Chapter
05

Comprehensive approaches to trade controls: Pros and cons

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Although international practices in managing international commercial transfers seem to make use of similar principles and mechanisms, the question can be asked whether a "trade control" culture shall be the basis of the applicable norms at national level. The United Nations Security Council Resolution 1540 (2004)[2], for dual-use items, and the Arms Trade Treaty[3], for conventional arms, set principles that, despite their general terms, are essentially convergent: an obligation of control on certain goods and for certain transactions. Often, their implementations follow parallel paths, such as the creation of control lists, the insertion of catch-all clauses, the listing of criteria, inter-ministerial decision-making processes, etc. While they are undoubtedly similar, the question that shall be asked is whether these controls should be truly identical. Or, formulated in a different way, if a "comprehensive approach" to trade controls is meant to lead to "comprehensive controls".

An empirical review, based on the observation of national systems using dual-use trade management mechanisms for controlling other items than dual-use ones, followed by an exploration of the assets and drawbacks of "going comprehensive", will attempt to delineate the expectations one might have about this rising trade control culture.

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2 Resolution 1540 (2004) adopted by the Security Council of the United Nations at its 4956th meeting on 28 April 2004.

3 The Arms Trade Treaty.

1. EXAMPLES OF "COMPREHENSIVE APPROACHES" TO TRADE CONTROLS AND THEIR ROOTS

1.1. Different approaches for enlarging the scope of dual-use trade controls

An empirical review of the national systems for controlling the trade of dual-use items allows the identification of different tendencies in the approaches selected for extending the controls to other items. These are presented according to the growing level of integration they treat the other-than-dual-use items with.

A first family is characterised by a form of extension of the dual-use trade controls to other items not listed in the international-European single list, which is taken as the reference in the present article. Nonetheless, these items are "dual-use" ones, and are controlled independently from the use of "catch-all" provisions. For instance, Ukraine adds to the single list, which it uses as its national control list, nationally-controlled items it considers as corresponding to the definition of dual-use items and inserts these items into the list with a specific export control classification number (ECCN)[4]. This is the case for industrial explosives, detonators, and material and equipment for their production, numbered 1A906, 1B904 and 1C913 respectively. The United Arab Emirates have not published their control list, but they also use in practice the single list, to which they have added armoured vehicles and related equipment. It could be said that the countries of this family have only "extended" the single list to include more items and, in doing so, have extended their definitions of "dual-use" items.

A second family is composed of countries whose dual-use trade control systems are characterised by an overarching legislation covering other-than-dual-use items but making distinctions in the regimes applied. Switzerland, for instance, has passed an

4 Numbering these nationally-controlled items from 901 to 999 in the list.

ordinance[5] which applies to 4 different lists: "dual-use" in a similar meaning to the EU single list (Annex 2), "special military goods" as per the meaning of the Munitions List (Annex 3), "strategic goods" (Annex 4), and "goods subject to national export control" (Annex 5)[6]. However, in the text, the Ordinance assigns different regimes to the different types of items. The Law of Georgia[7] controls both dual-use items, using the single list as the reference, and military items, using the Munitions List. Within the Law, different provisions apply to the items depending on the list they belong to, notably regarding import, transit and brokering controls. The two types of items - military and dual-use - are even more integrated in the Belarussian system. The Law on export control[8] does not make the distinction between the two in principle - and even counts 6 lists as these ones are individually linked to international control regimes, like in Russia - but establishes some exceptions in relation to the specificities of the items, such as a differentiation of criteria applied in the licensing processes[9].

A third family is characterised by the highest level of integration, as its members merge dual-use trade controls with controls on other items. Although the first two families envision a comprehensive "approach" to trade controls, this family proposes truly comprehensive "controls" comprising, but not limited to, dual-use trade controls. Kazakhstan has designed a whole category 10 in the single list which it also uses for its controls. This category is meant to contain nationally-controlled dual-use goods, which thus belong to dual-use "concept-extending" countries, but it also controls the

5 Ordinance on the Export, Import and Transit of Dual Use Goods, Specific Military Goods and Strategic Goods (2016).

6 The contents of Annex 2 correspond exactly to those of the European Union's single list, Annex 3 is the Munitions List set up in the framework of the Wassenaar Arrangement, Annex 4 is currently empty, and Annex 5 contains weapons excluded from controls under the war material legislation, as well as explosives and propellants (May 2019).

