
On 23 November 2016 the Council adopted an amending Regulation concerning goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. The legislative path leading to such a legitimization started in January 2014, by means of the Proposal for a Regulation, amending the Regulation (EC) No. 1236/2005, contemplated by the European Commission. Having regard to the 2014 COM Proposal as well as the several committee opinions and reports at EP level, the Regulation was amended with the primary aim to prevent EU exports from contributing to human rights violations in third countries.

Finally, on 13 December 2016, Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 November 2016 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment has been published on the Official Journal of the European Union (OJ L 338/1 of 13/12/2016).

In an overall perspective, the modified Regulation amends the 2005 version in a more operational and proper regulatory way. Indeed, on the one hand, useless administrative burdens for exporters, as well as normative overlaps among competent authorities, are avoided; on the other hand, it is enhanced a more comprehensive framework where each institution or actor, prescribed by the Regulation, knows exactly how to act for the sake of preventing the use of goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. Lastly, the amended Regulation totally underpins the European values embodied in the Treaty of the European Union (TEU) and in the Charter of Fundamental Rights of EU (The Charter).

In general term, the amendments provide for the following main changes to the Regulation:

- the definitions of “torture” and “other cruel, inhuman or degrading treatment or punishment” are strengthen by adding to the definition a sentence stating that “Capital punishment is not deemed a lawful penalty under any circumstances”.
- It facilitates by adopting an General Export Authorisation exports to countries that have abolished capital punishment for all crimes and confirmed that abolition through an international commitment.
- It prohibits brokering activities of goods located in third countries when those goods

1 The text of the Regulation is available at the following link http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE_27_2016_REV_2&from=EN
4 The Charter became legally binding with the entry into force of the Lisbon Treaty - 1 December 2009.
are subject to an import and export ban, as listed in Annex II (goods that can only be used for torture or capital punishment).

- It introduces a prior authorisation regime for brokering services and technical assistance related to goods listed in Annex III or IIIa (goods that could be used for torture or capital punishment but which also have legitimate applications);
- It introduces a prior authorisation regime for the supply of technical assistance concerning goods listed in Annex III or IIIa.
- It prohibits transport of goods in transit if they are listed in Annex II, III or IIIa (prohibition concerning goods listed in annex III or IIIa is not absolute but applies where the economic operator has some information about their use for torture or capital punishment in the country of destination).
- It prohibits the promotion at exhibitions and trade fairs in the EU and the advertising of goods listed in Annex II.
- It establishes a coordination group, which will serve as a platform for Member State experts and the European Commission to exchange information on administrative practices.
- It provides for an urgency procedure in case rapid amendment of the Regulation's annexes is necessary.

More specifically:

1. In the Preamble:
   a. The recitals are modified and replaced as to be 26 where the core changes, as well as the main normative framework⁵, are presented.

2. In Chapter I, Subject matter scope and definitions:
   a. Article 1, the subject matter, is replaced in order to also establish the rules governing the supply of brokering services, technical assistance, training and advertising relating to the goods contemplated.

3. In Chapter II, Prohibition provisions (Annex II):
   a. Articles 3 and 4 are replaced in order to impose a total ban for the export and import of goods listed in Annex II.
   b. Articles 4a, 4b, 4c, 4d, 4e and 4f are added in order to prohibit the transit, training, trade fairs, and advertising of items listed in Annex II. Article 4f

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⁶ In the definition of brokering services the ‘ancillary’ ones are explicitly excluded, which are deemed as transportation, financial services, insurance or re-insurance, or general advertising or promotion.
concerns MS’ possibility to adopt or maintain national measures in order to restrict ancillary services related to Annex II goods.

   a. Article 5, paragraph I is replaced in order to adjust the normative framework according to which no export authorisation shall be required for customs territory of the Union goods, which fall under the transit procedure settled by Art. 226 of Regulation (EU) No 952/2013, (instead of Art. 91 of Regulation (EEC) No. 2913/92).
   b. Article 6, paragraph I is replaced in order to establish the criteria for granting export authorisation also in the light of intended end-use and the risk of diversion considerations.
   c. Article 6a is added in order to prohibit the transit of Annex III goods if anyone, empowered by the Regulation, knows that such good is intended to be used for torture or other cruel, inhuman or degrading treatment or punishment in a third country.
   d. Article 7a is added for the sake of setting out the authorisation requirement for brokering services and supply of technical assistance to Annex III goods.

