

On 18 November 2020, the Council published an **informal version of the final compromise text of the new EU Export Control Regulation (Recast of the Dual-Use Regulation 428/2009)**.

The way to the modernisation of EU export controls was a long process. Since the publication of the Green paper in 2011 (COM(2011) 393 final), almost ten years passed. In September 2016, the Commission transmitted its legislative proposal (COM(2016) 616 final) to the European parliament and the Council, which adopted their positions in January 2018 (TA/2018/6/P8) and June 2019 (ST 9923 2019 INIT), respectively.

Between October 2019 and November 2020, five informal trilogues took place. A compromise was reached during the final trilogue on 9 November, 2020.

Council's position presents substantial differences with regard to the RECAST as proposed by the Commission and as successively amended by the European Parliament. The adoption and publication of the final joint text is scheduled in May 2021 and its entry into force ninety days later.

The main changes characterising the final compromise text are the following:

- **Updating and introduction of new key concepts and definitions** (e.g. exporter, re-export, technical assistance, supplier of technical assistance, transit, arms embargo, ICP, cyber-surveillance items, essentially identical transaction).
- **EU autonomous mechanism to control the export of cyber-surveillance items for human right considerations** (art. 4a), and **publication of an “EU Watch List”**.
- **Enlarged scope of the catch-all provisions** with the introduction the new art. 4a establishing **human rights end-use controls** on cyber-surveillance technologies, the art. 8a for emerging technologies, and with the extension of art. 8 catch-all clause to the **prevention of act of terrorism**.
- **Coordination of national controls on non-listed items** pursuant to art. 8a, submitting the export of non-listed items to authorisation if such **authorisation is required on the basis of the national control list of another MS**.
- **Further harmonisation** of certain services and measures (e.g. controls on the supply of technical assistance, application of catch-all provisions)
- **Strengthened information-sharing and cooperation** among national authorities (licensing, customs, enforcement, e.g. Enforcement Coordination Mechanism of art. 22), as well as **with third countries, notably on outreach activities** (see Chapter IX, art. 27).
- **Greater transparency** pursuant to art. 24, with an **annual report by the Commission** reporting information on **authorisations** (number and value by types of items and by destinations), **denials**, **enforcement** of controls (number of infringements and penalties).
- **2 new EU general export authorisation: EU007 on Intra-group export of software and technology**, and **EU008 on Encryption**.

A more detailed view of the major updates is listed here below.

- **Re-Export, Re-export Declaration and Exit Summary Declaration**

- **Article 2.2b:** Broader definition of **re-export**, occurring also if, during a transit through the customs territory of the Union, an exit summary declaration has to be lodged because the final destination of the items has been changed.
- **Article 2.3 Exporter:** **re-export declaration** and **exit summary** are added as documents, and the definition of exporter is enlarged covering as well any natural person carrying the dual use items to be exported where these dual use items are contained in the **person's personal baggage**.
- **Article 2.5 and 2.5a:** it's introduced the definition of "**re-export declaration**" (the act within the meaning of Article 5(13) of the Union Customs Code) and "**exit summary declaration**" (the act within the meaning of Article 5(10) of the Union Customs Code).

- **Technical Assistance**

- **Article 2.8:** it's introduced the definition of "**technical assistance**" (*any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance*).
- **Article 2.9:** it's introduced the definition of "**supplier of technical assistance**".
- **Article 7:** it's introduced an **authorisation for technical assistance** related to dual-use items listed in Annex I if the supplier of technical assistance has been informed or is aware of any possible misuse referred to in art. 4.1.
The authorisation requirement does not apply in the following cases: (a) for countries listed in Part 2 of Section A of Annex II; (b) information in the public domain or basic scientific research; (c) supply by MS authorities or agencies in their official tasks; (d) for a MS armed forces; (e) for purpose cited in the exceptions for items in the MTCR in Annex IV; (f) it is the "minimum necessary" for an authorised exported item.
- **Article 7.4:** MS can extend these measures for non-listed items.
- **Article 7.5:** MS can adopt or maintain national authorisation requirement if the supplier of technical assistance has grounds for suspecting misuses.
- **Article 11.2:** authorisations for technical assistance shall clearly identify the end-user and its exact location.

- **Transit**

- **Article 2.10:** enlarged definition of **transit** (items: (a) placed under an external transit procedure - according to Article 226 of the Union Customs Code - and only pass through the customs territory of the Union; (b) trans-shipped within, or directly re-exported from, a free zone; (c) temporary storage and are directly re-exported from a temporary storage facility; (d) brought into the customs territory of the Union on the same vessel or aircraft that will take them out of that territory without unloading).
- Article 6.2: additional clarification on the **possibility to prohibit a transit** when taking place through the territory of multiple MS and depending if the natural or legal person or partnership having the power for determining the sending of the item is resident or established on the EU customs territory.

- **Large Project Authorisation**

- **Article 2.13:** Introduction of the **large project authorisation**.
- **Article 10: Individual and global export authorisations are valid for up to two years** (unless decided differently by the competent authority), **whereas large project authorisations** shall be valid for a duration to be determined by the competent authority, but **no longer than four years** (except in duly justified circumstances based on the duration of the project).

- **Article 2.19:** introduction of the definition of **arms embargo**.

