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Article 2 Definitions

For the purposes of this Regulation:

(a) “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or from a third person information or a confession, punishing that person for an act that either that person or a third person has committed or is suspected of having committed, or intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties. Capital punishment is not deemed a lawful penalty under any circumstances;

Comment:

The definition is largely inspired from the one proposed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Amendments provided by the EU Regulation concern the recognition that capital punishment could not be under any circumstances a lawful penalty.

(b) “other cruel, inhuman or degrading treatment or punishment” means any act by which pain or suffering attaining a minimum level of severity, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties. Capital punishment is not deemed a lawful penalty under any circumstances;

(c) “law enforcement authority” means any authority responsible for preventing, detecting, investigating, combating and punishing criminal offences, including, but not limited to, the police, any prosecutor, any judicial authority, any public or private prison authority and, where appropriate, any of the state security forces and military authorities;

(d) “export” means any departure of goods from the customs territory of the Union, including the departure of goods that requires a customs declaration and the departure of goods after their storage in a free zone within the meaning of Regulation (EU) No 952/2013 of the European Parliament and of the Council³⁰;

Comment:

This Regulation does not establish specific provisions for “temporary export” of items. Temporary exports concern transfers of controlled items for a fair or an exhibition that afterwards would be re-imported to the EU without any changes. Such transfer should normally be submitted to the standard export control rules. Therefore, temporary export of items listed in Annex III could be

³⁰ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

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authorized but for items listed in Annex III, it is prohibited unless it will have the exclusive purpose of public display in a museum in view of their historic significance (see article 3.2).

(e) “import” means any entry of goods into the customs territory of the Union, including temporary storage, the placing in a free zone, the placing under a special procedure and the release for free circulation within the meaning of Regulation (EU) No 952/2013;

(f) “Technical assistance” means any technical support related to repairs, development, manufacture, testing, maintenance, assembly or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services. Technical assistance includes verbal forms of assistance and assistance provided by electronic means;

(g) “Museum” means a non-profit making, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment;

(h) “competent authority” means an authority of one of the Member States, as listed in Annex I, which is, in accordance with Article 20, entitled to make a decision on an application for an authorisation or to prohibit an exporter from using the Union general export authorisation;

(i) “Applicant” means

1. the exporter, in the case of exports referred to in Article 3,11 or 16;
2. the natural or legal person, entity or body transporting the goods within the customs territory of the Union, in the case of transit referred to in Article 5;
3. the supplier of technical assistance, in the case of supplies of technical assistance referred to in Article 3;
4. the museum that will display the goods, in the case of imports and supplies of technical assistance referred to in Article 4;
5. the supplier of technical assistance or the broker, in the case of supplies of technical assistance referred to in Article 15 or brokering services referred to in Article 19;

Comment:

The term applicant has been adapted to the extension of the scope introduced by Regulation 1236/2016.

(j) “customs territory of the Union” means the territory within the meaning of Article 4 of Regulation (EU) No 952/2013;

Complementary information:

1. The customs territory of the Union shall comprise the following territories, including their territorial waters, internal waters and airspace:
- the territory of the Kingdom of Belgium,
- the territory of the Republic of Bulgaria,

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- *the territory of the Czech Republic,*
- *the territory of the Kingdom of Denmark, except the Faroe Islands and Greenland,*
- *the territory of the Federal Republic of Germany, except the Island of Heligoland and the territory of Büsingen (Treaty of 23 November 1964 between the Federal Republic of Germany and the Swiss Confederation),*
- *the territory of the Republic of Estonia,*
- *the territory of Ireland,*
- *the territory of the Hellenic Republic,*
- *the territory of the Kingdom of Spain, except Ceuta and Melilla,*
- *the territory of the French Republic, except the French overseas countries and territories to which the provisions of Part Four of the TFEU apply,*
- *the territory of the Republic of Croatia,*
- *the territory of the Italian Republic, except the municipalities of Livigno and Campione d'Italia and the national waters of Lake Lugano which are between the bank and the political frontier of the area between Ponte Tresa and Porto Ceresio,*
- *the territory of the Republic of Cyprus, in accordance with the provisions of the 2003 Act of Accession,*
- *the territory of the Republic of Latvia,*
- *the territory of the Republic of Lithuania,*
- *the territory of the Grand Duchy of Luxembourg,*
- *the territory of Hungary,*
- *the territory of Malta,*
- *the territory of the Kingdom of the Netherlands in Europe,*
- *the territory of the Republic of Austria,*
- *the territory of the Republic of Poland,*
- *the territory of the Portuguese Republic,*
- *the territory of Romania,*
- *the territory of the Republic of Slovenia,*
- *the territory of the Slovak Republic,*
- *the territory of the Republic of Finland,*
- *the territory of the Kingdom of Sweden, and*
- *the territory of the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man³¹.*

2. The following territories, including their territorial waters, internal waters and airspace, situated outside the territory of the Member States shall, taking into account the conventions and treaties applicable to them, be considered to be part of the customs territory of the Union:

(a) FRANCE

The territory of Monaco as defined in the Customs Convention signed in Paris on 18 May 1963 (Journal officiel de la République française (Official Journal of the French Republic) of 27 September 1963, p. 8679);

(b) CYPRUS

³¹ This provision no longer applies since the EU Treaties ceased to apply to the United Kingdom, as a consequence of Brexit. However, there is a transition period until the end of 2020 while the UK and EU negotiate additional arrangements. New rules will take effect on 1 January 2021.

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The territory of the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia as defined in the Treaty concerning the Establishment of the Republic of Cyprus, signed in Nicosia on 16 August 1960 (United Kingdom Treaty Series No 4 (1961) Cmnd. 1252).