5. A new chapter dedicated to “goods that could be used for the purpose of capital punishment and have been approved or actually used for capital punishment by one or more third countries that have not abolished capital punishment” has been added. This chapter targets essentially medicinal products that could be used for lethal injection.
   Chapter IIIa, Goods that could be used for the purpose of capital punishment, is added:
   a. Articles 7b, 7c, 7d and 7e are added by following the same rationale of Chapter III, namely: ‘Export authorisation requirement’, ‘Criteria for granting export authorisations’, ‘Prohibition of transit’ and ‘Authorisation requirement for certain services’.

6. In Chapter IV, Authorisation procedures:
   a. Article 8 is replaced with the view of properly defining the types of authorisation and issuing authorities (see the table below).
   b. Article 9 is replaced as to issue the authorisation forms, the period of validity and the procedures the competent authorities can undertake if they deem appropriate. Particularly:
      i. Authorisations for export, import or transit: form in Annex V;
      ii. Authorisations for brokering services: form in Annex VI;
      iii. Authorisations for technical assistance: form in Annex VII.

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7 As stated in article 9.1: Such authorisations shall be valid throughout the Union. The period of validity of an authorisation shall be from three to twelve months with a possible extension of up to 12 months. The period of validity of a global authorisation shall be from one year to three years with a possible extension of up to two years.
c. In Article 10 paragraph 2 is replaced in order to add the custom authorities possibility to detain items listed in Annexes II, III or IIIa, if no authorisation has been granted.
d. Article 11 is replaced settling the MS’ procedure for the notification of an authorisation dismissal.

7. In Chapter V, General and final provisions:
   a. Article 12 is amended as to empower the EU Commission to adopt delegated acts and to amend all the annexes to this Regulation (I, II, IIIa, IIIb, IV, V, VI, VII).
   b. Article 12a is added to set out the requests for adding goods to the existing lists.
   c. In Article 13, paragraph 3a is inserted to establish the Commission’s task to prepare an annual report on the exchange of information between MS’ authorities and the COM - such document will be publicly available.
   d. Article 13a is added to settle the processing of personal data as ruled by Directive 95/46/EC and Regulation (EC) No 45/2001.
   e. Article 15a is amended in order to set forth the delegated acts procedure.
   f. Articles 15b, 15c, and 15d are inserted to introduce, respectively: an urgency procedure*, an Anti-Torture Coordination Group9 and a Review Mechanism.
   g. Article 18 is amended as to specify the territorial scope of the Regulation according to the new, and modified, articles.

8. In the Annexes:
   a. In Annex II, item 1.1 is replaced (i.e. gallows, guillotines and blades for guillotines);
   b. In Annex III, sections 4 and 5 are deleted;
   c. New Annexes IIIa, IIIb, VI, and VII are added.

Article 8 - Authorisations

<table>
<thead>
<tr>
<th>Type</th>
<th>Annex</th>
<th>Issuing Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Union General Export Authorisation</td>
<td>Iib</td>
<td>Regulation</td>
</tr>
<tr>
<td>Individual export authorisation</td>
<td>II, III, IIIa</td>
<td>MS where the exporter is resident or established</td>
</tr>
<tr>
<td>Global export authorisation</td>
<td>III, IIIa</td>
<td>MS where the exporter is resident or established</td>
</tr>
<tr>
<td>Transit authorisation</td>
<td>II</td>
<td>MS, according to annex I, where the legal or natural person or body transporting goods is established10.</td>
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*Specifically, the urgency procedure could be triggered when new goods enter the market or where there is a clear and immediate risk that those goods will be used for purposes that entail human rights abuses within the meaning of the Regulation.

9 Such a coordination group will serve as a platform for member state experts and the Commission to exchange information on administrative practices as well as a forum to discuss matters of interpretation, developments and implementation of the Regulation.
<table>
<thead>
<tr>
<th>Service Type</th>
<th>MS Authority Level</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imports authorisation</td>
<td>II</td>
<td>MS competent authority, annex I, where the museum is established.</td>
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<tr>
<td>Supply of technical assistance</td>
<td>II</td>
<td>MS competent authority, annex I, where the supplier is resident, established or the museum is established.</td>
</tr>
<tr>
<td></td>
<td>III, IIIa</td>
<td>MS competent authority, annex I, where the supplier is resident or established.</td>
</tr>
<tr>
<td>Brokering services authorisation</td>
<td>III, IIIa</td>
<td>MS competent authority, annex I, where the broker is resident or established.</td>
</tr>
</tbody>
</table>

10. “If that person, entity or body is not resident or established in a Member State, an authorisation shall be granted by the competent authority of the Member State in which the entry of goods into the customs territory of the Union takes place. Such an authorisation shall be an individual authorisation”.

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