

# Evolution of conditions and criteria in the last decade

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The EU trade control system dedicated a provision to criteria and conditions from its first set of legislation. The objective was to enhance common understanding and implementation by Member States' licensing authorities. It shall be recalled that the EU has not adopted one trade control system implemented by one single EU authority, but its legislation consists of an attempt to coordinate Member States' trade control systems.

The first set of legislation was an unusual mix of a legally binding act in the form of a Council Regulation<sup>1</sup>, and a politically binding act in the form of a Council Joint Action<sup>2</sup>, with cross-references between the two documents. The Regulation defined principles governing the export of dual-use items and the Joint Action adopted lists of items and criteria.

Article 8 of the Regulation obligated Member States' authorities to take into consideration the *common guidelines set out in Annex III to Decision 94/942/CFSP* when considering whether or not to grant an export authorisation. The term "guidelines" has to be assimilated to criteria rather than conditions, as the Council Joint Action was referring to factors to be considered and not to elements to be fulfilled by the end-user to obtain the authorisation. Four categories of criteria were listed in the Joint Action:

- Member States' commitments under international agreements on non-proliferation and the control of sensitive goods;

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1 Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods *OJ L 367, 31.12.1994, P. 1-7.*

2 Council Decision (94/942/CFSP) of 19 December 1994 on the Joint Action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods *OJ L 367, 31.12.1994, P. 8-167.*

- Member States' obligations under sanctions imposed by the UN Security Council or agreed in other international fora;
- Considerations of national foreign and security policy including, where relevant, those covered by the criteria agreed at the European Council in Luxembourg in June 1991 and in Lisbon in June 1992 with regard to the export of conventional weapons;
- Considerations about intended end-use risk of diversion.

In 1994, twelve States were members of the European Union and all were parties of the same international trade control regimes. It could therefore be expected that they shared and considered the same set of criteria concerning the granting of authorisations. It is interesting to note that two export conditions became indirectly compulsory for all Member States due to the ratification of certain international treaties.

The first is a general commitment taken from the CWC, the BWC and the NPT, which prohibits the transfer of chemical, biological and nuclear weapons to a third State<sup>3</sup>.

The second is the commitment to grant an export authorisation for certain nuclear material only if the State end-user had signed and implemented a safeguards agreement with the IAEA<sup>4</sup>.

A similar analysis could be made for some conditions requested by international trade control regimes like the NSG, the Australia Group, the Wassenaar Arrangement, the MTCR and the Zangger Committee as long as all EU Member States are parties to those regimes.

For example, the NSG has adopted two conditions that consist of formal governmental assurances from the recipient State. The first should explicitly exclude uses which could result in any nuclear

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3 It shall be recalled that ownership of WMD is prohibited by those treaties except for nuclear weapons, which five States have the right to hold under certain conditions, including a disarmament commitment.

4 Article III.2 NPT.

explosive device before transferring certain nuclear items<sup>5</sup>. The second concerns the retransfer of items or the transfer of listed items derived from facilities originally transferred by the supplier, where the same assurances as those required by the original transfer will be required for the new recipient<sup>6</sup>. The MTCR has adopted similar conditions consisting in formal assurance concerning the modification of the use of transferred and retransferred items<sup>7</sup>.

In June 2000, the EU trade control system was replaced by one single Regulation that directly integrated the criteria of the Joint Action<sup>8</sup>. The list of criteria has remained similar:

- A.** the obligations and commitments they have each accepted as a member of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties;
- B.** their obligations under sanctions imposed by a common position or a joint action adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;
- C.** considerations of national foreign and security policy, including those covered by the European Union Code of Conduct on arms exports;
- D.** considerations about intended end-use and the risk of diversion.<sup>9</sup>

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5 Paragraph 2 of INFCIRC/254. Part I.

6 Paragraph 9 of INFCIRC/254. Part I.

7 Article 5 of the MTCR Guidelines: "5. Where the transfer could contribute to a delivery system for weapons of mass destruction, the Government will authorize transfers of items in the Annex only on receipt of appropriate assurances from the government of the recipient state that:

the items will be used only for the purpose stated and that such use will not be modified nor the items modified or replicated without the prior consent of the Government; Neither the items nor replicas nor derivatives thereof will be re transferred without the consent of the Government."

8 Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology *OJ L 159, 30.6.2000*, p. 1-215.

9 Article 8 of Regulation 1334/2000.

The wording of the first criterion has been amended to better reflect the international ruling of dual-use trade control, which consists of a mix of international laws (essentially the three treaties) and soft laws (the five dual-use trade control regimes). The text has also been amended to formally confirm that criteria listed by one of those instruments is obligatory for all Member States only if they have all ratified it or are parties to it. In 2000, the 15 Member States were all part of the same instruments, so this amendment had almost no consequences.

