Article 6

General Comment:
This article establishes the **possibility** for Member States to submit, on case-by-case basis, a transit operation to authorisation. It does not submit all transit operations, as it is a case of export, to authorisation. Therefore, this **provision might not be equally applied** by the 28 Member States. Considering their national export control policies, some Member States might prohibit or require an authorisation or not, for the same transit operation.

If dual-use items are brought as non-Community goods from third countries into the EU territory and remain **at all times** assigned to a **customs-approved treatment or use** without having as their destination a port or airport situated in those Member States, such operation **might** be prohibited or submitted to authorisation by Member States' competent authorities. Such authorisation could be required for listed and non-listed dual-use items, **if** the items are or may be intended for a use in a WMD application. If such condition appears to be necessary to extend the control to non-listed items, it is not appropriate for listed dual-use items. The necessity to list dual-use items is precisely founded on their potential military use. Therefore, inserting a possibility to submit to authorisation a transit of listed dual-use items seems to be unnecessary, as far as its potential non-peaceful application is doubtless, owing to the fact that it is already listed. Nevertheless, it should be admitted that Article 4(1) focuses essentially on a potential WMD use and not on broad military use, as it is a case of Article 2(1).

The dual-use items **imported** from third countries (non-EU Member States) and subsequently **released** for free circulation in the Community are not covered by Article 6 and should be considered as Community goods. Such items will be subjected to an export **authorisation,** if further transferred outside the EU.

It should be noted that, in the context of the fight against terrorism, the new article **36A of the Customs Code** [57] exempts from the summary declaration (pre-arrival, pre-departure declaration) only goods in external transit carried by means of transport passing through the territorial waters or the airspace of the customs territory of the EU, without a stop within this territory and other cases, where duly justified by the type of goods or traffic, or where required by international agreements. In this context, Member States' Customs Authorities could monitor appropriate controls to verify the accuracy of the summary declaration.
Complementary to this article, it should be recalled that some Member States have a transit definition slightly different to the one used by this Regulation (see comment on Article 2 (7)). Therefore, they might have to extend the scope of controls of transfer activities. Furthermore, some Member States require an authorisation for all external transits of dual-use items. In this regard, the scope of transit operations concerned will be the one of the national legislations and not the one of this Regulation. The Member States concerned are **Belgium**, **Luxembourg, Malta** and **Poland**.

1. The transit of non-Community dual-use items listed in Annex I may be prohibited by the competent authorities 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(1). When deciding on

[57] This provision is replaced by article 127 of the UCC.

such a prohibition the Member States shall take into account their obligations and commitments they have agreed to as parties to international treaties or as members of international non-proliferation regimes.

2. Before deciding whether or not to prohibit a transit a Member States may provide that its competent authorities may impose in individual cases an authorisation requirement for the specific transit of dual-use items listed in Annex I if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1).

Comment:
Austria[58], **Belgium (Flemish Region and Walloon Region)**[59], **Bulgaria**[60], **Croatia**[61], **Estonia**[62], **Finland**[63], **Germany**[64], **Greece**[65], **Hungary**[66], **Ireland**[67], **Luxembourg**[68], the **Netherlands**[69] and **Romania**[70] have introduced, in their national legislation, the possibility to impose an authorisation for specific transits, if the items are or may be used 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*" (Article 4(1)).
Belgium (Walloon Region) has formally subjected to prior authorisation the transit of items listed in Annex I, according Art 6 of the Walloon Government Decree of 6 February 2014 regulating export, transit and transfer of dual-use items and technology (Belgian Official Gazette of 19/02/2014).
Belgium (Flemish Region) has formally subjected to prior authorisation the transit of items listed in Annex I, as well as non-Annex I goods if:
- The authorities have informed the involved entity the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1) or are or may be intended, in their entirety or in part, for a military end-use referred to in Article 4(2); or
-The involved entity is aware or has a well-substantiated suspicion that the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1) or are or may be intended, in their entirety or in part, for a military end-use referred to in Article 4(2).