7 Law of Georgia on the control of Military and Dual-Use Goods (2014).

8 Law on export control (2016).

9 *Idem*, Article 15.

transfer of military items with the same legislation[10]. Azerbaijan has made a slightly different choice, as it has inserted the Munitions List into the dual-use single list as its category 1011. Norway[12], Kosovo[13], Malaysia[14], Singapore[15], Australia[16] and New Zealand[17] apply their overarching legislation indistinctly to two lists, a dual-use one and a military, which generally[18] correspond to the single list and the Munitions List respectively. The provisions, and the regimes they set forth, do not make any distinction between the related items. In the Philippines' legislation[19], the controls apply indistinctly to military, dual-use and nationally-controlled items[20].

A glance at the systems currently in formation also offers interesting, and sometimes contradictory, information about the tendencies.

For instance, preliminary discussions between the national authorities have led the Government of Burkina Faso to consider selecting comprehensive controls on both military and dual-use items for the implementation of their international arms transfers

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10 Law of the Republic of Kazakhstan of 21 July 2007 n° 300-III "on export control", Article 3.

11 Resolution of the Cabinet of Ministers of the Azerbaijan Republic No. 230 about approval of some regulatory legal acts connected to using the Law of the Azerbaijan Republic «About export control".

12 Act of 18 December 1987 relating to Control of the Export of Strategic Goods, Services and Technology, Article 1 and Regulations relating to the export of defence-related products, dual-use items, technology and services (2013).

13 Law on the Trade of Strategic Goods 2013, Article 7.

14 Strategic Trade Act (2010) Section 9 and Strategic Trade Order (2017).

15 Defence Trade Controls Act 2012 and Defence and Strategic Goods List.

16 Customs and Excise Act 2018 and Strategic Goods List October 2017.

17 Australia and New Zealand have inserted the same additional entries into their munitions lists, consisting of 6 extra categories, such as ML909 for "detonators or other equipment, other than those specified by ML4 or 1A007, for the initiation of "energetic materials" specified by ML908".

18 The Munitions Lists of Australia and New Zealand both contain 6 additional categories, such as a category ML 909 for "detonators or other equipment, other than those specified by ML4 or 1A007".

19 Strategic Trade Management Act (2015), Section 10.

20 However, this list of nationally-controlled items, which is Annex 3 of the National Strategic Goods List, does not contain any item currently (May 2019).

obligations[21]. However, most of the examples found by the author emphasize the opposite trend. Thailand[22] and - with the support of their outreach partners[23] - Lao PDR, Morocco and Tunisia are building their control systems by separating the legislation on the international transfer of military and dual-use items.

The Balkan countries also offer a first-choice analysis sample, as the region has seen a wave of reforms of trade control legislations. Kosovo, as presented above, can be classified as a country practicing "comprehensive controls". North Macedonia, on the contrary, has long separated the legal frameworks for dual-use and military items[24]. Interestingly, Albania[25], Bosnia[26], Montenegro[27] and Serbia[28], which had previously adopted comprehensive approaches or controls, opted for the division of their frameworks in the late 2000s and early 2010s in order to separate the two areas of control. The case of the Balkans will eventually spark a debate on the objective and subjective merits of one or the other option - "going comprehensive" or "distinguishing" - but it is also particularly important for investigating the origins of such comprehensive approaches and their effects on the "dual-use" concept.

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21 Information shared by national sources but not supported by specific documentation (4 June 2019).

22 Thailand is currently finalizing the adoption of its dual-use trade control legal framework, the implementation of which is due for January 2020, and which will exist beside long-established and specific military items' international transfer control legislation (4 June 2019).

23 Notably the European Union Partner-to-Partner and the US Export Control and Border Security programmes.

24 Law on export control of dual-use goods and technologies 2005, replaced by the Law on export control of dual-use goods and technologies 2012. See Article 5.

