at national and EU level. Under these circumstances, Option 2 was not retained, although a

gradual implementation of some actions could be envisaged (e.g. development of electronic licensing systems, technical consultations with industry) on the basis of a clear prioritisation of tasks and provided the necessary additional resources can be allocated, including through joint commitments by relevant stakeholders such as Member States and industry.

Option 5 would have implied radically changing the EU approach to export controls, including the centralisation of the implementation of controls and the establishment of a central licensing agency at EU level. Considerable the costs – administrative, financial as well as in terms of legal transition – and the lack of stakeholder support, this option was not retained.

- **Regulatory fitness and simplification**

As a REFIT initiative, the proposal is expected to bring benefits in terms of reduction of administrative burden both for operators and public administrations, in particular due to positive impact on staff resources and processing times. Thus, thanks to the introduction of new EU General Export Authorisations (EUGEAs), controls would become four times less costly for companies, and up to 11 times less costly for licensing authorities. The proposal is also expected to enable a reduction of administrative burden within the Single Market, in particular as the number of products subject to control on transfers within the EU would be reduced by approximately 40%.

The proposal also contains amendments to certain key control provisions whose implementation experience has demonstrated to be sometimes unclear. The proposal is thus expected to enhance legal clarity and, by way of consequence, reduce compliance costs due to complex and unclear control provisions.

The proposal does not provide for exemptions in favour of Small and Medium Enterprises (SMEs) or micro-enterprises: due to overriding security reasons, it is imperative that SMEs – legal or natural persons – comply with controls. However, the scope of certain provisions which may be particularly demanding in terms of human and IT resources has been limited to avoid excessive regulatory burden on SMEs. Thus, the requirement for companies to implement an effective Internal Compliance Programme (ICP) – a set of formal measures and procedures ensuring compliance with export controls – mainly applies in relation to global licences, while small companies that cannot afford to develop a formal ICP can export under most general authorisations and/or individual licences. Moreover, the proposal's simplification of licensing procedures and enhanced legal clarity will bring important benefits to SMEs.

Lastly, the proposal is expected to improve the international competitiveness of EU operators as certain provisions – e.g. on technology transfers, on the export of encryption – will facilitate controls in areas where third countries have already introduced more flexible control modalities. The proposal's new chapter on cooperation with third countries is also expected to promote the convergence of controls with key trade partners and a global level-playing field, and thus to have a positive impact on international trade.

- **Fundamental rights**

In recent years, there have been numerous reports of cyber-surveillance technologies being exported, in some cases by companies based in the EU, to repressive regimes and/or into conflict areas and misused in violation of human rights. Cyber-surveillance technologies, which have legitimate and regulated law enforcement applications, have thus been misused for internal repression by authoritarian or repressive governments to infiltrate computer systems of dissidents and human rights activists, at times resulting in their imprisonment or even death. As evidenced by those reports, the export of cyber-surveillance technology under such

conditions poses a risk to the security of those persons and to the protection of fundamental human rights, such as the right to privacy and the protection of personal data, freedom of expression, freedom of association, as well as, indirectly, freedom from arbitrary arrest and detention, or the right to life.

Surveillance activities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, must be laid down by law and constitute a necessary and proportionate measure in a democratic society with due regard for the legitimate interests of the individuals concerned. Exporting cyber-surveillance technologies to third countries should therefore be controlled in view of their potential misuse by authoritarian or repressive governments. By subjecting exports of specific types of cyber-surveillance technologies (e.g. certain spyware or malware, certain specially designed telecommunication and internet surveillance technologies) to authorisation, the proposal provides for an effective response to threats for human rights resulting from their uncontrolled export, which was identified as a key issue in the impact assessment. While the measures will have some effects on the freedom to conduct a business for exporters, these measures will be appropriate to the overall objective of an effective response to threats to human rights resulting from the export of these technologies. The proposal is thus expected to have an overall significant positive impacts for the protection of fundamental rights.

4. BUDGETARY IMPLICATIONS

Some specific provisions in the proposal are expected to have implications on the resources of relevant services at EU or national levels. The implementation of the extended competence for the Commission to amend lists of dual-use items and general export authorisations by delegated acts is expected to require about 50% of a Full Time Expert (FTE), depending on the number of modifications to EUGEAs that could be expected each year. In addition, cyber-surveillance controls are expected to require some additional administrative costs (staff) for administrations, both at national and EU level (1 FTE).

The proposal also provides a legal basis to enable the realisation of certain actions – such as the development of electronic licensing systems – while the financing and budgetary implications remain to be assessed in detail before any decision is taken regarding their implementation.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Monitoring of implementation will be carried out in cooperation with Member States in order to ensure that competent authorities and exporters implement effectively and consistently the requirements of the proposed regulation. The practice of periodic (annual) reporting will allow for appropriate monitoring of the implementation of the proposed Regulation and to inform the European Parliament and the Council regularly.

In addition, as indicated in the impact assessment report, the Commission will undertake an evaluation of its new initiative five years after its entry into force in order to assess the actual economic, social, and environmental impacts and evaluate its efficiency and effectiveness and the extent to which its results are consistent with the objectives. The Commission will communicate the results of the evaluation to the European Parliament and the Council.

6. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSAL

• *Modernisation of existing control provisions.*

The proposal provides for amendments to various control provisions in order to clarify, simplify and improve the regulatory framework in light of "lessons learnt" and to tackle new developments:

- The proposal contains amendments to key export control notions in order to reflect new realities. Importantly, the definition of dual-use items is thus revised to reflect the emergence of new types of dual-use items, such as cyber-surveillance technologies. Some key provisions are revised in light of lessons learnt from experience. Thus, the proposal amends the provisions relating to the determination of the competent authority, in order to ensure its application in relation to exports by natural persons, who may be "exporters", especially when it comes to technology transfers, and to clarify that the determination of the competent authority applies to all control operations (incl. e.g. a decision on decontrol of items), and not only to the granting of a licence.
- Intangible technology transfers (ITT): The proposal clarifies ITT controls and facilitates low-risk technology transfers, as they only become subject to control when the controlled technology is made available to a person in a third country, which is in particular expected to facilitate the use of cloud services where the technology remains with the originator. Also, the application of the definition of exporter in Article 2(3) of the Regulation to natural persons resident outside the EU is clarified, in particular as the notion of exporter today extends to e.g. service providers, researchers, consultants and even a person downloading "controlled technology" within EU jurisdiction, but not necessarily resident or established on the EU territory.
- Technical assistance: With the entry into force of the Lisbon Treaty, the provision of technical assistance involving a cross-border movement has become EU competence and is subject to controls. The proposal therefore clarifies applicable controls and defines technical assistance.
- Tackling illicit trade: the proposal includes provisions to counter the illicit trafficking of dual-use items and provides a robust basis for enforcement. In line with best practice in other trade security instruments (restrictive measures or sanctions), it provides for certain controls – e.g. on brokering, technical assistance and technology transfers - to apply throughout the EU jurisdiction – including controls on the activities of EU persons located in third countries. It also introduces an anti-circumvention clause, i.e. a prohibition of actions which intentionally circumvent controls, thus establishing an EU-wide legal basis for the prosecution of export control violations.
- Strengthening of brokering controls: the proposal reduces the risk that controls are circumvented by extending the definition of the broker to subsidiaries of EU companies outside of the EU, as well as to brokering services supplied by

third country nationals from within the EU territory. Moreover, in order to ensure their consistency and effectiveness, the proposal harmonises their application to non-listed items and military end-uses and extends their application to terrorism and human rights violations.

