Article 11

Comment:
This provision alters the principle of mutual recognition of a licence granted by other Member States, by establishing an obligation of consultation between the Member State that issues a licence (the State where the exporter is established) and the Member State where an item is or will be located. This provision concerns only a limited number of items submitted to individual licences:
- All items of Annex IV for any destination;
- All items of Annex I for a destination other than Australia, Canada, United States of America, Japan, Norway, New Zealand, Switzerland (Annex IIa)[89].

It should be noted that the decision of a Member State consulted **binds** the decision of the Member State where that application has been made. Thus, a negative answer imposes the denial of the authorisation.

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 IV** 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 authorities 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.

Comment:
The terms "are or will be located" of this paragraph should be understood as requiring a consultation between Member States in the following cases:
- If an item is located in another Member State, when the exporter applies for an authorisation;
- If an item will be located in another Member State, before leaving the EU territory for reasons like: some finishing has to be done on the item, or it constitutes a subsystem of a (non)listed item and will be integrated into it, or destination might change, or an active processing should be done on it.

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.

[89] UK and Northern Ireland are added to this list of countries, following the entry into force of Regulation (EU) No. 2019/496 of the European Council and of the Parliament of 27 March 2019 *amending Council Regulation (EC) No 428/2009 by granting a Union general export authorisation for the export of certain dual-use items from the Union to the United Kingdom* (*Official Journal* L851/20, 27/3/2019).

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 13(6).

Comment: Contrary to the provision of paragraph 1, the consulted Member State is free to grant or maintain the authorisation, once a consultation has been achieved.

The term "**essential security interests**" was not defined; it is therefore left to the judgement of the Member States.
This concept is also used by the General Tariff and Trade Agreement (World Trade Organisation) in its Article XXI in order to allow participating States adopting restrictive measures. The interpretation of "essential security interest" which constraints the use of article XXI (a) (information) and (b) (fissile material, implement of war and emergency) to adopt national restrictive measures have been discussed more than once within various WTO fora. Nevertheless, States Parties never succeeded to endorse a common understanding. In 1961, Ghana adopted a ban on import of Portuguese goods which was motivated "*under the provisions of Article XXI: (b)(iii), noting that 'under this Article each contracting party was the sole judge of what was necessary in its essential security interests' (SR.19/12, page 196). The statement of Ghana on the invocation of Article XXI was noted by the Contracting Parties*"[90]. Similar embargo and boycott decisions adopted by Egypt against Israel (1970), by EU Member States, Australia and Canada against Argentina (1982), by United States against Cuba (1962) and Nicaragua (1985) have been motivated by the defence of "essential security interests". The reason might be due to a jurisdictional argument as yet unresolved and "*relied more than once by the United States – that the phrase 'it considers necessary' in the chapeau of paragraph (b) means that a country's decision to take action on national security ground under XXI: 1(b) cannot be challenged in the dispute resolution system*"[91].
As regards the conformity of measures adopted by States with the spirit of article XXI, the issue has been discussed once when, in 1975, Sweden introduced a global import quota system for certain footwear. "*The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, inter alia, that the "decrease in domestic production has become a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy. This policy required the maintenance of a minimum domestic production capacity in vital industries" (L/4250). In the Council "many representatives expressed doubts as to the justification of these measures under the General Agreement" (C/M/109)*"[92].

Therefore, States appear to be rather free to define what might fall under their national security interests.

[90] Article XXI note by the Secretariat, 18 August 1987 (MTN.GNG/NG7/W/16), page 5.
[91] Alan S. Alexandroff and Rajeev Sharma, the World Trade Organization: Legal, Economic and Political Analysis, Springer US, 2005, p.1575.
[92] Article XXI note by the Secretariat, 18 August 1987 (MTN.GNG/NG7/W/16), page 6.