

Technical Note on: The EU trade control regime and adoption of restrictive measures against Syria, Iran and North Korea related to dual-use items, arms and instruments of internal repression

1. General Principle

The **trade control** of dual use items is an element of the common commercial policy established by article 207 of the Treaty on the functioning of the EU. Since 2008, it is ruled by the Regulation 428/2009 as amended by the Regulation 1232/2011 (new EUGEA) and 388/2012 (Annexes updating).

The Regulation includes several Annexes listing items to be submitted to trade restrictive measures:

1. Annex I which contains the list of dual-use items submitted to export authorization delivered by Member States;
2. Annexes II a to f which define six EU General Export Authorizations covering certain items, operations and destinations. The objective of these Annexes consists essentially to facilitate certain transactions of items listed in Annex I to certain destinations. It could not be assimilate to a trade restriction.

Restrictive measures are essentially the implementation of UN Security Council Resolutions¹. It targets a state that by its acts or decisions presents a risk of "threat to the peace, breach of the peace, or act of aggression"². The implementation of such restrictive decisions are done by the EU through two different instruments:

- 1 **A Common and Foreign Security Policy Decision** as long as it has clearly an external policy objective (Chapter II of Title V of the Treaty on European Union);
- 2 **A external commercial policy Regulation** as long as it restraints the trade flow with the State of concerns. The adoption of such Regulation derogates to the codecision principle and shall be adopted by the Council only, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission. The European Parliament is only informed(article 215 of the Treaty of the functioning of the EU).

¹ Nevertheless, restrictive measures adopted in particular against China, Syria and partly Iran are not implemented an UNSCR.

² Article 39 of the UN Charter

Formally the adoption of the CFSP Decision shall precede and *authorize* the adoption of the trade restriction regulation. Presently three countries are submitted to restrictive measures as regard export of dual-use items and related items :

Syria³

- a. **Council Decision 2012/739/CFSP⁴** concerning restrictive measures against Syria:

Adoption of a prohibition to:

- export arms and related material
- certain dual use items related telecommunication or internet monitoring or interception items and technology⁵
- related services (technical assistance, financing, insurance and re-insurance)

- b. **Council Regulation 36/2012** (as amended lastly by Council Regulation 867/2012 and Council implementing Regulation 1117/2012) concerning restrictive measures in view of the situation in Syria:

Adoption of a prohibition to export certain dual-use items related telecommunication or internet monitoring or interception items and technology listed in Annex V⁶

Iran⁷

- a. **Council Decision 2010/413/CFSP** concerning restrictive measures against Iran (as amended lastly by 2012/829):

External relation decisions adopting an embargo on :

- Dual-use items (goods and technology) listed by Regulation 428/2009
- Arms and related material⁸

³ The list of Decisions and Regulations related to Iran is available on the Commission website at : http://www.eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

⁴ The Decision has been renewed by Council Decision 2013/255/CFSP of 31 May 2013

⁵ The Decision didn't define the list of items and delegates it to the Council which "shall take the necessary measures in order to determine the relevant elements to be covered by this article"

⁶ The Council Decision as well as the Council Regulation use the terms "sale, supply, transfer or export" (article 3 of the Decision and 4 of the Regulation) Unfortunately such terms are not defined and the difference between transfer and export should have required an clear distinction if there is any. The Council Decision includes also in the prohibition of export any participation "knowingly or intentionally in activities the object or effect of which is to circumvent the prohibition laid down in this Decision" (article 25). This prohibition is partly inserted in the Regulation for technical assistance and brokering activities (article 5). It does not seem to apply for exports as defined by article 4.