25 Law on State import-export control of military goods and dual-use goods and technology (2007) replaced by the Law on State international transfer control of military goods and dual-use items and technology (2018).

26 Law on control of foreign trade of goods and services of strategic importance for the security of Bosnia and Herzegovina (2009) replaced by the Law on control of foreign trade in dual-use goods (2016).

27 Law on foreign trade in arms, military equipment and dual-use items (2005) replaced by the Law on control of export of dual-use items (2012).

28 Law on foreign trade in arms, military equipment and dual-use items (2005) replaced by the Law on export and import of dual-use items (2013).

1.2. Possible origins and effects of the delineation of "dual-use" items

The selection of comprehensive approaches for controlling trade beyond dual-use items does not appear to take its roots in regional cultures. Even within the European Union (EU), Member States like the United Kingdom have made the choice to apply essentially – though not exactly - the same control mechanisms to dual-use and military items in the national implementing legislation, in spite of the distinction at the Union level with the specific Regulation[29]. In South-East Asia and in the Balkans, both comprehensive and "distinctive" approaches co-exist.

Searching for the origins of "dual-use" items in the absence of a critical mass of national transactions in one or the other trade proves equally unsatisfactory. It could have been a pragmatic choice to avoid increasing the amount of legislative effort for countries with limited international trade capacities in either or both dual-use and military items. However, examples[30] such as Montenegro, on the one hand, and Australia, on the other hand, show that this is not the case.

As for the Balkans specifically, one reason could have been the ambition to join the European Union, a condition of which is to integrate the *acquis communautaire* into the national legal framework prior to entering. The EU has developed its legislation according to the division of competences agreed with the Member States: an EU Regulation setting the principles of dual-use trade control, alongside more exclusive national legislation concerning military items. One explanation, therefore, could be that the candidate countries had to follow this division. This is in fact not the case, as nothing prevents any State from legally applying the same general control regime

29 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a community regime for the controls of export, transfer, brokering and transit of dual-use items.

30 See for an estimate of the international transfers of strategic items of the country: Cristina Versino, Peter Heine, Julie Carrera, Strategic Trade Atlas 2018. Available: https://ec.europa.eu/jrc/en/publication/strategic-trade-atlas-commodity-based-views.

to both categories of items. This is the approach adopted by the United Kingdom, for instance. As the EU is not competent in this area, the strictness of the controls on the transfer of military items remains the sole decision of the Member States, and by extension of the candidate States.

Although the EU enlargement may not be a decisive factor, geopolitical considerations should not be underestimated. Many of the countries with "comprehensive controls" cited above have been engaged in cooperation partnerships with one or both of the two main international donors in the construction of their trade control legal frameworks. While countries in the Balkans, the Caucasus and South-East Asia originally elaborated their legislation with the technical support of the American Export Control and Border Security (EXBS) Program, many countries have also more recently received offers of accompaniment from the EU "Partner-to-Partner" (P2P) programme. The EU has a distinctive approach and the United States a more comprehensive one – though not reaching the level of comprehensive controls – for themselves. This might have played a conscious or unconscious role in the design of their respective offers of support. But, here again, the full explanation cannot be found in a sort of imperialism-driven form of assistance as, in fact, the EU having no legal competence on arms transfers in principle, it statutorily limits the scope of its offer[31], and the EXBS program has supported the creation or transformation of either distinctive or "comprehensive controls" systems.

Hence, no deterministic factor can be precisely identified to explain the mosaic of systems which can be found at the international level. Notwithstanding, this diversity produces visible effects on the delineation of the "dual-use" concept. The limit between what is encompassed by the term "dual-use" and what is not is both technically and legally difficult to draw. On the one hand,

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31 The European Union developed a separate outreach programme on the implementation of the Arms Trade Treaty. See: Council Decision (CFSP) 2017/915 of 29 May 2017 on Union outreach activities in support of the implementation of the Arms Trade Treaty.

