

X EDITION OF THE CHAUDFONTAINE GROUP

The identification of gaps between formal definitions and their scope of application in Council Regulation (EC) No. 428/2009

While new international security challenges would require a review and update of legal definitions, the EU Dual-Use Legislation seems not to properly respond to such new demands. For this reason, from 26 to 28 January the 2020 Chaudfontaine Group gathered to discuss the gaps existing between formal definitions and their scope of application in Council Regulation (EC) No. 428/2009¹, aiming to find an agreement on new potentially improved definitions. The group was composed of academics, public authorities and experts from research centres.

The attention was mainly focused on the concepts of “dual-use items” and “export”.

- With regard to “dual-use items”, it is important to keep in mind that many of the current security threats are posed by the transfer of intangible technology, which does not require the physical crossing of a border and is thus not subject to concrete border controls. For this reason, the working group started its discussion with the presentation of the TIM Project², a useful tool developed by the Joint Research Centre of the European Commission, based in Ispra, to monitor and map the transfers of intangible and emerging technologies. TIM will be tested soon by the University of Liège to screen scientific publications and identify those potentially concerned by dual-use controls requirements.

Subsequently, in analysing Council Regulation (EC) 428/2009, the experts identified as their main goals an improved definition of “dual-use items” and a better clarification of the meaning of “civil and military purposes”. During the debate, several issues were raised, including: (i) the juxtaposition between the terms “dual use items” and “dual use goods” present in the Regulation; (ii) the necessity to control and include in the definition of dual-use items emerging technologies and human rights consideration; (iii) the necessity to simplify the current definition of dual-use items, eliminating its second part; (iv) the fact that the current definition of dual-use items only makes explicit reference to nuclear weapons and their manufacture; (v) the necessity of a EU autonomous list of dual-use items; (vi) the possibility to elaborate a definition of “military end-user” to avoid ambiguity on the purposes for which dual-use items could be exported.

In working on an improved terminology, the group of experts agreed upon: (i) the necessity to simplify the wording of the dual-use items definition, making also reference to intangible technologies and to new hybrid threats³; (ii) not including the reference to human rights considerations in the formal definition of dual-use items; (iii) specifying that “goods” are a subcategory of the more general “dual-use items”.

¹ For more information about Council Regulation (EC) 428/2009, the *Vademecum of the European Union Dual-Use Items Control Regime: Comment of the Legislation article-by-article* can be consulted on the website of the European Studies Unit (University of Liège), at http://www.esu.ulg.ac.be/49/pdf/euduicr/euduicr_full.pdf.

² <https://www.timanalytics.eu/website/>.

³ The definition of hybrid threats can be found on the website of the Council of the EU, at <https://www.consilium.europa.eu/en/press/press-releases/2019/12/10/countering-hybrid-threats-council-calls-for-enhanced-common-action/>.

On the basis of these common opinions, a new definition was drafted (new wording in green):

“Dual-use items’ shall mean goods, software and technology which can be used for both civil and military purposes, as covered by the provisions of this Regulation and its Annex I. Such items both tangible and intangible, are or may be used in connection with nuclear, chemical and biological weapons and their means of delivery, or with military and hybrid capabilities”.

- With regard to **“export”**, the discussion focused on the legal entities responsible for a transmission, the concept of passive transmission, clouds and how to include uploads/downloads to/from them in the definition of “export” of dual-use items.

There was no general consensus on the understanding of “export”, but the experts all agreed upon: (i)shortening the definition and making it clearer; (ii)considering a separate dedicated provision on clouds; (iii)controlling the process of a person transferring intangible dual-use items to him/her-self.

A new working session of the same experts will be organized to focus on other definitions, such as “Public Domain” and “Fundamental Research”, and to conclude the discussions on “export” and “exporter”. An academic publication containing the new proposed definitions and their rationale will follow shortly after.