Chapter
03

The definition-scope gap when considering human rights in EU dual-use items – Regulation 428/2009

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1. INTRODUCTION

This contribution seeks to analyse the content of the EU dual-use items Regulation 428/2009[1] with regard to human rights provisions intended to control dual-use goods and technologies that might be used to violate human rights.

To this end, the definition of "dual-use items", as laid out in article 2 of Regulation 428/2009, will be considered together with the scope of application, as defined in article 3 and including catch-all clauses provisions (articles 4 and 8) and Annex I.

Finally, a comparison will be drawn between the scope of application of Regulation 428/2009 and the RECAST as proposed by the European Commission.[2] Although there is very little chance that this piece of legislation will ever be adopted as tabled by the European Commission, it is still interesting from an analytical perspective to note the efforts that have been made in this document to bridge the gap between the definition of "dual-use items" and the real scope of application.

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1 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 134/1 of 29/05/2009, available from: https://eur-lex.europa.eu/resource.html?uri=cellar:1b8f930e-8648-11e6-b076-01aa75ed71a1.0013.02/DOC_1&format=PDF.

2 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), Brussels, 28.9.2016 COM(2016) 616 final 2016/0295 (COD). Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF.

The aim of the analysis will be to answer the following questions: does the scope of application of the EU dual-use Regulation match with the definition, and what are the consequences of matching or not matching?

2. THE EMERGENCE OF NEW SECURITY THREATS AND THE DUAL-USE DEFINITION

Through the years, the scope of dual-use items to control has increased given the evolution of security threats. In fact, besides the classic security threats, such as the non-proliferation of weapons of mass destruction (WMD) in the hands of States and the threat of WMD in the hands of terrorists (this last international security threat was officially recognised in the UN Security Council Resolution 1540 of 28 April 2004 (UNSCR 1540)), new and more insidious threats have emerged on the international scene, mainly linked to the always evolving "information society". One of the main risks in this sort of society appears to be growing surveillance.

These new concerns were already recognised by the European Commission in the Green Paper issued on 30 June 2011, as established by Art. 25 of Regulation 428/2009 requiring the Commission to prepare a report on the implementation of the EU trade control system and possible areas of reform[3]. Among the challenges that the EU trade control system has to face, the Green Paper recognises new threats to security coupled with technological progress leading to the increased availability of sensitive items.

On 17 January 2013, a report on the 2011 Green Paper results was published which confirmed and expanded on the challenges

3 European Commission, "Green Paper: The Dual-use Export Control System of the European Union: Ensuring Security and Competitiveness in a Changing World," COM(2011) 393 final, Brussels, June 30, 2011.

raised by new technologies and technological development[4]. Among the new technologies, transformational technologies and cloud computing are cited, while the term "cyber-tools" appears for the first time in the Commission's documents on dual-use trade control. The connection between international political events, such as the Arab Spring, and the need to prevent human rights abuses through the export control of telecommunications surveillance and internet monitoring systems is, for the first time, brought to the attention of the Commission by some Member States, some MEPs, civil society organisations and researchers.

In this context, security threats linked to human rights violations seem more likely than classical ones, and the need to control dual-use items with HR considerations is therefore higher. Article 2 of Regulation 428/2009 defines dual-use items as:

> *(...) items, including software and technology, which can be used for both civil and military purposes, and shall include 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 (...).*

The definition of dual-use items used by this Regulation attempts to mix two different understandings of the term. The first considers items that could have military and non-military purposes (as for the Wassenaar Arrangement, the Australia Group and the Missile Technology Control Regime), and the second includes items that could have nuclear and non-nuclear purposes (as for the Nuclear Suppliers Group). As it appears, the definition does not consider the human rights dimension.

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4 European Commission, "Commission 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," COM(2011) 393, SWD(2013) 7 nal, Brussels, January 17, 2013.

3. THE SCOPE OF APPLICATION OF THE EU DUAL-USE REGULATION

Despite the "crystallised", although already comprehensive, definition of "dual-use items", the scope of application is wider than the definition laid down in article 2, as stated in article 3:

1. *An authorisation shall be required for the export of the dual-use items listed in Annex I.*
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.*

Three main elements represent the scope of application as indicated in this article: items listed in Annex I, non-listed items covered by article 4 and non-listed items covered by article 8.