- **Cybersurveillance Items**

- **Article 2.21:** introduction of the definition of “**cyber-surveillance items**”.
- **Article 8:** Introduction of **EU autonomous controls** allowing, under certain conditions, the establishment of human rights end-use controls **on cyber-surveillance technologies and** higher EU-level coordination mechanism which allows for greater exchange between the Member States concerning the export of cyber-surveillance items;

- **Internal Compliance Programme**

- **Article 2.22:** introduction of the definition of “**ICP**”.
- **Art. 10.4: mandatory implementation of ICP for exporters using global export authorisations**, unless considered unnecessary by the competent authority. ICP requirements relating to the use of global export authorisations shall be defined by MS.
- **Art. 14.2:** The implementation by the exporter of an ICP is taken into consideration by the MS when assessing an application for a global export authorisation.

- **Article 2.24:** introduction of the definition of “**essentially identical transaction**”.

- **Catch-all Clauses**
 - **Article 3: Scope of catch-all clauses extended pursuant to Articles 4, 4a, 8 and 8a.**

 - Article 4.4: When a MS imposes an **authorisation requirement under the catch-all** clause of art. 4, it has the **duty to immediately inform** its Customs administration and provide other MS and the Commission with the relative information, including (unless not appropriate or too sensitive) the items and end-users concerned.

 - **Article 4a:** it’s introduced a **new article establishing catch-all provisions for cyber-surveillance** items with possible misuse violating human rights. The authorisation requirement is mandatory when the exporter (§1) has been informed by the authorities or (§2) is aware of the possible misuse of the item, but it is left up to the MS to decide to establish such a requirement when (§3) an exporter has grounds for suspecting of the possible misuse.

 - Article 4a, §4 and 5: When a MS imposes an **authorisation requirement under the catch-all** clause of art. 4a, it has the **duty to immediately inform** its Customs administration and provide other MS and the Commission with the relative information, including (unless not appropriate or too sensitive) the items and end-users concerned. While the other MS have the duty to take into account the notified information and to review it within 30 working days.

 - Article 4a.6: if **all MS notify** the other MS and the Commission of **catch-all provisions under article 4a for essentially identical transactions**, the Commission shall publish in the C series of the OJ information regarding cyber-surveillance items and, when appropriate, also destinations.

 - Article 4a.10: **MS shall consider supporting the inclusion of items published pursuant to paragraph 6 in the appropriate international non-proliferation regimes** or export control arrangements with a view to extending controls.

 - **Article 8:** Scope of the catch-all clause for human rights or public security reasons extended to the prevention of **acts of terrorism**, and need to notify the measures to the Commission and the other MS indicating the exact reason. When the measure is the **establishment of a national control list**, the MS shall also inform the Commission and the other MS of the description of the controlled items (including any modifications to the national control lists). The measures and, separately, the national control lists will be published and updated by the Commission.

 - **Article 8a:** it’s introduced an **authorisation requirement for items not listed in Annex I but listed on a MS’ national control lists** (pursuant to art. 8) **published by the Commission**, and if the exporter has been informed of the possible misuse of these items for reasons of public security, prevention of acts of terrorism or human rights considerations. If MS refuses such an authorisation, it has to inform the Commission or,

in case of adoption, shall inform the customs administration and other MS and the Commission with information about the item and the end-users.

- **Article 22:** Creation of an **Enforcement Coordination Mechanism** by the **Dual-Use Coordination Group** to support (confidential) exchange of information and direct cooperation between competent authorities and enforcement agencies of the MS (e.g. exchange of best practises regarding risk-based audits, the detection and prosecution of unauthorised exports and/or possible other infringements).

- **Transparency and monitoring**
 - Article 24.1: The provision of guidelines and/or recommendations for best practices to exporters, brokers and suppliers of technical assistance shall be the responsibility of the MS where they are resident or established (with particular attention to SME).

 - **Article 24.2:** submission by the Commission, in consultation with the Dual-Use Coordination Group, of a **public annual report** to the EP and to the Council on the implementation of the Regulation, reporting **information on authorisations** (number and value by types of items and by destinations), **denials and prohibitions, compliance and outreach activities**, and **enforcement** of controls (number of infringements and penalties), with a particular attention to cyber surveillance items. The Commission and the Council shall make available guidelines on the methodology for data gathering and processing for the preparation of the annual report, including the determination of the types of items and the availability of enforcement data.

 - **Article 24.4: Between five and seven years after the date of application of this Regulation, the Commission shall carry out an evaluation of this Regulation and report on the main findings** to the EP, the Council and the European Economic and Social Committee.
After three years after the date of application of this Regulation, the Commission shall carry out an evaluation of Article 4a and report on the main findings to the EP, the Council and the European Economic and Social Committee.

- **Article 25: The obligation of record-keeping is extended to at least 5 years** (instead of 3 years), while the **documents and records of intra-Union transfers** of dual-use items listed in Annex I shall be kept for **at least 3 years** from the end of the calendar year in which a transfer took place and shall be produced.

- It's introduced a chapter IX on **cooperation with third countries** (notably, **outreach activities** on dual-use items trade controls) to promote the global convergence of controls.

- **Two new EU general export authorisations:**
 - Annex II G: **intra-group export of software and technology** (EU007)
 - Annex II H: **encryption** (EU008);