- Strengthening of transit controls: in order to ensure the consistency and effectiveness of control, and avoid distortions of competition and the risk of weak links in the chain of controls, the proposal harmonises the application of transit controls to non-listed items and military end-uses, and extends controls to the risk of misuse for terrorist acts and human rights violations.

- ***Optimisation of EU licensing architecture.***

The proposal further harmonises licensing processes with a view to reducing the share of individual licences in favour of control modalities such as general authorisations, that are less disruptive of commercial transactions:

- Harmonisation of licensing processes: the proposal provides for a definition of authorisations and for common licensing parameters (e.g. validity period) and conditions for use of the EUGEAs (registration, reporting requirements...) and for global licences (requirement for an Internal Compliance Programme). A standard requirement for transparency on licensing timelines is also proposed with a view to reducing differences in licensing timelines between competent authorities.

A new type of global authorisation for 'large-projects' is proposed to address the gap between the validity period of licences and the duration of certain large multiannual projects e.g. construction of a nuclear power plant, providing the benefit of one single licence covering all related export operations, for the duration of the project and subject to certain conditions (e.g. reporting, auditing).

- Introduction of new EUGEAs: the proposal provides for increased use of general authorisations to facilitate trade while ensuring a sufficient level of security through robust control modalities e.g. registration, notification and reporting, as well as compliance audits of companies. Against this background, the proposal introduces new general authorisations as follows:

- Cryptography: the facilitation of controls for products containing cryptography could be especially useful given the commercial importance and wide circulation of these items and to ensure a level-playing field in light of license exceptions existing in certain non-EU countries;
- Low Value Shipments: this general authorisation aims at facilitating controls for shipments under a certain value provided the items and destinations are eligible and certain conditions are met;
- Intra-company technology transfers: this general authorisation aims at facilitating transfers of dual-use technology and software within a

company and its affiliates in non-sensitive countries, in particular for research and development purposes, as long as the technology remains under the ownership or control of the parent company;

- "Other dual-use items": in light of the experience of certain Member States, the proposal introduces a general authorisation for the export of frequency changers – a relatively low risk dual-use item exported in big volumes –, but more importantly aims at equipping the EU with a capacity to facilitate controls of certain "other dual-use items" when it is considered that their export to certain destinations can be allowed under general authorisation.

- Delegation of competence: the proposal expands the delegation of competence for the Commission to modify destinations or items on EUGEAs, with a view to ensuring that the EU export control regime becomes more flexible and capable of reacting to technological or economic developments.

- ***Convergence of catch-all controls.***

The proposal provides for a clarification and harmonisation of the definition and scope of catch-all controls to ensure their uniform application across the EU. The proposal also provides for a mandatory consultation procedure between competent authorities to ensure the EU-wide application and validity of catch-all decisions. It introduces regular exchange of information between the Commission and Member States to be supported by a "catch-all database" recording catch-all licensing requirements, end-users and items of concern.

- ***Re-evaluation of intra-EU transfers.***

The proposal revises the list of items subject to control within the EU in order to focus controls on an updated list of most sensitive items (in Annex IVb), taking account of technological and commercial developments. It also introduces a general transfer authorisation in Annex IVa for the updated list of sensitive items. It thus minimises administrative burden and disruptions to trade within the EU while ensuring the security of transfers of most sensitive items through robust control modalities (e.g. registration, notification, reporting, auditing, post-shipment verification).

- ***An initiative to control exports of cyber-surveillance technologies.***

The proposal responds to the need to protect national security and public morals, in consideration of the proliferation of cyber-surveillance technologies whose misuse poses a risk to international security as well as the security of the EU, its governments, companies and citizens, and to the protection of human rights and digital freedoms in a globally connected world,

The proposal sets out new provisions for an effective control focusing on specific and relevant cyber-surveillance technologies. It introduces an EU autonomous list of specific cyber-surveillance technologies of concern to be subject to controls (monitoring centres and data retention systems), with detailed technical parameters. Moreover, it provides for targeted catch-all controls of cyber-surveillance technology, in order to allow controlling the export of non-listed cyber-surveillance technologies in certain situations where there is evidence that they may be misused. The targeted

catch-all control applies where there is evidence that the items may be misused by the proposed end-user for directing or implementing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination.

Controls of cyber-surveillance technology are supported by a revised definition of "dual-use items", reflecting the evolution beyond the traditional military and state-centred approach to security towards a wider approach also taking into consideration the security of the EU, its citizens and companies. The revised definition of "dual-use items" is combined with a definition of "cyber-surveillance technology" and revised control criteria, explicitly providing for controls to prevent exports where there is a clear risk of human rights violations (and terrorism).

- ***Enhanced cooperation on implementation and enforcement.***

The proposal provides for enhanced information exchange between competent authorities and the Commission with a view to support effective and consistent application of controls. It introduces a legal basis regarding the introduction of electronic licensing systems and their interconnection with the Dual-Use Electronic System (DUEs) with a view to supporting more effective licensing procedures for all competent authorities, and for the setting up of 'technical expert groups' bringing together key industry players with Government experts into a dialogue on the technical parameters for controls.

With due respect to the competences of the Member States, the proposal introduces provisions to support information-exchange and cooperation on enforcement, in particular with the setting up of an enforcement coordination mechanism under the Dual-Use Coordination Group.

- ***Transparency and outreach – private sector partnership.***

Based on the observation that regulatory compliance and competitiveness are mutually reinforcing, the proposal sets out transparency measures and expands outreach and information-sharing with operators in order to support greater interaction between authorities and develop a "partnership with the private sector", as the first line of defence against evolving security risks. The proposal also provides a legal basis for the development of tools for operators as a key element of that partnership. It thus supports the introduction of electronic licensing systems in all Member States, which will allow for more timely, efficient and effective, IT-based management of licensing processes and relations with economic operators.

In response to industry's call for a common interpretation and application of the Regulation, the proposal provides for the publication of guidance for exporters supporting the consistent application of controls on topical issues. Transparency, e.g. with the publication of annual reports, will also enable civil society organisations to fully contribute to the formulation and implementation of export control policy.

