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Short comments and analysis of the Commission proposal to amend Regulation 428/2009 setting up a Union regime for the control of dual use items

Dual use items

A new element has been added to cover *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.*

A definition of cyber-surveillance technology is added in article 2.21. It covers the common understanding of such items (intrusion into information and telecommunication systems). A new subcategory has been added in Annex (Section B) to include those items.

> Comment: this addition changed completely the scope by extending to items that are not WMD related. For this new category the dual element is difficult to identify as long as it does not concern a contribution to prohibited end use with a normal industrial good but only a misuse of the normal application of the item. However, this is also in line with the trend already implemented in the current controls on e.g. IP monitoring software and telecommunication jamming equipment.
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> This addition could have been more appropriate in the anti-Torture Regulation 1236/2005.

Intangible Technology Transfers

The proposal simplifies the scope of ITT by deleting transmission "over the telephone" and the terms "outside of the Union" in the first part of the sentence. Therefore the focus is not anymore made on the transmission (uploading or downloading) but on the final recipient (end user).

If the proposal is adopted, export control of ITT will concern export of intangible technology by digital transfers to an end-user located (legal or natural) outside of the EU.

> Comment: The proposal, will close an never-ending debate on cloud computing. In principle, uploading controlled technology on a cloud located outside of the EU will not require an authorisation. Only downloading the controlled technology from a cloud by someone located in a third country might require an authorisation. It shall precise that the proposal does not consider differently the owner of the controlled information. Therefore if the owner downloads the information when he is travelling in a third country, he might as well need an authorisation.
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> The sensitive question of dual-use research has not been considered by the proposal.

Technical assistance

The proposal has integrated into the Regulation the Joint action (200/0401/CFSP). Technical assistance that consists of a service provided via the cross border of natural person has been since the Lisbon Treaty formally included in the Common Commercial Policy (see article 207.1 TFEU). The definition of the supplier of technical assistance has been added and it will help identifying the person (natural or legal) in charge of applying for the authorisation.

The scope has not been extended by the proposal and an authorisation to export is necessary only:

- if the exporter has been informed by his authority
- If the exporter is aware that it will contribute to prohibited uses (see article 4).

Comment: This cut and paste paragraph from the Joint Action will raise some questions. Why using a catch-all wording when the procedure covers both dual use items listed and not listed? Why not adding the wording "his obligation to exercise due diligence" to the term be "aware" like it is suggested for the new catch-all proposal

Catch all- clause

The three level catch-all mechanism established by the Regulation has been reorganized (exporter knows, has been informed, has ground for suspecting).

The new articulation includes only two levels:

- Exporter has been informed that the items contribute to WMD, military end-use in countries under arms embargo, contribution to military items exported illegally, serious violation of human rights, act of terrorism
- Exporter under "his obligation to exercise due diligence" "is aware" of uses refer above.

The new procedure has unionized the principle. If in the previous system Member States were free to decide and adopt a catch-all, the proposal requests that:

- If a Member State decides on catch-all, it has to inform other Member States and the Commission
- If no objection is received, the catch-all will have to be implemented by all Member States
- If there is objection, the Member State may maintain it only if it will prejudice its essential security interest.

Comment: The proposal reviews fundamentally the present situation. The simplification from a three levels mechanism to a two level might support a better understanding by operators. The catch-all level three (ground for suspecting) has regularly raised concerns by operators and certain authorities on how to implement it. However, the new term exercising "due diligence" will need also some guidelines to clarify its exact signification. Experience from conflict minerals (US legislation and EU commission proposal) might help to clarify its understanding.

The proposal might raise some implementing difficulties. Member States have different understanding of catch-all that might not be necessarily compatible with the new system. For catch-all might be a real challenge. For instance, for certain Member States, a catch-all consists in a prohibition to export while for

others it represents essentially a request for an authorisation to export. Therefore, the first group issues very few prohibitions per year while the other submits to authorisation a large group of items.