Annex I to Regulation 428/2009 is a compilation of the control lists of the international export control regimes: the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG) and the Australia Group (AG). Each amendment to one of the international export control lists is integrated in Annex I by the European Commission, which, following Regulation 599/2014[5], can adopt delegated acts to modify and update the lists of items and countries covered by the Regulation. Previously, the annual update was done by the Council and the European Parliament under the normal legislative procedure (which takes around a year).

In this context and with regard to human rights considerations, on 30 December 2014, the Commission Delegated Regulation

5 European Union, Regulation (EU) No 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 173/79 of 12/06/2014.

(EU) No 1382/2014[6] entered into force, updating Annex I to include modifications adopted by export control regimes in 2011, 2012 and 2013. Among the updates introduced, the Commission Delegated Regulation inserted the Wassenaar Arrangement's December 2013 updates, including some "Intrusion Software" and "IP Network Surveillance Systems". In Annex I of the EU Dual-Use Regulation, "Intrusion software" falls within Category 4, (Computers Systems, Equipment and Components), control entry 4A005, while "IP Network Surveillance Systems" fall within Category 5 (Telecommunications systems, equipment, components and accessories), control entry 5A001. Although these controls were not included in the Wassenaar Arrangement on the basis of human rights considerations, they paved the way for the control of items which might also be used to violate human rights.

The Regulation establishes the possibility of controlling non-listed items on the basis of articles 4 and 8. These provisions, called "catch-all clauses", allow the possibility of controlling unlisted items for reasons established in the relevant provision. As per article 4, items may be controlled if there is a risk of military end-use or a WMD-related risk, or if the country of destination is subject to an arms embargo. As stated in article 4:

1. *An authorisation shall be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the competent authorities of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part, 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.*

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6 Commission Delegated Regulation (EU) No 1382/2014 of 22 October 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 371/1 of 30/12/2014, available on: https://eur-lex.europa.eu/eli/reg_del/2014/1382/oj/eng.

2. *An authorisation shall also be required for the export of dual-use items not listed in Annex I 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. For the purposes of this paragraph, "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.*
3. *An authorisation shall also be required for the export of dual-use items not listed in Annex I 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 use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State.*
4. *If an exporter is aware that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1, 2 and 3, he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorisation.*
5. *A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items*

not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1.
(...).

During the evolution of Regulation 428/2009, article 4 broadened its scope of application, passing from Council Regulation (EC) No 3381/94 of 19 December 1994[7] to Council Regulation (EC) No 1334/2000 of 22 June 2000[8]. In fact, while the first EU dual-use Regulation only covered unlisted items for misuses related to WMD proliferation issues, Council Regulation (EC) No 1334/2000 broadened the scope by including a risk of military end-use and if the country of destination is subject to an arms embargo in the present Regulation 428/2009.

As stated in

Article 8 establishes the possibility of controlling non-listed items but for reasons linked to human rights violations. As stated in the article:

1. *A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security or human rights considerations.*
2. *Member States shall notify the Commission of any measures adopted pursuant to paragraph 1 immediately after their adoption and indicate the precise reasons for the measures.*
(...).

As it appears from the articles above, the implementation of catch-all clauses is left to individual Member States, which may

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

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, Official Journal of the European Union, (OJ L 159, 30.06.2000).

adopt such measures on a case-by-case basis. Moreover, the quantity and variety of items which might be controlled through a catch-all provision are potentially high and might divert from one Member State to another.

The implications for the implementation of trade controls due to human rights concerns cannot be neglected, since the scope of the Regulation can be widely expanded through this provision.

It is interesting to note that although this provision, which gives Member States the possibility of controlling items for human rights concerns, already existed in the previous EU dual-use regulation (Council Regulation (EC) No 1334/2000 of 22 June 2000), it was only used for the first time in 2012 by Italy (published on September 19 (C 283/4, 19.9.2012)), when the Italian competent authority adopted a catch-all clause against Syria due to public security and human rights considerations.