there exists no internationally shared definition that could serve as a reference, while Resolution 1540 (2004) itself does not use the term, which is used only by trade control regimes. In practice, the European definition is widely accepted but it cannot be considered a standard. On the other hand, the listing of dual-use items as a technique is imperfect, as the lists are factually dependent on international negotiations where trade and security are balanced differently from one participating State to another. The "delineation" is the product of both definition and the listing of what is covered under the concept "dual-use". As such, dual-use trade controls as they are commonly accepted, as controlling items which can be used for weapons of mass destruction, their means of delivery and military goods, even go beyond the scope defined by the "root" Resolution 1540 (2004), as this does not cover the latter category. The delineation also establishes the room for manoeuvre the States have in designing their controls, notably regarding the "catch-all" provisions which develop in the space left between the list and the definition.

The observations made by considering "comprehensive approaches" systems give three indications regarding the delineation of the "dual-use" concept. The first indication is that countries using the same definition of the concept may extend its delineation to more items. For instance, Ukraine, Australia and New Zealand have inserted additional items into the list compiling the international regimes' lists. In these specific cases, it is interesting to find that explosives and related items are common "add-ons". The second indication is that countries using the same lists may also extend its delineation to more items. For instance, even the European Union[32], which is currently in the process of amending its Regulation, envisages extending its definition to include items that can be used to jeopardise human security, while it does not

32 See: 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, 5 June 2019, Annex I.

intend to integrate more items than those in the international lists, not even items used for torture or capital punishment, which it controls through a separate legislation. The third indication is that a non-negligible proportion of "comprehensive controls" countries merge both dual-use and military items' controls in "strategic trade" control systems, where "strategic" shall be understood in the meaning of the World Customs Organization's Strategic Trade Control Enforcement (STCE)[33].

On the basis of these observations, the choice of a comprehensive approach for controlling the trade of dual-use and other items considered to be strategic or sensitive may be explained by a -legitimate – ambition to simplify the controls, or at least their legislation, as a single text may designate different authorities and procedures for different items. However, the choice of "comprehensive controls" is a radical one and challenges the rationale of dual-use trade controls as an area obeying its own principles. What are the pros and cons, if any, of these "comprehensive controls"?

2. PROS AND CONS OF "COMPREHENSIVE CONTROLS"

It is proposed in this section to reflect on the options available to countries on the basis of the observations made above from "distinctive" on the one end, "comprehensive approaches" in the middle, to "comprehensive controls" on the other end. Though one may not expect from this review of pros and cons to identify a universal ideal or factual evidence of the exclusive merit of one or the other approach, it is intended to highlight existing trade control cultures and, potentially, to provide food for thought for the construction of new systems.

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33 World Customs Organization, "Strategic Trade Control Enforcement – Implementation Guide": "Strategic goods are weapons of mass destruction (WMD), conventional weapons and related items involved in the development, production or use of such weapons and their delivery systems".

First of all, from a legal perspective, the existence of similarities and differences between dual-use and military items' trade control regimes sets the foundations for a doctrinal debate. Within the European Union, the division of competences in principle between the European level – regulating the trade of dual-use items– and the national one – regulating the trade of military items – presumably prevents EU countries from adopting comprehensive controls. Should they be willing to do so, the Member States would have to subject arms trade controls to the principles set forth by the strongest legal source in the hierarchy of norms, *i.e.* the dual-use trade Regulation. It does not prevent them from implementing comprehensive approaches, however. Furthermore, it must also be acknowledged that the dual-use Regulation itself prescribes the establishment of bridges in requesting that the criteria set forth in the – though non-legislative - Council Common Position 2008/944/CFSP[34] be considered in the dual-use licensing process.

In terms of international legal provisions, one must take note of global similarities. An obligation of control based on risk-based assessment of the end-use or end-user is foreseen by both Resolution 1540 (2004) and the Arms Trade Treaty, for instance. In practice, a vast majority of countries have effectively translated these requirements into prior authorisation obligations. The scope of controls, in terms of transactions covered, is slightly different. For military items, the Arms Trade Treaty urges the States Parties to control the export, import, transit, transhipment and brokering of arms. For dual-use items, Resolution 1540 (2004) requests that all States control the export, transit, transshipment and services that should be understood as including brokering[35] and financial services. None of these texts, however, prevent the countries from covering more transactions, such as import, and the scope of controls may thus be similar for both areas.