Since the adoption of the first system, the potential for the EU to unilaterally impose sanctions concerning dual-use items against a third State has been controversial. If EU treaties seem to have empowered the Council, most of its decisions involved the implementation of a UNSCR. The new wording of the second criterion has closed the debate by making it possible for the Council to adopt only EU grounded dual-use items-related sanctions, since an increasing number of countries have been targeted by EU dual-use items-related sanctions<sup>10</sup>.

In 2008, the EU dual-use trade control system was reviewed and the Regulation was amended substantially, but provisions relating to the four criteria were not amended<sup>11</sup>. However, while in 2000 the Member States were all parties of the same instruments, in 2008 this was no longer the case. Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia, Slovakia and Romania were not and are still not members of the MTCR, and Cyprus is not a member of the Wassenaar Arrangement. Questions have therefore been raised regarding how criteria defined by the MTCR and the Wassenaar Arrangement should be considered by Member States which are not parties to those instruments. According to the Regulation, only criteria adopted by instruments to which all Member States

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10 It concerns countries like Iran, Myanmar, Syria, Venezuela and Zimbabwe (see <https://sanctionsmap.eu/#/main>).

11 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items *OJ L 134, 29.5.2009, p. 1-269*.

are parties are compulsory. As such, in principle, Member States not party to the instruments do not have to take such criteria into account. However, the scope of the commercial policy, which is an exclusive competence of the EU, includes dual-use items. To avoid the risk of unfair competition between suppliers, it would be difficult for Member States which are not parties to the instruments to be exempt from considering the MTCR or Wassenaar criteria when they are analysing a transfer application for an item listed by one of those regimes.

If the set of criteria defined by the EU trade control system has remained almost unchanged, the one defined by international regimes to which the EU refers has been lightly amended in light of the evolution of the international situation. For example, the unacceptable risk of diversion to acts of terrorism has been included in most trade control regimes after the New York World Trade Center Twin Tower terrorist attack in September 2001.

The situation was the same for conditions, as there was no consensus between the Council and the Parliament regarding the inclusion of trade control conditions in the EU Regulation, and the conditions already established by international trade control regimes have also been amended in light of the evolution of the international situation. An example of this is the condition that the transfer of enrichment and reprocessing facilities must be denied if the recipient State is not adhering to the NSG Guidelines and has not reported to the Security Council of the United Nations that it is implementing effective export controls as identified by Security Council Resolution 1540.

In 2016, the EU Commission, considering that there was a need to upgrade the EU Regulation, tabled a proposal to revise it<sup>12</sup>. While the document does not include conditions to be fulfilled by

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12 Proposal for a Regulation of the European Parliament and the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) {SWD(2016) 314 final} {SWD(2016) 315 final} available at [https://eur-lex.europa.eu/resource.html?uri=cellar:1b8f930e-8648-11e6-b076-01aa75ed71a1.0013.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:1b8f930e-8648-11e6-b076-01aa75ed71a1.0013.02/DOC_1&format=PDF).

the recipient to supply the items, the list of criteria has been partly amended and completed. The first group of proposed amendments attempts to clarify existing criteria (a, e and f), while the second group adds new elements (b, c, and d) to be assessed by Member States' authority.

The first group concerns:

- The need to consider Member States' individual commitments and obligations in international regimes, as well as EU commitments as long as the EU is a member of the Australia Group and an observer of the NSG;
- The commitment not only to consider the eight criteria of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the exports of military technology, but also to consider more globally the 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;
- The need to consider the intended end use and the risk of diversion, but also the risk that the dual-use items will be diverted or re-exported under undesirable conditions.

The second group adds new criteria that might be already considered by certain Member States' authorities in the assessment process of a transfer application but were not included in the Regulation. It shall be recalled that the EU list of criteria is not comprehensive and that Member States have the possibility to consider any element they consider suitable. The new criteria proposed by the Commission are:

- The respect for human rights in the country of final destination as well as respect by that country of international humanitarian law;
- 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;

- The preservation of regional peace, security and stability.

The three criteria are copied/pasted from the list defined by Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment. If their insertion into the Regulation formally commits States' authorities to assess them in the authorisation granting process, this was already the case in the present Regulation that referred directly to the Common Position.

The Commission's proposal is submitted to the codecision of Council and Parliament, and is still under discussion. It is not clear when it will be adopted or if the new criteria will remain as they stand at the end of the negotiation.

Over the last decade, criteria and conditions defined by the EU trade control system have remained almost identical. Few modifications have been added, and those that were adopted were essentially to reflect the evolution of the international situation.

This does not mean that the policy followed by Member States to grant or deny an authorisation has not evolved. The overly broad scope of the criteria and conditions and the possibility for Member States to add any element that they consider relevant at the national level makes it impossible to identify a common EU policy regarding the implementation of the criteria. Moreover, unlike in the case of the export of weapons, Member States do not publish dual-use export control data identifying the criteria or the conditions they have considered.