- ***Export control dialogue with third countries.***

In order to enhance regulatory convergence and the global level-playing field, the proposal provides a basis for the development of regular dialogues between the EU and key trade partners, and for the negotiation of mutually beneficial measures such as

end-user verification programmes (whereby selected third-country companies could be granted special status of "Verified end-user" and obtain EU-wide recognition and facilitation of controls).

In addition, the EU is implementing an "EU P2P Export Control Programme" in third countries in order to assist these countries to establish well-functioning export control systems. This programme will offer a good basis to update third countries on developments with respect to EU legislation.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items

(Recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) United Nations Security Council Resolution 1540, adopted on 28 April 2004, decides that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials. Controls are also required under relevant international agreements, such as the Chemical Weapons Convention and the Biological and Toxin Weapons Convention, and in line with commitments agreed upon in multilateral export control regimes. An effective common system of export controls on dual-use items is therefore necessary to ensure that the international commitments and responsibilities of the Member States and of the Union, especially regarding non-proliferation, are complied with.
- (2) The EU Strategy against proliferation of Weapons of Mass Destruction of 12 December 2003 (EU WMD Strategy), as updated by the Council Conclusions of 21 October 2013 on "ensuring the continued pursuit of an effective EU policy on the new challenges presented by the proliferation of weapons of mass destruction", calls for the strengthening of the export control policies and practices of the Union.
- (3) Considering the emergence of new categories of dual-use items, and in response to calls from the European Parliament and indications that certain cyber-surveillance technologies exported from the Union have been misused by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression, it is appropriate to control the export of those technologies. These measures should not go beyond what is proportionate. They should, in particular, not prevent the export of information and communication technology used for legitimate purposes, including law enforcement and internet security research.
- (4) As a result, it is also appropriate to revise the definition of dual-use items, and to introduce a definition of cyber-surveillance technology. It should also be clarified that assessment criteria for the control of exports of dual-use items include considerations

regarding their possible misuse in connection with acts of terrorism or human rights violations.

- (5) Transmission of dual-use software and technology by means of electronic media, fax or telephone to destinations outside the Union should also be controlled. In order to limit the administrative burden for exporters and the competent authorities of the Member States, the definition of export should however be revised to exclude transmissions which do not pose a grave risk of proliferation or other misuse covered by this Regulation.
- (6) Considering that various categories of persons may be involved in the export of dual-use items, including natural persons such as service providers, researchers, consultants and persons transmitting dual-use items electronically, the definition of exporter, and its application to natural persons, should be clarified.
- (7) The scope of "catch-all controls", that apply to non-listed dual use items in specific circumstances, should be clarified and harmonised, and should address the risk of terrorism and human rights violations. Appropriate exchange of information and consultations on "catch all controls" should ensure the effective and consistent application of controls throughout the Union. Targeted catch-all controls should also apply, under certain conditions, to the export of cyber-surveillance technology.
- (8) The definition of broker should be revised to avoid the circumvention of controls on the provision of brokering services by persons falling within the jurisdiction of the Union. Controls on the provision of brokering services should be harmonised to ensure their effective and consistent application throughout the Union and should also apply in order to prevent acts of terrorism and human rights violations.
- (9) With the entry into force of the Lisbon Treaty, it has been clarified that the supply of technical assistance services involving a cross-border movement falls under Union competence. It is therefore appropriate to clarify the controls applicable to technical assistance services, and to introduce a definition of those services. For reasons of effectiveness and consistency, controls on the supply of technical assistance services should be harmonised and apply also in order to prevent acts of terrorism and human rights violations.
- (10) Council Regulation (EC) No 428/2009 provides for a possibility for Member States' authorities to prohibit on a case-by-case basis the transit of non-Community dual-use items, where they have reasonable grounds for suspecting from intelligence or other sources that the items are or may be intended in their entirety or in part for proliferation of weapons of mass destruction or of their means of delivery. For reasons of effectiveness and consistency, transit controls should be harmonised and apply also in order to prevent acts of terrorism and human rights violations.
- (11) Licensing conditions and requirements, including the period of validity and licensing timelines for individual and global authorisations, should be harmonised in order to avoid distortions of competition and ensure the consistent and effective application of controls throughout the Union. To this effect, it is also necessary to ensure a clear determination of the competent authority in all control situations. The responsibility for deciding on individual, global or national general export authorisations, on authorisations for brokering services and technical assistance, as well as on transits of non-Union dual-use items, lies with national authorities.
- (12) A standard requirement for compliance in the form of "internal compliance programmes" should be introduced in order to contribute to the level-playing field

between exporters and to enhance the effective application of controls. For reasons of proportionality, this requirement should apply to specific control modalities in the form of global authorisations and certain general export authorisations.

- (13) Additional Union general export authorisations should be introduced in order to reduce administrative burden on companies and authorities while ensuring an appropriate level of control of the relevant items to the relevant destinations. A global authorisation for large projects should also be introduced to adapt licensing conditions to the peculiar needs of industry.
- (14) Common lists of dual-use items, destinations and guidelines are essential elements for an effective export control regime. Decisions to update the common list of dual-use items subject to export controls in Annex I should be in conformity with the obligations and commitments that Member States and the Union have accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties. Decisions to update the common list of dual-use items subject to export controls in Annex Ia, such as cyber-surveillance technology, should be made in consideration of the risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States. Decisions to update the common list of dual-use items subject to export controls in Annex IVb should be made in consideration of the public policy and public security interests of the Member States under Article 36 of the Treaty on the Functioning of the European Union. Decisions to update the common lists of items and destinations set out in Annex IIa to IIj should be made in consideration of the assessment criteria set out in this Regulation.
- (15) In order to allow for a swift Union response to changing circumstances as regards the assessment of the sensitivity of exports under Union General Export Authorisations as well as technological and commercial developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending Annexes I, IA, IIa to IIj and IVb to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (16) National provisions and decisions affecting exports of dual-use items should be taken in the framework of the common commercial policy, and in particular Regulation (EU) No 2015/479 of the European Parliament and of the Council on common rules for exports¹⁵. Appropriate exchange of information and consultations on national provisions and decisions should ensure the effective and consistent application of controls throughout the Union.
- (17) The existence of a common control system is a prerequisite for establishing the free movement of dual-use items inside the Union. Pursuant to and within the limits of Article 36 of the Treaty on the Functioning of the European Union and pending a greater degree of harmonisation, Member States retain the right to carry out controls

¹⁵ OJ L83, 27.03.2015, p. 34.

on transfers of certain dual-use items within the Union in order to safeguard public policy or public security. For reasons of proportionality, controls on the transfer of dual-use items within the Union should be revised in order to minimise the burden for companies and authorities. Moreover, the list of items subject to intra-Union transfer controls in Annex IVb should be periodically reviewed in light of technological and commercial developments and as regards the assessment of the sensitivity of transfers.

