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European Commission Provides insight into possible directions for future EU dual-use export control regime

I.   Introduction

The European Commission has recently outlined its priorities and suggestions for modernising and improving the EU's Dual-Use export controls regime in a Communication.[1] The proposed approach focuses on 'smarter' controls, enhanced/improved exchange of information and intelligence between the authorities, a swifter reaction to emerging technologies, the de-listing of items which are commercially widely available, more focus on controls of intangible transfers, reducing the burden on companies, more international cooperation, and the creation of a level playing field within the EU and globally. The EU Council and European Parliament will first consider these ideas, and after that concrete legislative proposals are expected to be prepared.

Meanwhile, the current rules (set out in Regulation 428/2009)[2] have recently also been amended, essentially to allow a swifter updating of the EU's Dual-Use control list in line with changes in the various international control lists on which the EU list is based.

II.   Background to EU review

The EU's review process started three years ago with the publication of a Green Paper[3] to launch the public debate. Based on the result of a public consultation,[4] the Commission prepared a Communication outlining the reasons for the review of the current regime, the priorities it sees, and concrete suggestions on how these could be addressed. The Commission considers the review justified and necessary for the following reasons:

- There is a growing weapons of mass destruction (WMD) proliferation challenge.

- Export controls must focus more on intangible technology transfers since faster diffusion of technology (including through cloud computing) entails the risk of "cyber-proliferation"; unlike in the case of physical exports, no border controls are possible for these transfers.

- Supply chains are increasingly global and there is a clear need for level playing field in what is controlled, and how.

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[1] See Commission Communication entitled "The Review of export control policy: ensuring security and competitiveness in a changing world" (COM(2014)244).
[2] See the consolidated version of Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (not yet reflecting the most recent amendment through Regulation 599/2014 (see below)).
[3] See Green Paper (COM(2011)393).
[4] See Report on the public consultation (SWD(2013)7).

- The lines between civilian and defence technology and companies are blurring, and the increasing difficulty to distinguish between purely civil and dual-uses leads to an increase in the share of dual-use trade.

- Different levels of controls exist in third countries but also within the EU, and this distorts competition.

III. Priorities and proposed initiatives

The Commission's priorities have been grouped according to four themes, for each of which a number of concrete suggestions are proposed.

Priority 1 – Adjusting to evolving security environment and increasing the EU contribution to international security

- Recognising that security and human rights are interlinked and that controls should be broadened to focus not only on WMD/military items, but cover 'strategic items'.[5]

- Adopting a 'smart security' approach, by:

  - ensuring rapid reaction to challenges posed by emerging technologies (e.g. cloud computing, 3D printing, nanotechnology), while de-listing obsolete items or items widely commercialised;

  - clarifying controls of cyber tools (by promoting multilateral decisions, or introducing EU list or special catch-all mechanism), but without hindering competiveness of EU ICT industry; and/or

  - modernising the control approach, by clarifying the 'export'/'exporter' concepts; clarifying which authority is competent; updating the control of 'technical assistance'; enhancing consistency in brokering and transit controls; introducing anti-circumvention provisions; shifting emphasis to end-use monitoring, and facilitating legitimate exports.

- Addressing the challenge posed by intangible technology transfers, including through clarification of the control of dual-use research, while avoiding obstacles to free flow of knowledge and global competitiveness of EU science and technology; this could entail the introduction of special Union General Export Authorisations (UGEAs) for intra-company R&D, more focus on pre-transfer controls (registration and self-auditing), combined with post-transfer monitoring (compliance audits), and a possible code of conduct for scientists.

Priority 2: Promoting convergence and a global playing field

- Swifter updating of the EU control list (see also below).

- Optimising licensing processes and minimising delays in obtaining licences via:

  - the regular review of national general export authorisations and their possible transformation into UGEAs;

  - the introduction of new UGEAs for low value shipments, encryption, intra-company technology transfers, intra-EU transfers, and 'large projects';

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[5] The Commission, Council and European Parliament in a joint statement published on 12 June 2014, along with Regulation 599/2014, have acknowledged that certain ICT items can be used to violate human rights and undermine the EU's security (e.g. technology for mass surveillance, monitoring, tracking, tracing and censoring) and that this must be addressed in the review of the EU Dual-use export controls regime.

- ensuring that UGEAs are up to date in terms of covered destinations and items;

- harmonising certain licensing conditions and the validity period of licences; and/or

- developing guidelines on best practices (e.g. on processing times).

- Promoting global convergence including active outreach and cooperation with partner countries in developing convergent regulations, and to avoid conflicting regulatory requirements of key trading partners.

Priority 3: Developing an effective/competitive EU export control regime and addressing 'asymmetric' implementation within the EU to minimise distortions of competition and reduce transaction costs associated with controls within the EU

- Developing a robust common risk management framework.

- Harmonising the definition of 'catch-all', strengthening consultations, and reinforcing a policy of 'no undercutting', and possibly the creation of a partially public 'catch-all' database.

- Re-evaluating intra-EU controls in order to minimise barriers in the single market, possibly by reviewing the intra-EU control list, introducing special UGEAs, and shifting to post-shipment verification.

Priority 4: Supporting effective/consistent implementation/enforcement through a more integrated framework

- More exchange of information between EU export control authorities including on destinations, end-users, incidents and violation through expansion of the secure Dual-Use Electronic System (DUeS).

- Enhancing strategic/operational cooperation with enforcement agencies (such as customs) to increase effectiveness, for example, through joint operations.

- Ensuring coherence with other related EU policies/regulations, such as those on explosives precursors and firearms.

- Capacity building and training of officials (including customs officials) and pooling of experts.

- Recognising the crucial role of the private sector and the need for a true partnership with companies to enhance security, by:

  - encouraging the use of internal compliance programmes and possibly introducing standard requirements for these;

  - promoting convergence with customs trusted operators' programmes (Authorised Economic Operators) to reduce duplication of controls;

  - publishing reports with non-sensitive control information and guidelines; and/or

  - developing common EU IT tools and electronic licensing systems.

- Cooperating with third countries, e.g. on end-use monitoring of third-country companies and mutual recognition of assessments.

IV.   Next steps in the review process

At this stage, the Commission has not put forward any **concrete legislative proposals**. This will happen after the EU Council and the European Parliament have had a chance to consider these proposed directions for the future regime. Meanwhile, the Commission will also carry out **impact assessments** for the various options.

V.   Meanwhile, improvement of current rules

Until now, the updating of the list of items subject to dual-use export controls (Annex I to Regulation 428/2009) had to happen via the normal legislative procedure, i.e. the adoption of an amendment to the Regulation by both the EU Council and the European Parliament based on a formal proposal by the European Commission. This process has often been – rightly – criticised for being too slow to align the EU control list with updates of the international control lists on which it is based.[6] This leads to a divergent approach at international level. It may also disadvantage EU companies if their competitors outside the EU may not need a licence if items on an international list are narrowed.

With Regulation 599/2014, the EU Council and European Parliament have now 'delegated' the **power to update the EU control list** to the European Commission, which will cut short the current lengthy procedures. The Commission will also have the **power to immediately remove destinations for which EU arms embargoes are introduced from the list of destinations covered by UGEAs**.

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[6] Namely, the Australia Group, the Missile Technology Control Regime, the Wassenaar Arrangement, the Nuclear Suppliers Group, and the Chemical Weapons Convention.