This does not preclude the possibility to simply prohibit a transit of Annex I controlled items in conformity with article 6 of the Regulation.

[58] Article 15 of the 2011 Foreign Trade Act — Außenwirtschaftsgesetz 2011, BGBl. I Nr. 26/2011.
[59] Article 6 and 7 of the Flemish Government Decree of 14 March 2014 regulating export, transit and transfer of dual-use and the delivery of technical assistance (Belgian Official Gazette of 2 May 2014), Article 5 and 6 of the Walloon Government Decree of 6 February 2014 regulating export, transit and transfer of dual-use items and technology (Belgian Official Gazette of 19.02.2014).
[60] Articles 48-50 of the 'Defence-Related Products and Dual-Use Items and Technologies Export Control Act', State Gazette No 26/29.3.2011.
[61] Act on Control of dual-use items (OG 80/11 i 68/2013).
[62] Par. 3, 6 and 7 of the Strategic Goods Act (SGA).
[63] Par. 3.3 of law 562/1996.
[64] Section 44 of the German Foreign Trade and Payments Regu lation — Aussenwirtschaftsverordnung — AWV
[65] Par. 3.3.2 of the Ministerial Decision No 121837/ e3/21837/28-9-2009.
[66] Par. 18 of Government Decree No 13 of 2011 on the foreign trade authorisation of dual-use items.
[67] Section 10 of Statutory Instrument 443 of 2009, Control of Exports (Dual-Use Items) Order 2009, as amended.
[68] Law, art. 43 (1)).
[69] Article 4(a)(1) of the Decree for Strategic Goods (Besluit strat egische goederen).
[70] Par. 1 of Article 15 of the Emergency Order No 119 of 23 December 2010 (GEO No 119/2010) 'on the control regime for operations concerning dual-use items'.

Italy may subject to licence requirements the transit of listed and not listed items, goods under the authority of EU Reg. 125/2019 or under the authority of an EU regulation for export restrictions to Third Countries, as provided by Art. 7 of Legislative Decree no. 221/2017.
In **Latvia**, transit license is required for listed goods, except if the goods listed in annexes IIa-IIf of Regulation 428/2009 are in transit to countries listed in annexes IIa-IIf of Regulation 428/2009, or if the goods listed in annexes IIa-IIf of Regulation 428/2009 are in transit from countries listed in annexes IIa-IIf of Regulation 428/2009, and has a valid export licence.

3. A Member State may extend the application of paragraph 1 to non-listed dual-use items for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).

Comment:
This provision has raised some controversial discussion on its field of implementation. If the first part of the sentence concerning the possibility for a Member State to control transit for non-listed dual-use items in case it will contribute to a WMD program does not raise concerns, it is not clear how the term of the second part of the sentence shall be understood. Does the term "dual-use items" allow Member States to control listed and non-listed dual-use items or only listed items? It seems that it is the broad interpretation that shall prevail, or at least, it is the most commonly accepted by Member States.

For the time being, **Austria**, **Belgium** (**Walloon Region and Flemish Region**), **Croatia**, **Czech Republic**, **Cyprus, Estonia**, **Finland**, **Greece, Hungary**, **Ireland**, **Luxembourg,** the **Netherlands**, **Romania** and **Spain** have introduced in their legislation the possibility to prohibit the transit of non-listed items for uses 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*" (Article 4(1)), as well as the option prohibiting the transit of listed items "*if the purchasing country or country of destination is subject to an arms embargo decided by a common position or joint action 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 and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for a military end-use*" (Article 4(2)).

4. The provisions of Article 8(2), (3) and (4) shall apply to the national measures referred to in paragraph 2 and 3 of this Article.

Comment:
Article 8(2) to (4) establishes an obligation to notify to the Commission any measure and its modifications adopted under these provisions. Such measures should afterwards be published in the C series of the *Official Journal* of the EU.