- (18) On 22 September 1998 the Member States and the Commission signed Protocols additional to the respective safeguards agreements between the Member States, the European Atomic Energy Community and the International Atomic Energy Agency, which, among other measures, oblige the Member States to provide information on transfers of specified equipment and non-nuclear material. Intra-Union transfer controls should allow the Member States and the Union to fulfil their obligations under these agreements.
- (19) It is desirable to achieve a uniform and consistent application of controls throughout the Union in order to promote Union and international security and to provide a level playing field for EU exporters. It is therefore appropriate, in accordance with the EU WMD Strategy, to broaden the scope of consultation and information exchange between the Member States and the Commission, and to introduce tools to support the development of a common export control network throughout the Union, such as electronic licensing procedures, technical expert groups and the setting up of an enforcement coordination mechanism. It is also appropriate to ensure close cooperation with customs authorities under the common risk management framework.
- (20) It is appropriate to clarify that, to the extent that it concerns personal data, processing and exchange of information should comply with the applicable rules on processing and exchange of personal data in accordance with the rules laid down in Directive 95/46/EC of the European Parliament¹⁶ and of the Council and Regulation (EC) No 45/2001 of the European Parliament and of the Council¹⁷.
- (21) Outreach to the private sector and transparency are essential elements for an effective export control regime. It is therefore appropriate to provide for the continued development of guidance to support the application of this Regulation and for the publication of an annual report on the implementation of controls, in line with current practice.
- (22) In order to ensure that this Regulation is properly applied, each Member State should take measures giving the competent authorities appropriate powers.
- (23) Each Member State should determine effective, proportionate and dissuasive penalties applicable in the event of breach of the provisions of this Regulation. It is also appropriate to introduce provisions to tackle specifically instances of illicit trafficking of dual-use items in order to support effective enforcement of controls.
- (24) The Union has adopted a body of customs rules, contained in Council Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code¹⁸ (hereinafter the Union Customs Code), which lay down, among other things, provisions relating to the export and re-export of goods. Nothing in this Regulation constrains any powers under and pursuant to the Union Customs Code and its implementing provisions.

¹⁶ OJ L 281, 23.11.1995, p. 31

¹⁷ OJ L 8, 12.1.2001, p. 1.

¹⁸ OJ L 269, 10.10.2013, p. 1.

- (25) Export controls have an impact on international security and trade with third countries and it is therefore appropriate to develop dialogue and cooperation with third countries in order to support a global level-playing field and enhance international security.
- (26) It is appropriate to clarify that this Regulation is without prejudice to the Commission Delegated Decision of 15 September 2015¹⁹ supplementing Decision No 1104/2011/EU of the European Parliament and of the Council, which establishes specific rules for the control of the export of items for the Public Regulated Service (PRS) under the Galileo Programme.
- (27) Council Regulation (EC) No 428/2009 of 5 May 2009²⁰ has been significantly amended. Since further amendments are to be made, it should be recast in the interests of clarity.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT AND DEFINITIONS

Article 1

This Regulation sets up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

Article 2

For the purposes of this Regulation:

1. 'dual-use items' shall mean items, including software and technology, which can be used for both civil and military purposes.

'Dual-use items' shall include items which can be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery, including 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;

'Dual-use items' shall also include cyber-surveillance technology which 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;

2. 'export' shall mean:

(a) an export procedure within the meaning of Article 269 of the Union Customs Code;

¹⁹ C(2015) 6123 final

²⁰ OJ L 134, 29.5.2009, p. 1.

- (b) a re-export within the meaning of Article 270 (1) of the Union Customs Code;
 - (c) outward processing procedure within the meaning of Article 259 of the Union Customs Code; and
 - (d) transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to legal and natural persons and partnerships outside the Union;
3. 'exporter' shall mean any natural or legal person or partnership:
- (a) on whose behalf an export or re-export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining the sending of the item out of the customs territory of the Union. If no export contract has been concluded, the exporter shall mean the person who has the power for determining the sending of the item out of the customs territory of the Union;
 - (b) which decides to transmit or make available software or technology by electronic media including by fax, telephone, electronic mail or by any other electronic means to legal and natural persons and partnerships outside the Union and
- Where the benefit of a right to dispose of the dual-use item belongs to a person resident or established outside the Union, pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party resident or established in the Union.
- 'Exporter' shall also mean any natural person carrying the goods to be exported where these goods are contained in the person's personal baggage within the meaning of Article 1(19)(b) of Regulation (EU) 2015/2446 of 28 July 2015.
4. 'export declaration' shall mean the act whereby a person indicates in the prescribed form and manner the wish to export dual-use items specified in paragraph 2;
5. 're-export declaration' shall mean the act within the meaning of Article 5 (13) of the Union Customs Code;
6. 'brokering services' shall mean:
- (a) the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or
 - (b) the selling or buying of dual-use items that are located in third countries for their transfer to another third country.
- For the purposes of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion;
7. 'broker' shall mean any natural or legal person or partnership resident or established in a Member State of the Union, or a legal person or partnership owned or controlled by such person, or another person that carries out brokering services from the Union into the territory of a third country;
8. 'technical assistance' shall mean any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including verbal forms of assistance;

9. 'supplier of technical assistance' means any natural or legal person or partnership resident or established in a Member State of the Union, or a legal person or partnership owned or controlled by such person, or another person which supplies technical assistance from the Union into the territory of a third country;
10. 'transit' shall mean a transport of non-Union dual-use items entering and passing through the customs territory of the Union with a destination outside the Union, including items:
- (a) which are placed under the external transit procedure and only pass through the customs territory of the Union;
 - (b) which are trans-shipped within, or directly re-exported from, a free zone;
 - (c) which are in temporary storage and are directly re-exported from a temporary storage facility;
 - (d) which were brought into the customs territory of the Union on the same vessel or aircraft that will take them out of that territory without unloading;
11. 'individual export authorisation' shall mean an authorisation granted to one specific exporter for one end user or consignee in a third country and covering one or more dual-use items;
12. 'global export authorisation' shall mean an authorisation granted to one specific exporter, in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users in one or more specified third countries;
13. 'large project authorisation' shall mean a global export authorisation granted to one specific exporter, in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users in one or more specified third countries for the duration of a specified project the realisation of which exceeds one year;
14. 'Union general export authorisation' shall mean an export authorisation for exports to certain countries of destination available to all exporters who respect its conditions and requirements for use as listed in Annexes IIa to IIj;
15. 'Union general transfer authorisation' shall mean an authorisation granted for transfers of certain dual-use items between Member States available to all operators who respect its conditions and requirements for use as listed in Annex IVa;
16. 'national general export authorisation' shall mean an export authorisation defined by national legislation in conformity with Article 10(6) and Annex IIIc;
17. 'customs territory of the Union' shall mean the territory within the meaning of Article 4 of the Union Customs Code;
18. 'non-Union dual-use items' shall mean items that have the status of non-Union goods within the meaning of Article 5(24) of the Union Customs Code.
19. 'military end-use' shall mean:
- (a) incorporation into military items listed in the military list of Member States;
 - (b) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the abovementioned list;
 - (c) use of any unfinished products in a plant for the production of military items listed in the abovementioned list;