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34 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

35 *Ibid*. United Nations Security Council Resolution 1540 (2004), Paragraph 3(c).

Finally, it must be noted that Resolution 1540 (2004) is less prescriptive than the Arms Trade Treaty regarding the controls themselves. It only contains the principle of these controls, whereas the Treaty establishes objective conditions and subjective criteria for the risk-based assessment leading to the authorisation or prohibition of the transaction. It is equally true that prohibitions in the trade of dual-use items may be found in specific treaties outside the Resolution – e.g. the Non-Proliferation Treaty, the Chemical Weapons Convention, the Biological and Toxins Weapons Convention – but these contain only objective conditions for prohibiting the transaction from taking place. Outside the range of prohibition cases, the consideration in the authorisation process of the factors and implications of a given – non-prohibited – transaction is not governed by these conventions. The Chemical Weapons Convention, for instance, merely states that "each State Party shall adopt the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention"[36], thus leaving the actual definition of subjective criteria for the decision to the States. In leaving this effort of definition to the regimes or States themselves, the Resolution appears less prescriptive, hence more permissive, than the Arms Trade Treaty. More formally, the reflection may be extended to the nature of the regulating frames of these specific trades. A consensus, though not a universal one, has been reached for framing arms transfers in the form of a treaty. Would military and dual-use items-related controls be exactly the same, and should we expect a "dual-use items trade treaty" or a "strategic trade treaty" in the foreseeable future?

Furthermore, from a technical perspective, in the sense of the implementation of the controls, comprehensive approaches offer interesting perspectives of rationalisation. In terms of legal architecture, limiting the number of fundamental texts undoubtedly

36 Convention on the Prohibition of Chemical Weapons, Annex on Implementation and Verification, Part VII para. C (schedule 2 chemicals) and Part VII para. C (schedule 3 chemicals).

eases the understanding, and thereby acceptance, of the controls by the stakeholders. In terms of institutional setting, however, the question may legitimately be asked whether, in the event of comprehensive controls, giving decision-making competences for all items to one responsible authority only is the most adequate option a country might chose. The fact that ministries of defence are in charge of controlling the trade of dual-use items or that ministries of trade control the trade of military items can only be interpreted as signals sent by the States to express their policies *vis-à-vis* these items and the balance that is sought and promoted between trade interests and security imperatives. At a minimum, commercial entities are entitled to interpret them as such. Nevertheless, even for comprehensive controls, this first impression may be compensated by the effectiveness of inter-ministerial coordination or co-decision mechanisms in the licensing procedures.

In the course of the process of control itself, the efficiency of comprehensive controls may be questioned. At the stage of technical identification or classification of the items, they are not fundamentally different from the distinctive approach, for instance in the sense that the necessary technical expertise cannot be found in the hands of one organisation or person only, due to the variety of expertise required. At the stage of the assessment of the application, the purposes of the control of military items and the control of dual-use items are not fundamentally divergent: they are intended to evaluate the risk entailed by the end use or end user. It is the nature of the item which drives, or should drive, the review in different directions. The misuse of dual-use items must be considered in light of its potential, but the misuse of military "single-use" items must be considered in light of its likelihood. While a presumption of innocence presides - or at least is taken into consideration - in the assessment of the control of dual-use items, a presumption of guilt drives the assessment of the control of military items. At the enforcement stage, further differences are encountered. The Harmonised System coding, used by a majority of countries for their customs controls and targeting of shipments, facilitates the

identification of military items, while it remains difficult to assign specific codes to dual-use items because of the originality of the "dual-use" characteristics of the goods. As such, at this stage and with this information, the risk is asserted for military items, while only potential is considered for dual-use ones. Taking this into consideration, the STCE shall be seen as a methodological approach to the enforcement of the controls of military and dual-use items rather than a single mechanism of pre- or post-licensing control.