(k) “brokering services” means:

- (1) the negotiation or arrangement of transactions for the purchase, sale or supply of relevant goods from a third country to any other third country, or
- (2) the selling or buying of relevant goods that are located in a third country 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;

Comment:

Generally speaking, the exclusion of ancillary services from the scope of brokering services can be considered as a loophole of the Regulation. As concerns EU law, ancillary services are regularly covered by Council decisions implementing resolutions of the UN Security Council on restrictive measures against third countries. These provisions do not explicitly include nor exclude brokering activities related to ancillary services. The Council uses more vague wording and speaks about “direct or indirect” supply of controlled items. As long as brokering activities consist in an indirect supply of items including transport and financial services, brokering of ancillary services could be considered as covered by these specific Council decisions as it is, for example, the case for the Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria³², Article 1.2:

“it shall not apply to:

- a) Provide, directly or indirectly, technical assistance, brokering services or other services related to the items referred to in paragraph 1 or related to the provision, manufacture, maintenance and use of such items, to any natural or legal person, entity or body in, or for use in, Syria;*
- b) Provide, directly or indirectly, financing or financial assistance related to the items referred to in paragraph 1, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of such items, or for the provision of related technical assistance, brokering services or other services to any natural or legal person, entity or body in, or for use in, Syria;*
- c) Participate, knowingly and intentionally, in activities, the object or effect of which is to circumvent the prohibitions referred to in points (a) or (b).”*

Finally, Member States have the possibility to adopt unilaterally or maintain national measures restricting ancillary services (transportation, financial services, insurance or re-insurance, or general advertising or promotion) of certain items (see article 10).

³²Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria (OJ, L 121, 10.05.2011, p. 11).

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Comment:

Brokering services carried out by an EU broker (established in or resident of the EU) when he or she is travelling outside of the EU and if the transaction is not accounted in the EU will not be ruled by this Regulation.

(l) “broker” means any natural or legal person, entity or body, including a partnership, resident or established in a Member State that supplies services defined under point (k) from within the Union; any natural person having the nationality of a Member State, wherever resident, who supplies such services from within the Union; and any legal person, entity or body incorporated or constituted under the law of a Member State, wherever established, that supplies such services from within the Union;

(m) “supplier of technical assistance” means any natural or legal person, entity or body, including a partnership, resident or established in a Member State that supplies technical assistance defined under point (f) from within the Union; any natural person having the nationality of a Member State, wherever resident, who supplies such assistance from within the Union; and any legal person, entity or body incorporated or constituted under the law of a Member State, wherever established that supplies such assistance from within the Union;

(n) “exporter” means any natural or legal person entity or body, including a partnership, on whose behalf an export declaration is made, that is to say the person, entity or body, who, at the time when the export declaration is accepted, holds a contract with the consignee in the third country concerned and has the necessary power for determining the sending of the goods out of the customs territory of the Union. If no such contract has been concluded or if the holder of that contract does not act on its own behalf, the exporter means the person, entity or body who has the necessary power for determining the sending of the goods out of the customs territory of the Union. Where the benefit of a right to dispose of the goods belongs to a person, entity or body resident or established outside the Union pursuant to that contract, the exporter shall be considered to be the contracting party resident or established in the Union;

(o) “Union General Export Authorisation” means an authorisation for exports as defined under point (d) to certain countries which is available to all exporters who respect conditions and requirements for its use as listed in Annex V;

(p) “individual authorisation” means an authorisation granted to:

1. one specific exporter for exports as defined under point (d) to one end-user or consignee in a third country and covering one or more goods;
2. one specific broker for the supply of brokering services as defined under point (k) to one end-user or consignee in a third country and covering one or more goods; or
3. a natural or legal person, entity or body transporting goods within the customs territory of the Union for transit as defined under point (s);

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Comment:

The supply of technical assistance does not seem to fall under the scope of individual authorisation as defined by this provision. However, article 19 submits to authorisation the supply of technical assistance. If the category of authorisation is not mentioned, the wording used by the article clearly refers to individual authorisation.

(q) “global authorisation” means an authorisation granted to one specific exporter or broker in respect of a type of goods listed in Annex III or in Annex IV, which may be valid for:

1. exports as defined under point (d) to one or more specified end-users in one or more specified third countries;
2. exports as defined under point (d) to one or more specified distributors in one or more specified third countries, where the exporter is a manufacturer of goods included in point 3.2 or 3.3. of Annex III or in Section 1 of Annex IV;
3. the supply of brokering services related to transfers of goods which are located in a third country, to one or more specified end-users in one or more specified third countries;
4. the supply of brokering services related to transfers of goods which are located in a third country, to one or more specified distributors in one or more specified third countries, where the broker is a manufacturer of goods included in point 3.2 or 3.3. of Annex III or in Section 1 of Annex IV;

Comment:

The supply of technical assistance and transit operations does not seem to fall under the scope of individual authorisation as defined by this provision. Therefore, the granting of a global authorisation for such transactions seems not possible.

(r) “distributor” means an economic operator performing wholesale activities in relation to goods listed in point 3.2 or 3.3 of Annex III or in section 1 of Annex IV, such as procuring such goods from manufacturers or holding, supplying or exporting such goods; wholesale activities of such goods do not include procurement by either a hospital, a pharmacist or a medical professional for the sole purpose of supplying such goods to the public;

(s) “transit” means a transport within the customs territory of the Union of non-Union goods which pass through the customs territory of the Union with a destination outside the customs territory of the Union.

Comment:

The Regulation does not make the difference between transit and transshipment. Therefore, both operations are included and potentially submitted to authorisation.