20. 'arms embargo' shall mean an arms embargo imposed by a decision or a common position adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations;
21. 'Cyber-surveillance technology' shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, extracting, collecting and analysing data and/or incapacitating or damaging the targeted system. This includes items related to the following technology and equipment:
- a) mobile telecommunication interception equipment;
 - b) intrusion software;
 - c) monitoring centers;
 - d) lawful interception systems and data retention systems;
 - e) biometrics;
 - f) digital forensics;
 - g) location tracking devices;
 - h) probes;
 - i) deep package inspection (DPI) systems;
21. 'Internal compliance programme' shall mean effective, appropriate and proportionate means and procedures, including the development, implementation, and adherence to standardised operational compliance policies, procedures, standards of conduct, and safeguards, developed by exporters to ensure compliance with the provisions and with the terms and conditions of authorisations set out in this Regulation.

CHAPTER II

SCOPE

Article 3

1. An authorisation shall be required for the export of the dual-use items listed in Annex I and in Annex Ia.
2. Pursuant to Article 4 or Article 8, an authorisation may also be required for the export to all or certain destinations of certain dual-use items not listed in Annex I or Annex Ia.

Article 4

1. An authorisation shall be required for the export of dual-use items not listed in Annex I or Ia if the exporter has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part:

- a) for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons;
- b) for a military end-use if the purchasing country or country of destination is subject to an arms embargo;
- c) for use as parts or components of military items listed in the national military list that have been exported from the territory of a Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State;
- d) for use by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination, and where there is evidence of the use of this or similar items for directing or implementing such serious violations by the proposed end-user;
- e) for use in connection with acts of terrorism.

2. If an exporter is aware that dual-use items which he proposes to export, not listed in Annex I or Ia, are intended, in their entirety or in part, for any of the uses referred to in paragraph 1 he must notify the competent authority, which will decide whether or not it is expedient to make the export concerned subject to authorisation.

3. Authorisations for the export of non-listed items shall be granted for specific items and end-users. The authorisations shall be granted by the competent authority of the Member State where the exporter is resident or established or, in case when the exporter is a person resident or established outside the Union, by the competent authority of the Member State where the items are located. The authorisations shall be valid throughout the Union. The authorisations shall be valid for one year, and may be renewed by the competent authority.

4. A Member State which imposes an authorisation requirement, in application of paragraphs 1 to 3, on the export of a dual-use item not listed in Annex I or Annex IA, shall immediately inform the other Member States and the Commission and provide them with the relevant information, in particular concerning the items and end-users concerned. The other Member States shall give all due consideration to this information and shall make known within 10 working days any objections they may have to the imposition of such an authorisation requirement. In exceptional cases, any Member State consulted may request an extension of the 10-day period. However, the extension may not exceed 30 working days.

If no objections are received, the Member States consulted shall be considered to have no objection and shall impose authorisations requirements for all "essentially similar transactions". They shall inform their customs administration and other relevant national authorities about the authorisations requirements.

If objections are received from any consulted Member State, the requirement for authorisation shall be revoked unless the Member State which imposes the authorisation requirement considers that an export might prejudice its essential security interests. In that case, that Member State may decide to maintain the authorisation requirement. This should be notified to the Commission and the other Member States without delay.

The Commission and the Member States will maintain an updated register of authorisation requirements in place.

5. The provisions of Article 15(1), (2) and (5) to (7) shall apply to cases concerning dual-use items not listed in Annex I or Annex Ia.

8. This Regulation is without prejudice to the right of Member States to take national measures under Article 10 of Regulation (EU) No 2015/479.

Article 5

1. An authorisation shall be required for brokering services of dual-use items if the broker has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4.

2. If a broker is aware that the dual-use items for which he proposes brokering services are intended, in their entirety or in part, for any of the uses referred to in Article 4, he must notify the competent authority which will decide whether or not it is expedient to make such brokering services subject to authorisation.

Article 6

1. The transit of non-Union dual-use items may be prohibited at any time by the competent authority of the Member State where the transit occurs if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4.

2. Before deciding whether or not to prohibit a transit the competent authority may impose in individual cases an authorisation requirement for the specific transit of dual-use items if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4.

The competent authority may impose the authorisation requirement on any of the following:

- a) the declarant within the meaning of Article 5(15) of the Union Customs Code;
- b) the carrier within the meaning of Article 5(40) of the Union Customs Code;
- c) the natural person carrying the goods to be exported where these goods are contained in the person's personal baggage within the meaning of Article 1(19)(b) of Regulation (EU) 2015/2446.

Article 7

1. An authorisation shall be required for the provision, directly or indirectly, of technical assistance related to dual-use items, or related to the provision, manufacture, maintenance and use of dual-use items, if the supplier of technical assistance has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4.

2. If a supplier of technical assistance is aware that the dual-use items for which he proposes to supply technical assistance are intended, in their entirety or in part, for any of the uses referred to in Article 4, he must notify the competent authority which will decide whether or not it is expedient to make such technical assistance subject to authorisation.

Article 8

1. A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I or Annex Ia for reasons of public security or for human rights considerations.

2. Member States shall notify the Commission and the other Member States of any measures adopted pursuant to paragraph 1 immediately after their adoption and indicate the precise reasons for the measures.
3. Member States shall also immediately notify the Commission and the other Member States of any modifications to measures adopted pursuant to paragraph 1.
4. The Commission shall publish the measures notified to it pursuant to paragraphs 2 and 3 in the C series of the *Official Journal of the European Union*.