Finally, from a philosophical perspective, conceptual divergences between the controls of military items and dual-use items can be highlighted. In particular, the notion of risk is both an argument in favour of and an objection to comprehensive controls. Although the occurrence of critical proliferation – and use – of weapons of mass destruction[37] as a consequence of diverted trade is reduced but its impact in terms of casualties is extremely significant, the use of weapons transferred is almost certain but its impact is relatively less significant. In this regard, all approaches to trade controls, including "comprehensive controls", are equally legitimate and one should not envisage "de-controlling" the dual-use items.

Notwithstanding, the question of the liberalisation of the trade of dual-use items as a specific form of control is also legitimate. An international consensus appears to have been reached for evading the trade of both dual-use and military items according to the free trade principle: the transfers of items under surveillance are prohibited unless duly authorised. However, the "how" is debatable. The Arms Trade Treaty is prescriptive, whereas Resolution 1540 (2004) only sets the principle of the controls. In the Balkans, the countries that "separated" dual-use and military items-related provisions took this opportunity to liberalise controls on the trade of dual-use items by suppressing import licensing obligations or

37 It is worth considering, however, that most of the "dual-use" items listed by the international regimes, and notably found in the European single list of controls, are not weapons of mass destruction but military-related items.

maintaining the prior registration obligation for entities trading military items only, for instance. Hence, this philosophical choice bears very concrete implications for the industry.

The nature of the items and their end uses shall also be studied from a societal point of view and analysed. As it is crystal clear that military items contribute in no way to the economic or societal development of the end-use country, the idea of development is profoundly anchored in the "dual-use" concept. The items concerned, consisting of material, equipment or technology, are designed to be, or at least can be, used for a greater good for the end-use countries, such as the production of goods or access to the most advanced technologies for feeding innovation. Their potential, which is reinforced by the observation that proliferative intents undoubtedly represent an extremely minor share of exchanges of dual-use items, makes these items contributions to sustainable development, whereas military items tend to be their opposite. This is supported by the important role taken by civil society in debates about arms trade controls: in these cases, it expresses radical opposition in principle to transfers. By contrast, it is absent from debates – of which there are few, if any, examples - about prohibiting the trade of dual-use items.

Finally, a philosophical output of the study of comprehensive controls could lead to a redefinition the scope of these controls. How comprehensive should or could the controls be? How large can the "strategic trade" be in principle if the States are left to decide what is strategic for them and what is not, taking into due consideration international economic competition realities? Indeed, the STCE acceptance of the scope of strategic trade is only one accepted definition of the term, and it does not prevent the extension the concept in principle. Strategic trade should therefore be considered in light of the practices observed, as a snapshot of its time: for instance, in respect of the contents of "nationally-controlled" items. Overall and in theory, if items can be indifferently controlled because of their potential end use, are we likely to see the emergence of "sensitive items comprehensive" control systems, encompassing for example "torture goods", sensitive raw material, cultural goods and diamonds?

The "comprehensive controls" of strategic trade, understood here as controlling indifferently dual-use and military items, offer both advantages and disadvantages to the countries which have opted for this form of controls in comparison with distinctive controls and other comprehensive approaches. Neither from a legal, nor from a technical or a philosophical perspective, can a definitive argument be found in favour of one or the other approach. Elements only, not evidence, can be identified to allow (self-)reflection on the existing control systems or those yet to be elaborated.

3. CONCLUSIONS:

Many countries are merging controls of both dual-use and other items - military ones in the first place – in their legal framework, and their numbers may even increase in the future as new countries initiate the elaboration of their systems. This is translated into different forms of comprehensive approaches – as opposed to distinctive approaches - going from sharing the same fundamental text to applying the exact same authorization processes to make the controls truly "comprehensive". Beyond practical consequences, these comprehensive controls impact the delineation of the "dual-use" concept itself in questioning the relevance of its own identity.

Despite the apparent facilitation offered by comprehensive controls, legal, technical and philosophical reflections on the concept point at the existence of a specificity of dual-use items and the subsequent controls of their trade, which suggests that distinctive and other forms of comprehensive approaches to controls remain, at a minimum, legitimate.