From the brief analysis above, it emerges that although the definition of dual-use items does not take into account human rights considerations, the scope of application of the EU dual-use regulation goes far beyond the definition given in article 2. Indeed, both in terms of listed and non-listed items, the scope of controls has followed developments going on in the technology and international security fields.

Still, a sort of hysteria seems to surround the EU dual-use Regulation implemented in two different but parallel dimensions following different timeframes. One dimension concerns the definition of "dual-use items", which seems stuck in the past, at the very origin of international security threats; the other dimension is dominated by the scope of application of the regulation, which seems more fluid in its implementation as it tries to keep pace with developments in the international arena.

4. THE RECAST AS AN ATTEMPT TO FILL THE GAP

The RECAST, as tabled by the European Commission in September 2016, seemed to be an attempt to put an end to this "temporal inconsistency" and bridge the definition-scope gap.

The first element that acknowledges the link between security and human rights is a broader definition of "dual-use items". Indeed, the RECAST adds a paragraph to the classical definition in a way that includes the human rights dimension:

> **b.** *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.*

The scope of catch-all clauses is also broadened by adding the possibility of controlling non-listed items for serious violations of human rights in situations of armed conflict or internal repression in the country of destination:

> *(...)*
> **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, as identified by relevant public international institutions, or European or national competent authorities, 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.*

In line with the broadened scope, the amended article 14 adds the human rights dimension to the list of control criteria to assess when deciding whether or not to grant an authorisation:

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, the competent authorities of the Member States shall take into account:*
   (...)
   B. *respect for human rights in the country of final destination as well as respect by that country of international humanitarian law; (...).*

Finally, the RECAST introduces more controls on cyber-surveillance technologies in a newly added second part of Annex I (Annex I-B), which allows for autonomous EU controls, independent of international export control regimes lists updates.

The European Parliament contributed, by a series of amendments proposed to the Commission's initial proposal, to broadening and further clarifying the human rights dimensions in the legislative proposal. The draft of the European Parliament's legislative resolution, contained in the Draft report of the Committee of International Trade[9], introduced 57 amendments[10] to the Commission's proposal. Some example of efforts aimed at clarifying the scope are: the definition given by the EP to "intrusion software" to stress that it may cover both malicious and desirable defensive purposes; the limitation of the category of "data retention system" to systems

9 Draft report on the 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) (COM(2016)0616 – C8-0393/2016 – 2016/0295(COD)), Committee on International Trade, Rapporteur: Klaus Buchner. Available on the European Parliament official website: https://www.europarl.europa.eu/doceo/document/A-8-2017-0390_EN.html.

10 *Amendment 13* starts the series of amendments made to articles of the Regulation. Previous amendments modify some recitals of the Regulation, in line with amendments made to articles.

connected with interception systems; and the exclusion of "digital forensics" from the scope of the Regulation since there is no clear definition of this term yet.

On the side of broadening the scope in relation to human rights, one of the parliamentary amendments proposed eliminating the limitations on respect of human rights only in cases of armed conflict or internal repression. In other words, violations of human rights or international humanitarian law would have become a reason to control non-listed items, even outside the framework of armed conflict or internal repression.

Following the draft report containing amendments proposed by the European Parliament's Committee on International Trade – INTA (rapporteur MEP Klaus Buchner) to the EU dual-use Regulation Recast[11], the EP's Committee on Foreign Affairs – AFET (rapporteur MEP Marietjie Schaake) delivered its own draft opinion[12].

The AFET draft opinion includes 26 amendments in total (8 to the recital and 18 to articles).

Most of the AFET amendments concern the link between human rights and cyber-surveillance technology. For example, the AFET report proposes:

– to specify which human rights are often violated by means of cyber-surveillance technology;
Text proposed by the Commission - Article 2 – paragraph 1 – point 1 – point b

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11 Draft report on the 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) (COM(2016)0616 – C8-0393/2016 – 2016/0295(COD)), Committee on International Trade, Rapporteur: Klaus Buchner. Available on the European Parliament official website: https://www.europarl.europa.eu/doceo/document/A-8-2017-0390_EN.html.