Article 9

1. An authorisation shall be required for intra-Union transfers of dual-use items listed in Annex IVb.
2. A Member State may impose an authorisation requirement for the transfer of other dual-use items from its territory to another Member State in cases where at the time of transfer:
 - the operator or the Member State knows that the final destination of the items concerned is outside the Union, and
 - export of those items to that final destination is subject to an authorisation requirement pursuant to Articles 3, 4 or 8 in the Member State from which the items are to be transferred, and such export directly from its territory is not authorised by a general authorisation or a global authorisation, and
 - no processing or working as defined in Article 24 of the Union Customs Code is to be performed on the items in the Member State to which they are to be transferred.
3. A Member State which adopts legislation imposing such a requirement shall inform the Commission and the other Member States of the measures it has taken without delay. The Commission shall publish this information in the C series of the *Official Journal of the European Union*.
4. The measures pursuant to paragraphs 1 and 2 shall not involve the application of internal frontier controls within the Union, but solely controls which are performed as part of the normal control procedures applied in a non-discriminatory fashion throughout the territory of the Union.
5. Application of the measures pursuant to paragraphs 1 and 2 may in no case result in transfers from one Member State to another being subject to more restrictive conditions than those imposed for exports of the same items to third countries.
6. A Member State may, by national legislation, require that, for any intra-Union transfers from that Member State of items listed in Category 5, Part 2 of Annex I which are not listed in Annex IVb, additional information concerning those items shall be provided to the competent authority of that Member State.
7. The relevant commercial documents relating to intra-Union transfers of dual-use items listed in Annex I and Annex Ia shall indicate clearly that those items are subject to controls if exported from the Union. Relevant commercial documents include, in particular, any sales contract, order confirmation, invoice or dispatch note.

CHAPTER III

EXPORT AUTHORISATION AND AUTHORISATION FOR BROKERING SERVICES, TECHNICAL ASSISTANCE AND TRANSFER

Article 10

1. The following authorisations for export are established under this Regulation:

- a) individual export authorisation,
- b) global export authorisation, including global export authorisation for large projects,
- c) national general export authorisation,
- d) Union general export authorisations for certain exports as set out in Annexes IIa to IIj.

All the authorisations shall be valid throughout the Union.

2. The competent authority of the Member State where the exporter is resident or established shall be responsible for granting individual and global authorisations, for issuing national general authorisations, as well as for all other decisions regarding the application of this Regulation to exporters resident or established on its territory.

When the exporter is resident or established outside the territory of the Union, the competent authority of the Member State where the items are located shall be responsible for granting individual and global authorisations, as well as for all other decisions regarding the application of this Regulation.

All individual and global export authorisations shall be issued, whenever possible, by electronic means on forms containing at least all the elements and in the order set out in the models which appear in Annexes IIIa.

3. Individual export authorisations and global export authorisations shall be valid for one year, and may be renewed by the competent authority. Global export authorisations for large projects shall be valid for a duration to be determined by the competent authority.

4. Exporters shall supply the competent authority with all relevant information required for their applications for individual and global export authorisation so as to provide complete information in particular on the end user, the country of destination and the end use of the item exported.

Authorisations may be subject, if appropriate, to an end-use statement.

Global export authorisations shall be subject to the implementation, by the exporter, of an effective internal compliance programme. The exporter shall also report to the competent authority, at least once a year, on the use of this authorisation; the report shall include at least the following information:

- (a) the description of the dual-use items, including the relevant control entry from Annex I or Ia;
- (b) the quantity and the value of the dual-use items;
- (c) the name and address of the consignee;
- (d) where known, the end-use and end-user of the dual-use items.

At the request of exporters, global export authorisations that contain quantitative limitations shall be split.

5. The competent authorities of the Member States shall process requests for individual or global authorisations within a period of time to be determined by national law or practice. The competent authorities shall provide to the Commission all information on the average times for processing applications for authorisations relevant for the preparation of the annual report referred to in Article 24.2.

6. National general export authorisations shall:

(a) exclude from their scope items listed in Annex IIk;

(b) be defined by national law or practice. They may be used by all exporters, established or resident in the Member State issuing these authorisations, if they meet the requirements set in this Regulation and in the complementary national legislation. They shall be issued in accordance with the indications set out in Annex IIlc;

Member States shall notify the Commission immediately of any national general export authorisations issued or modified. The Commission shall publish these notifications in the C series of the *Official Journal of the European Union*;

(c) not be used if the exporter has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4, or if the exporter is aware that the items are intended for the abovementioned uses.

7. The competent authority can prohibit an exporter from using Union and national general export authorisations if there is reasonable suspicion about his ability to comply with such authorisations or with a provision of the export control legislation.

The competent authorities of the Member States shall exchange information on exporters deprived of the right to use a Union general export authorisation, unless they determine that the exporter will not attempt to export dual-use items through another Member State. The system referred to in Article 20(4) shall be used for this purpose.

Article 11

1. Authorisations for brokering services and technical assistance under this Regulation shall be granted by the competent authority of the Member State where the broker or the supplier of technical assistance is resident or established.

Where the broker or the supplier of technical assistance is not resident or established on the territory of the Union, authorisations for brokering services and technical assistance under this Regulation shall be granted, alternatively, by the competent authority of the Member State where the parent company of the broker or supplier of technical assistance is established, or from where the brokering services or technical assistance will be supplied.

2. Authorisations for brokering services and technical assistance shall be granted for a set quantity of specific items. The location of the items in the originating third country, the end-user and its exact location must be clearly identified. The authorisations shall be valid throughout the Union.

3. Brokers and suppliers of technical assistance shall supply the competent authority with all relevant information required for their application for authorisation under this Regulation, in particular details of the location of the dual-use items, a clear description of the items and the

quantity involved, third parties involved in the transaction, the third country of destination, the end-user in that country and its exact location.

4. The competent authorities of the Member States shall process requests for authorisations for brokering services and technical assistance within a period of time and under the conditions as set out in Article 10(5).

5. All authorisations for brokering services and technical assistance shall be issued, whenever possible, by electronic means on forms containing at least all the elements and in the order set out in the models which appear in Annex IIIb.

Article 12

1. A Union general transfer authorisation as set out in Annex IVa is established by this Regulation for transfers between Member States of dual-use items listed in Annex IVb.

Article 13

1. If the dual-use items in respect of which an application has been made for an individual export authorisation to a destination not listed in Annex IIa or to any destination in the case of dual-use items listed in Annex IVb are or will be located in one or more Member States other than the one where the application has been made, that fact shall be indicated in the application. The competent authority of the Member State to which the application for authorisation has been made shall immediately consult the competent authorities of the Member State or States in question and provide the relevant information. The Member State or States consulted shall make known within 10 working days any objections it or they may have to the granting of such an authorisation, which shall bind the Member State in which the application has been made.

If no objections are received within 10 working days, the Member State or States consulted shall be regarded as having no objection.

In exceptional cases, any Member State consulted may request the extension of the 10-day period. However, the extension may not exceed 30 working days.

2. If an export might prejudice its essential security interests, a Member State may request another Member State not to grant an export authorisation or, if such authorisation has been granted, request its annulment, suspension, modification or revocation. The Member State receiving such a request shall immediately engage in consultations of a non-binding nature with the requesting Member State, to be terminated within 10 working days. In case the requested Member State decides to grant the authorisation, this should be notified to the Commission and other Member States using the electronic system mentioned in Article 20(4).