⁷ The list of Decisions and Regulations related to Iran is available on the Commission website at : http://www.eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

⁸ Formally the Decision covers the sale, supply and transfer (article 1). It includes also technical assistance, financing or financial assistance and brokering services (article 1.3). The Council Decision includes also prohibition "knowingly or intentionally in activities the object or effect of which is to circumvent the prohibition referred in point a and b" (article 1.3)

- Related services (technical assistance, financing, insurance and re-insurance)
- b. **Council Regulation 267/2012** on restrictive measures against Iran as amended lastly by Council Regulation 1263/2012 and Council implementing Regulation 1264/2012⁹:
 - Adoption of a prohibition to **export**¹⁰ items listed in Annex I (all items listed by Regulation 428/2009 except those mentioned in this Annex I) and II (items listed by the IAEA, UNSCR)
 - Adoption of a list of items submitted to **export** authorization (Annex III)¹¹
 - Adoption of a prohibition to provide **technical assistance or brokering services** for items listed in Annex and II¹²
 - Adoption of a prohibition to **import** items listed in Annex and II¹³
 - Adoption of a prohibition to provide **financial assistance** for items listed in Annex and II¹⁴
 - Adoption of list of items submitted authorization for **brokering services, technical assistance or financial assistance** (Annex III)¹⁵
- c. **Council Decision 2011/235/CFSP** (as amended by 2012/168/CFSP 2012/810/CFSP) on restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran
 - External relation decisions adopting an embargo of a prohibition to export certain dual use items related telecommunication monitoring and internet interception items and technology
- d. **Council Regulation 359/2011** (as amended by 264/2012 and 1245/2012) on restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran

⁹ The Regulation includes also prohibition “knowingly or intentionally in activities the object or effect of which is to circumvent the measures referred to in Article”: 2 (export), 5 (technical assistance, brokering services and financial support).

¹⁰ Formally the Regulation refers to “sale, supply transfer or export” (article 2). The Council Decision includes also prohibition “knowingly or intentionally in activities the object or effect of which is to circumvent the prohibition referred in point a to d” (article 5). Therefore the scope of Decision and the Regulation matches except that the term export is not used by the Decision.

¹¹ Formally the Regulation uses the term “sale, supply, transfer or export” (article 3). It includes also technical assistance, financing or financial assistance (article 5).

¹² Article 5b

¹³ Article 4

¹⁴ Article 5c

¹⁵ Article 5.2

Adoption of a prohibition to export certain dual-use items related *telecommunication or internet monitoring or interception services*¹⁶

Adoption of an embargo on equipment which might be used for internal repression

North Korea¹⁷

- a. **Council Decision 2010/800/CFSP** (amended by Council Decision 2011/860 and 2013/88) concerning restrictive measures against Democratic People's Republic of Korea¹⁸:

Adoption of a prohibition to export, import of items listed by the dual use Regulation 428/2009 and other items connected to WMD or listed by the UNSCR dedicated to North Korea¹⁹

- b. **Council Regulation 329/2007** concerning restrictive measures against Democratic People's Republic of Korea as amended (lastly by Council Regulation 567/2010 and Commission Implementing Regulation 137/2013) :

Adoption of a prohibition to export, import dual use items listed by Regulation 428/2009 (Annex I) and other nuclear weapons related items (Annex Ia)²⁰

2. Process to review the list of items and/or countries

As long as the **trade control** of dual use items are strictly ruling by the common commercial policy²¹, the amendment of Annex I and II of the Council Regulation

¹⁶ For the first time, these terms have been defined and shall mean “services that provide, in particular using equipment, technology or software as identified in Annex IV, access to and delivery of subject’s incoming and outgoing telecommunications and call- associated data for the purpose of its extraction, decoding, recording processing, analysis and storing or any other related activity” (article 1c.2)

The term “monitoring” is also defined by the Annex meaning “acquisition, extraction, decoding, recording, processing, analysis, and archiving call content or network data” (annex IV point E)

¹⁷ The list of Decisions and Regulations related to Iran is available on the Commission website at :

http://www.eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

¹⁸ This Decision repeals the Common Position 2006/795/CFSP (as amended)

¹⁹ The Decision covers the sale, supply, export, transfer and import. It includes also technical assistance, financing or financial assistance. The Council Decision includes also prohibition “knowingly or intentionally in activities the object or effect of which is to circumvent the prohibition referred in point a and b”

²⁰ The Regulation covers the sale, supply, export, transfer, import of items listed in both Annex. It includes also technical assistance, financing or financial assistance. The Regulation also includes also prohibition “knowingly or intentionally in activities the object or effect of which is to circumvent the prohibition referred in point a”.