12 Draft opinion of the Committee on Foreign Affairs for the Committee on International Trade on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace (Rapporteur: Marietjie Schaake), (COM(2016)0447 – C8-0264/2016 – 2016/0207(COD)).

B. 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;

Text proposed by the AFET

B. cyber-surveillance technology which can be used *to directly interfere with human rights, including the right to privacy, the right to data protection, freedom of speech and freedom of association*, or which can be used for the commission of serious violations of human rights law or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States;

– to clarify the definition of "cyber-surveillance technology" by adding the dimension of non-authorisation/awareness on the side of the owner or administrator of the system;

Text proposed by the Commission - Article 2 – paragraph 1 – point 21 – introductory part

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:

Text proposed by the AFET

21. "cyber-surveillance technology" shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, exfiltrating, collecting and analysing data and/or incapacitating or damaging the targeted system without the specific, informed and unambiguous authorisation of the owner or administrator of the systems. This includes items related to the following technology and equipment:

– to eliminate the adjective "serious" in reference to violations of human rights, explaining that human rights violations committed with dual-use items often will not qualify as serious human rights violations;

Text proposed by the Commission - Article 4 – paragraph 1 – point d

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, as identified by relevant public international institutions, or European or national competent authorities, 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;

Text proposed by the AFET

D. for use by persons complicit in or responsible for directing or committing violations of international human rights law or international humanitarian law in countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe, the Union or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such violations by the proposed end-user;

– to add the requirement of an end-user statement for authorisations for cyber-surveillance technology;

Text proposed by the Commission - Article 10 – paragraph 4 – subparagraph 2

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

Text proposed by the AFET

Authorisations for cyber-surveillance technology shall be subject to an end-use statement. Authorisations for other items may be subject to an end-use statement if appropriate.

5. LATEST DEVELOPMENTS IN THE RECAST PROCESS AND WAYS FORWARD

After a very lengthy procedure which lasted for several months at the Council level, on 5 June 2019, EU ambassadors agreed on the Council's negotiating position on the Recast[13]. However, the Council's position differs significantly from the RECAST as proposed by the European Commission, and in particular as amended by the European Parliament. Indeed, only a few elements are added to the current EU dual-use Regulation, mainly to bring it into line with the new Union Customs Code (such as the introduction of re-export declaration and exit summary declaration) and clarify the definitions of some concepts (e.g. technical assistance and supplier of technical assistance, military end-use, ICP, arms embargo, non-Union dual-use items).

The only meaningful amendment proposed by the Council as regards human rights is the extension of the catch-all provision as set out in article 8 (for human rights or public security issues) to acts of terrorism.

13 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) - Mandate for negotiations with the European Parliament, Brussels, 5 June 2019 (OR. en) 9923/19. Available from: https://www.consilium.europa.eu/media/39555/mandate-for-negociations.pdf.

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 for reasons of public security,* including the prevention of acts of terrorism*, or for human rights considerations.*
(...).

Still, it is worth noting that although the scope of application of article 8 is broadened to include acts of terrorism, these are not defined in the Council's position and the definition of "terrorist acts" as set out in the RECAST proposal is erased in the Council's position.

It appears from the evolution of the ordinary legislative procedure, its different steps and related issued documents that there is no will among Member States to broaden the scope of the EU dual-use regulation with the "human security package" and, in doing so, to make the burden even heavier for implementers. Indeed, on the side of licensing authorities and industries, it would imply a considerably higher number of items to control but also a deeper analysis with regard to the end-user and the country of destination.

The fact remains that the definition no longer matches the scope of application which evolved following major changes in the security and information environments.

Although a pragmatic approach is bridging the existing gap by means of Annex updates and catch-all clauses, legal certainty will have to take over and clearly define what is already contained in the regulation. Of course, the possibility of "switching" perspective still remains, and the human issue package could be dealt with in another context than dual-use trade controls by passing it in the so-called EU anti-torture regulation.

It is clear that a political decision has to be taken on this issue, which cannot remain off the "trade controls table" given the outstanding topicality of the human rights issue in the context of a growing information society.

As a conclusion cannot be drawn given the "work in progress" discussion between the main EU institutions, it might be wise in this context to remember Benjamin Franklin's famous quote, "Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one."