Article 14

1. In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services or technical assistance under this Regulation, or to prohibit a transit, the competent authorities of the Member States shall take into account the following criteria:

- a) Union and Member States' international obligations and commitments, in particular the obligations and commitments they have each accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties, and their obligations under sanctions imposed by a decision or a common position adopted

by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;

- b) respect for human rights in the country of final destination as well as respect by that country of international humanitarian law;
- c) the internal situation in the country of final destination – competent authorities will not authorise exports that would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination;
- d) preservation of regional peace, security and stability;
- e) considerations of national foreign and security policy, including security of Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
- f) behaviour with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law;
- g) considerations about intended end use and the risk of diversion, including existence of a risk that the dual-use items will be diverted or re-exported under undesirable conditions.

2. The Commission and the Council shall make available guidance and/or recommendations to ensure common risk assessments by the competent authorities of the Member States for the implementation of those criteria.

Article 15

1. The competent authorities of the Member States, acting in accordance with this Regulation, may refuse to grant an export authorisation and may annul, suspend, modify or revoke an export authorisation which they have already granted. Where they refuse, annul, suspend, substantially limit or revoke an export authorisation or when they have determined that the intended export is not to be authorised, they shall notify the competent authorities of the other Member States and the Commission thereof and share the relevant information with them. In case the competent authority of a Member State has suspended an export authorisation, the final assessment shall be communicated to the competent authorities of the other Member States and the Commission at the end of the period of suspension.

2. The competent authorities of Member States shall review denials of authorisations notified under paragraph 1 within three years of their notification and revoke them, amend them or renew them. The competent authorities of the Member States will notify the results of the review to the competent authorities of the other Member States and the Commission as soon as possible. Denials which are not revoked shall remain valid.

3. The competent authorities of the Member States shall notify the Member States and the Commission of their decisions to prohibit a transit of dual-use items taken under Article 6 without delay. These notifications will contain all relevant information including the classification of the item, its technical parameters, the country of destination and the end user.

4. Paragraphs 1 and 2 shall also apply to authorisations for brokering services and technical assistance.

5. Before the competent authority of a Member State, acting under this Regulation, grants an authorisation for export or brokering services or technical assistance, or decides on a transit, it shall examine all valid denials or decisions to prohibit a transit of dual-use items listed in Annex I taken under this Regulation to ascertain whether an authorisation or a transit has been denied by the competent authorities of another Member State or States for an essentially identical transaction (meaning an item with essentially identical parameters or technical characteristics to the same end user or consignee). They shall first consult the competent

authorities of the Member State or States which issued such denial(s) or decisions to prohibit the transit as provided for in paragraphs 1 and 3. If following such consultation the competent authority of the Member State decide to grant an authorisation or allow the transit, they shall notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision.

6. All notifications required pursuant to this Article shall be made via secure electronic means including the system referred to in Article 20(4).

7. All information shared in accordance with the provisions of this Article shall be in compliance with the provisions of Article 20(3), (4) and (6) concerning the confidentiality of such information.

CHAPTER IV

UPDATING OF LISTS OF DUAL-USE ITEMS AND DESTINATIONS

Article 16

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The Commission shall be empowered to adopt delegated acts in order to amend the lists of dual-use items set out in Annex I, Ia, and IVb, as follows:

a) The list of dual-use items set out in Annex I shall be amended in conformity with the relevant obligations and commitments, and any modification thereof, that Member States and the Union have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties. Where the amendment of Annex I concerns dual-use items which are also listed in Annexes IIa to IIj or IVb, those Annexes shall be amended accordingly.

b) The list of dual-use items set out in Annex Ia shall be updated in consideration of the risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States.

c) The list of dual-use items set out in Annex IVb, which is a subset of Annex I, shall be amended with regard to Article 36 of the Treaty on the Functioning of the European Union, namely the public policy and public security interests of the Member States.

3. The Commission shall be empowered to adopt delegated acts to amend Annex IIa to j by adding or removing items or destinations from the scope of Union general export authorisations set out in Annex IIa to IIj in consideration of the criteria set out in Article 14. Where imperative grounds of urgency require a removal of particular destinations from the scope of a Union general export authorisation, the procedure provided for in Article 17 shall apply to delegated acts adopted pursuant to this paragraph.

4. The power to adopt delegated acts referred to in this Article shall be conferred on the Commission for a period of five years from the entry into force of this Regulation. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

5. The delegation of power referred to in this Article may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

6. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Inter-Institutional Agreement on Better Law-Making of 13 April 2016.

7. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

8. A delegated act adopted pursuant to this Article shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 17

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in this Article. In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council.

CHAPTER V

CUSTOMS PROCEDURES

Article 18

1. When completing the formalities for the export of dual-use items at the customs office responsible for handling the export declaration, the exporter shall furnish proof that any necessary export authorisation has been obtained.

2. A translation of any documents furnished as proof into an official language of the Member State where the export declaration is presented may be required of the exporter.

3. Without prejudice to any powers conferred on it under, and pursuant to, the Union Customs Code, a Member State may also, for a period not exceeding the periods referred to in paragraph 4, suspend the process of export from its territory, or, if necessary, otherwise prevent the dual-use items listed in Annex I and Annex Ia which are covered by a valid export authorisation from leaving the Union via its territory, where it has grounds for suspicion that:

- (a) relevant information was not taken into account when the authorisation was granted, or

(b) circumstances have materially changed since the grant of the authorisation.

4. In the case referred to in paragraph 3, the competent authority of the Member State which granted the export authorisation shall be consulted forthwith in order that they may take action pursuant to Article 15(1). If such competent authority decides to maintain the authorisation, it shall reply within 10 working days, which, at its request, may be extended to 30 working days in exceptional circumstances. In such case, or if no reply is received within 10 or 30 days, as the case may be, the dual-use items shall be released immediately. The competent authority of the Member State which granted the authorisation shall inform the competent authorities of the other Member States and the Commission.

Article 19

1. Member States may provide that customs formalities for the export of dual-use items may be completed only at customs offices empowered to that end.

2. Member States availing themselves of the option set out in paragraph 1 shall inform the Commission of the duly empowered customs offices. The Commission shall publish the information in the C series of the *Official Journal of the European Union*.

CHAPTER VI

ADMINISTRATIVE COOPERATION, IMPLEMENTATION AND ENFORCEMENT

Article 20

1. Member States shall inform the Commission without delay of the laws, regulations and administrative provisions adopted in implementation of this Regulation, including:

a) a list of the authorities empowered to:

- grant export authorisations for dual-use items;
- grant authorisations for the provision of brokering services and technical assistance;
- decide to prohibit the transit of non-Union dual-use items under this Regulation.

b) the measures referred to in Article 22.