Lastly, as it is already the case under the present legislation, the necessity to apply a catch-all to non-listed items has always been considered by Member States in function of their national security policy and industrial configuration that might not match one another. Consequently, obtaining a consensus or meeting no objection to a 'unionized' a catch-all might be a real challenge.

Authorisation criteria

The list of criteria has been fundamentally reviewed by the proposal to add elements and/or to align it to the list of criteria established by the Code of conduct for weapons exports. In comparison with the present situation, considerations regarding human rights and preservation of peace and security have been formally added.

Comment: Authorisation is still assessed by Member States authorities but the list of criteria will be comprehensive, and not anymore indicative.

Broker and brokering activities

The definition has been enlarged to include subsidiaries of EU entity and someone acting from the EU (without being resident). The scope of brokering activities submitted to control has been reviewed and simplified. The proposal will extend the control to all dual-use items (and not only listed items) if the broker has been informed or if he is aware. The possibility offered to Member States to extend the scope of control in case the broker has ground for suspecting is not anymore available.

Comment: the proposal is in line with the one for catch-all: simplifying the procedure for this latter but not unionization. Amazingly the terms "exercise due diligence" have not been inserted as in the catch-all requirements.

Transit

The definition has been clarified to include transit operations not formally included previously like transhipment, temporary storage, unloadingfrom the carrier. The possibility to prohibit transit operation and/or imposing an authorisation for dual-use items listed and not listed has been integrated in one paragraph (previously its scope was limited to listed dual-use and Member States could decide to extend it).

Comment: Proposed amendments are essentially to align the Regulation to the Custom Code. It is unclear if transit authorisations are valid for the entire Union or only for the Member granting it (transit authorisations are not included in article 10). Prohibition will be valid only the Member State issuing it.

Global authorisation:
The project links issuing of global authorisation by Member States to the necessity for the applicant to have an Internal compliance Program in place. An annual report is also requested from the exporter.

Comment: It is unclear if the possibility to issue a Global Authorisation to operators has become an obligation for all Member States or it is still an option as it was in the previous text. Considering the definition (2.12), the new wording of paragraph 10.2, it seems that it has become an obligation. If this is the case, it seems a bit peculiar that the proposal did not define a framework to be applied by the Member States (scope, operations, exceptions,…).

Large project authorisation:
The possibility to grant one global authorisation to one exporter for a project involving more than one listed item to more than one end-user and or country, if the realisation of the project will not exceed one year, has been added.

Comment: the proposal seems to answer one of the main requests of Nuclear Industry for the supply of nuclear power reactor for electricity generation.

Union General Transfer Authorisation:

The proposal reflects a political compromise between certain Member States in favour of retrieving the Annex IV (authorisation for transfer between Member States) and those Member States who were in favour of maintaining it.
Comment: EU Transfer Authorisation is still in contradiction with the EU/Euratom internal market as long as the treaties established the principle of free movement of nuclear items. However, by establishing a general authorisation for intra-Union transfers, the risk of discrepancies posed by the previous situation is reduced (individual authorisation for certain items, and possibility for Member States to establish a national authorisation for certain items).

Competent Authority
The proposal defined the competent authority in function of the control operation:

- Export: the one of the Member State where the exporter is resident or established, if the exporter is outside the EU (not established, not resident) where the items are located
- Brokering, technical assistance: the one of the Member State where the supplier is resident or established, if the exporter if outside the EU (not established, not resident), the parent company or from where it will be supplied.

Amending control lists
The proposal empowered the Commission to amend Annex I by delegated acts. It includes the possibility to amend the cyber surveillance technology list (Annex I section B).

Enforcement/penalties
A new article has been added to prohibit the participation knowingly and intentionally, in activities, the object or effect of which is to circumvent the need for an authorisation.
Comment: this new paragraph adds a clear reference to illicit trafficking that was not covered before. The added value of this new paragraph is unclear and sounds a bit peculiar in a Regulation dedicated to the control of licit strategic trade.

Administrative cooperation, Transparency
Some new elements are proposed but none might fundamentally change the present situation.