Therefore the scope of the Regulation and of the Decision matches.

²¹ The exclusive competence has been confirmed twice by the European Court of Justice. See C-70/94 Werner

428/2009 is submitted since the entry into force of the Lisbon Treaty to the codecision of the Council and the Parliament²². The Regulation has been amended in 2011 under the new codecision to introduce in particular five new EU GEA.

The right of initiative to amend the Regulation is held by the Commission but regarding the updating of the list of controlled items, it shall be done within the framework of article 15 which states that the list *shall be updated in conformity with the relevant obligations and commitments and any modification thereof, that MS have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties*. This principle also included in the preamble of the Regulation was at the core of the debate when the Regulation has been adopted in 2000. It was a condition for certain Member States to accept that the list could be adopted only within the common commercial policy framework and not anymore under the CFSP as it was the case previously²³.

Before the entry into force of the Lisbon Treaty an annual update of the list of controlled items was adopted by the Council. Due essentially to the lengthy process of the codecision mechanism 2009, 2010 and 2011 updating were adopted only in 2012 (Regulation 388/2012).

To speed up the process, the Commission has drafted a proposal to amend the Regulation by introducing a delegation to the Commission. It is presently discussed by the Parliament and the Council²⁴. Considering that the competence to establish and adopt the list of controlled items has been heavily discussed when the Regulation has been adopted, the possibility to extend the competence of the Commission, even for a technical annual update, remains a controversial issue for certain Member States.

Restrictive measures shall be amended normally along the same principles which has led to their adoption.

Therefore in principle any amendment to a regulation concerning restrictive measures to one of the three listed countries shall be firstly authorized by a Decision of the Council within the framework of the CFSP.

Nevertheless, each Regulation could include its own reviewing process.

C-83/94 Leifer

²² Before it was the sole competence of the Council.

²³ It shall be noted that such principle raises some difficulties since the last two EU enlargements as far as some of the new Member States are not members of certain export control regimes. It is the case for Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia, Slovakia and Romania for the Missile Technology Control Regime (MTCR) and for Cyprus for the Wassenaar Arrangement.

²⁴ Commission Proposal COM(2011)704 final of November 2011.

Syria : the revision of the restrictive measures shall be done through the same principles as the one used to adopt it. No special provisions have been included in the Decision or the Regulation²⁵

North Korea : since 2009, the Commission has been empowered to amend Annex Ia “on the basis of determination made by either the Sanction Committee or the UNSC” (article 13 of the Regulation). This might appear amazing considering the fact that Member States have accepted to derogate to a principle that they didn't accept for the reviewing of Annex I of the Regulation 428/2009 which consists also essentially in the implementation of decisions decided by international regimes or organizations

Regarding Annex I, a direct reference is made to the Council Regulation 428/2009. Therefore the updating of the list apply to North Korea is the one decided in the reviewing process of Annex I of the Regulation 428/2009.

Iran : The revision of the Decision concerning the restrictive measures shall be review, amend or repeal in the light of relevant decision of UNSC (preamble 24). The review of the lists of Annex II and III of the Regulation are not constraint by a prior Decision adopting within the CFSP framework. Even more the Commission has been empowered to amend those lists: on the basis of information supply by Member States or by the UNSC for Annex II, on the basis of information supply by Member States for Annex III²⁶.

Considering the review of Annex I (items of the Regulation 428/2009) as far as the Regulation doesn't establish specific procedure, it shall follow the same principle that one used to adopt the Regulation. Therefore a Council Decision should be adopted to authorize the amendment to the Regulation²⁷.

²⁵ Except to amend the list of persons and entities of Annex I and II (article 21 of the Decision) and updating Annex III of the Regulation (list of competent authorities in the Member States and adress for notifications to the European Commission (article 31).

²⁶ Article 45 of teh Regulation 267/2012

²⁷ It shall be noted that another interpretation might prevail. As long as the Regulation proceeds by a negative list of items (meaning that items listed in Annex I shall not be submitted to authorisation) an updating of Annex I of the Regulation 428/2009 will automatically amend Annex II of the Iran Regulation.