IXth Chaudfontaine Group Conference 2019

A decade of evolution of dual-use trade control concepts: strengthening or weakening non-proliferation?

2 - 4 June 2019, Chaudfontaine, Belgium

SUMMARY REPORT

1. General introduction

The Ninth Edition of the Chaudfontaine Group, which was held from 2 to 4 June 2019 in Chaudfontaine (Belgium), made the state of play of **ten years** of EU legislation in dual-use items trade controls.

The objective was to assess the main **concepts** and **principles** contained in the *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* and the identification within those of potential international standards.

In order to better grasp and assess the different aspects and dimensions of the EU dual-use trade control system in place, the conference was divided in **three main sessions**:

- Session I focusing on the definition of concepts;
- Session II focusing on the definition of principles and mechanisms;
- Session III focusing on the EU list of controlled items (Annex I to Regulation 428/2009) and its adoption by third States.

The first session aimed at the analysis of the main **concepts** defined in the Regulation. In this framework, concepts such as: "dual-use items", "technology", "basic research", "end-user", "exporter" and "ICP" have been analysed.

The second session brought to light the main **mechanisms and principles** established by the EU dual-use Regulation, such as: the no undercut principle, due diligence and mechanisms for verification and information-sharing among Member States and between Member States and the European Commission (see for example the sharing of information on license denials and the application of catch-all clauses). In this context, parallelisms have been drawn between mechanisms and principles implemented at the EU level and those adopted in other systems, such as in the Nuclear Suppliers Group or in the Wassenaar Arrangement.

The third session considered the **EU list** of controlled items from several perspectives such as, its technical dimension and implementation by competent authorities and industries, the issue of updates and the adoption of the list outside the EU context, by third countries.

The conference gathered **participants having different backgrounds** and working in different sectors: governments, industry, researchers from European academic institutions as well as officials of the European Union in their personal capacity. Each participant actively contributed to the discussion by providing a short presentation aimed at launching the debate.

2. Main findings by session

2.1 Definition of concepts

From the discussion on concepts defined by the EU Regulation, it emerged a certain **lack of consensus and clarity in definitions**.

The very definition of "dual-use items" has been questioned, given its dichotomy between military *vs* civil items which seems reductive and lacking of legal certainty.
On this issue, it has been pointed out the wider scope of application compared to the definition, which does not include all WMD categories (chemicals and bio products are left out) or other items controlled for human rights issues.

Still, beyond the verity of dichotomy often attributed to dual-use items (military vs civil, peaceful vs non-peaceful, benevolent vs malevolent, etc.) the definition does not grasp the element of **intentionality** linked to the end-use of the item, which actually determines the dual nature and the authorisation of the transfer.

Other examples of reductive definitions are given by the notion of "technology" and "basic scientific research which leave **too much room for interpretation** to implementers and lacks of "operability". For "basic scientific research", for example, the definition is of little help in tracing a clear border line between fundamental research and basic research. Still, the concept remains very useful and some inspiration for improvement can be taken from other systems, such as the Australian one which makes a distinction between "pure basic research" and "strategic basic research".

Other reasons for the **lack of shared consensus** on concepts in the EU dual-use Regulation are to be found in the way the document was drafted. In fact, although it is a regulation, directly applicable in all Member States, it has **been drafted more like a Directive**, leaving the implementation and interpretation of many provisions to Member States individually. It is the case for the notion of "ICP" whose definition and role in the system are not clearly defined by the Regulation. The result is a disharmonised EU system including both overregulated and dysregulated national legislations, increasing the burden and the difficulties for industries operating on the EU territory.

As conclusion for this first session, a general trend emerged requesting to avoid partial definitions and unilateral interpretations, more alignment among countries sharing trade control system(s) and more guidance for economic and academic operators on expected behaviour.

2.2 Definition of principles and mechanisms

Discussion during the second session stressed even more the difficulty in implementing a **common understanding of principles** established by the Regulation. It is the case, for example, for the catch-all clause mechanism, interpreted by some Member States as a deny

mechanism and by others as a simple verification mechanism which could lead to the authorisation process.

Still, the importance of **having like-minded States** in a trade control system has been highlighted, especially in international fora, such as the NSG. It emerged, in fact, that mechanisms, such as the no undercut principle, are more performant and useful if applied by States sharing the same "values".

This second session also brought to light bright and dark sides of the EU dual-use trade control system. Among the bright sides, it has been highlighted how the EU dual-use Regulation allows for (more) **transparency** among Member States, in the sense that there are provisions that, if properly exploited, represent the legal basis for closer cooperation between MS (notably art. 19 on exchange of information and art. 25 on reporting measures).
On the dark side, the EU dual-use Regulation and the EU dual-use trade control system in general, do not allow for **effective verification mechanisms**, which are left to the unilateral interpretation and will of national legislations and practices. In the prosecution area, for example, this lack of regulation at the EU-level represents an even bigger obstacle given the supplementary need of judicial cooperation between States.

2.3 EU list of controlled items

The third session praised the success and deplored the limits of the EU list of controlled items.
The **worldwide spread adoption** of the EU list outside the EU borders can be considered as a success story, for the EU system as such and for the EU outreach policy in third countries in particular. In this context, the quantity (how many countries) and the quality (content of the list if copy-paste or inspired by) of the adoption of the EU list in third countries has been explored.
As for deplored limits of the EU list, its length and technical nature have been pointed out as main elements making this list difficult to implement for competent authorities and economic/academic operators. Still its usefulness has not been questioned, in the end.

3. General conclusion and ways ahead

Concluding and asking the question at the origin of the conference, which was if dual-use trade control concepts as developed today are strengthening or weakening non-proliferation policy, it seems that the answer is **strengthening rather than weakening**. However, two main remarks can be added to this general positive balance.
First and as it concerns the EU, lot of work remains to be done at the EU level to strengthen **harmonisation** and "**certainty of concepts**", as the situation widely differs from Member State to Member State.
Second, a re-focus on the **ultimate aim of dual-use trade controls** seems necessary. In fact, if on one side the scope of controls runs far beyond the original WMD proliferation-related concerns (see, for example, the human security issue), on the other side, additional measures should be implemented to face new and emerging dynamics linked to the "old" WMD proliferation-related concerns (student visa/vetting, proliferation finance control and Foreign Direct Investments are some examples).