The Commission shall forward the information to the other Member States and shall publish the information in the C series of the *Official Journal of the European Union*.

2. Member States, in cooperation with the Commission, shall take all appropriate measures to establish direct cooperation and exchange of information between the competent authorities with a view to enhance the efficiency of the Union export control regime and to ensure the consistent and effective implementation and enforcement of control throughout the EU. Such information shall include:

(a) information regarding the application of controls, including licensing data (number, value and types of licences and related destinations, number of users of general and global authorisations, number of operators with ICPs, processing times, volume and value of trade subject to intra-EU transfers etc), and, where available, data on exports of dual-use items carried out in other Member States;

- (b) information regarding the enforcement of controls, including details of exporters deprived of the right to use the national or Union general export authorisations, reports of violations, seizures and the application of other penalties;
- (c) data on sensitive end users, actors involved in suspicious procurement activities, and, where available, routes taken;
- (d) where appropriate, risk related information exchanged under Article 46 of the Union Customs Code.

Personal data mentioned in this paragraph shall be used by the competent authorities of the Member States and the Commission only for the purpose of implementation and enforcement of this Regulation and in light of its objectives. It shall be retained for a period not exceeding three years. The competent authorities of the Member states and the Commission may extend this period for a duration not exceeding the minimum necessary for the purpose of implementation and enforcement of this Regulation.

4. A secure and encrypted system for the exchange of information between Member States and the Commission shall support direct cooperation and exchange of information between the competent authorities of the Member States and the Commission, in consultation with the Dual-Use Coordination Group set up pursuant to Article 21. The system shall be connected, where appropriate, to the electronic licensing systems of the competent authorities of the Member States. The European Parliament shall be informed about the system's budget, development and functioning.

5. The processing of personal data shall be in accordance with the rules laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data²¹ and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data²².

Article 21

1. A Dual-Use Coordination Group chaired by a representative of the Commission shall be set up. Each Member State shall appoint a representative to this Group. It shall examine any question concerning the application of this Regulation which may be raised either by the chair or by a representative of a Member State.

2. The Chair of the Dual-Use Coordination Group shall, whenever it considers it to be necessary, consult exporters, brokers and other relevant stakeholders concerned by this Regulation.

3. The Dual-Use Coordination Group shall, where appropriate, set up technical expert groups composed of experts from Member States to examine specific issues relating to the implementation of controls, including issues relating to the updating of the Union control list. Technical expert groups shall, where appropriate, consult exporters, brokers and other relevant stakeholders concerned by this Regulation.

²¹ OJ L 281, 23.11.1995, p. 31.

²² OJ L 8, 12.1.2001, p. 1.

Article 22

1. Each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive.
2. The Dual-Use Coordination Group shall set up an Enforcement Coordination Mechanism with a view to establish direct cooperation and exchange of information between competent authorities and enforcement agencies.

Article 23

It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 3, 4, 5, 6, and 7.

CHAPTER VII

TRANSPARENCY, OUTREACH, MONITORING, EVALUATION

Article 24

1. The Commission and the Council shall, where appropriate, make available guidance and/or recommendations for best practices for the subjects referred to in this Regulation to ensure the efficiency of the Union export control regime and the consistency of its implementation. The competent authorities of the Member States shall also, where appropriate, provide complementary guidance for exporters, brokers and transit operators resident or established in that Member State.
 2. The Commission shall submit an annual report to the European Parliament and the Council on the implementation and enforcement of controls in the Union and on the activities, examinations and consultations of the Dual-Use Coordination Group. Member States shall provide to the Commission all appropriate information for the preparation of the report. This annual report shall be public.
 3. Between five and seven years after the date of application of this Regulation, the Commission shall carry out an evaluation of this Regulation and report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
- Member States shall be involved in this exercise and shall provide the Commission with necessary information for the preparation of that report.

CHAPTER VIII

CONTROL MEASURES

Article 25

1. Exporters of dual-use items shall keep detailed registers or records of their exports, in accordance with the national law or practice in force in the respective Member States. Such registers or records shall include in particular commercial documents such as invoices,

manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified:

- (a) the description of the dual-use items;
- (b) the quantity of the dual-use items;
- (c) the name and address of the exporter and of the consignee;
- (d) where known, the end-use and end-user of the dual-use items.

2. In accordance with national law or practice in force in the respective Member States, brokers and suppliers of technical assistance shall keep registers or records for brokering or technical assistance services so as to be able to prove, on request, the description of the dual-use items that were the subject of brokering or technical assistance services, the period during which the items were the subject of such services and their destination, and the countries concerned by those services.

3. The registers or records and the documents referred to in paragraphs 1 and 2 shall be kept for at least three years from the end of the calendar year in which the export took place or the brokering or technical assistance services were provided. They shall be produced, on request, to the competent authority.

4. Documents and records of intra-Union transfers of dual-use items listed in Annex I and Annex Ia shall be kept for at least three years from the end of the calendar year in which a transfer took place and shall be produced to the competent authority of the Member State from which these items were transferred on request.

Article 26

In order to ensure that this Regulation is properly applied, each Member State shall take whatever measures are needed to permit its competent authorities:

- (a) to gather information on any order or transaction involving dual-use items;
- (b) to establish that the export control measures are being properly applied, which may include in particular the power to enter the premises of persons with an interest in an export transaction or brokers involved in the supply of brokering services under circumstances set out in Article 5, or suppliers of technical assistance under the circumstances set out in Article 6.

CHAPTER IX

COOPERATION WITH THIRD COUNTRIES

Article 27

1. The Commission and the competent authorities of the Member States shall, where appropriate, maintain regular and reciprocal exchange of information with third countries.

2. Without prejudice to the provisions on mutual administrative assistance agreements or protocols in customs matters concluded between the Union and third countries, the Council may authorise the Commission to negotiate with third countries agreements providing for the mutual recognition of export controls of dual-use items covered by this Regulation and in particular:

- a) to eliminate authorisation requirements for re-exports within the territory of the Union;
- b) to enable the post-shipment verification of exports in third countries;
- c) to develop end-user verification programmes for trusted end-users in third countries.

These negotiations shall be conducted in accordance with the procedures established in Article 207(3) of the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, as appropriate.

CHAPTER X

OTHER PROVISIONS

Article 28

This Regulation is without prejudice to the Commission Delegated Decision of 15 September supplementing Decision No 1104/2011/EU of the European Parliament and of the Council.

Article 29

Regulation (EC) No 428/2009 is repealed with effect from

However, for export authorisation applications made before ..., the relevant provisions of Regulation (EC) No 428/2009 shall continue to apply.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex VI.

Article 30

This Regulation shall enter into force on the ninetieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President