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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE  
EUROPEAN PARLIAMENT**

**The Review of export control policy: ensuring security and competitiveness in a  
changing world**

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## **The Review of export control policy: ensuring security and competitiveness in a changing world**

### **1. Introduction**

The EU is a major producer and exporter of dual-use items and therefore a significant actor in counter-proliferation export controls. The EU export control regime emerged in the late 1990s and was gradually strengthened over the last decade, in particular in response to the EU Strategy against the proliferation of weapons of mass destruction (WMD) of December 2003. Regulation (EC) No 428/2009<sup>1</sup> (hereunder 'the Regulation') implements international commitments under United Nations Security Council Resolution (UNSCR) 1540 (2004), as well as relevant international agreements and multilateral export control regimes. The Regulation enables the free circulation of dual-use items – with some exceptions – inside the EU and lays down basic principles and common rules for the control of the export, brokering, transit and transfer of dual-use items.

Article 25 of the Regulation calls on the Commission to review its implementation and present proposals for amendments. Moreover, ten years after the adoption of the EU Strategy against WMD proliferation, the Council recently called for the continued pursuit of an effective EU WMD counter-proliferation policy and for a review and strengthening of export controls<sup>2</sup>. As a first step toward preparing the review, the Commission issued a Green Paper<sup>3</sup> launching a broad public debate concerning the EU export control system and, in January 2013, published a Staff Working Document<sup>4</sup> identifying the main issues raised by over 100 stakeholders, including their views concerning possible evolutions towards a more integrated EU export control regime ensuring security and a more level-playing field. A report to the European Parliament and Council on the implementation of the Regulation was adopted on 16 October 2013<sup>5</sup>, marking a second step in the review process. The present Communication aims at mapping the direction for EU export controls, and identifies concrete policy options for their modernisation and their adaptation to rapidly changing technological, economic and political circumstances.

This Communication has also been identified as an initiative under the Regulatory Fitness and Performance Programme (REFIT).

### **2. Export controls in a changing security, technological and economic environment: the need for an export control policy review**

The global counter-proliferation system has developed considerably since the turn of the century, and robust barriers have been erected against proliferation. Export controls constitute

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<sup>1</sup> OJ L 134, 29 May 2009, p. 1.

<sup>2</sup> Council Conclusions on ensuring the continued pursuit of an effective EU policy on the new challenges presented by the proliferation of weapons of mass destruction (WMD) and their delivery systems, 21 October 2013.

<sup>3</sup> COM(2011) 393 of 30 June 2011.

<sup>4</sup> SWD(2013)7 of 17 January 2013.

<sup>5</sup> COM(2013) 710 of 16 October 2013.

a key instrument in the counter-proliferation toolbox but they must keep pace with evolving proliferation threats, rapid technological and scientific developments and transformations in global economic activity that create new security challenges and impacts on the global level-playing field.

### **2.1. Evolving and new security risks and threats**

- There are growing WMD proliferation challenges and WMD proliferation still constitutes one of the greatest security risks for the EU, especially as an increasing number of states are developing capabilities of proliferation concern. Trade in sensitive items is therefore likely to remain a crucial pathway to outfit covert proliferation programmes in future.
- Globalisation and the increasing activity of non-state actors involved in clandestine proliferation programmes lead to a confluence of transnational security threats whereby illicit activities converge and a drug trafficker may also act as a terrorist or a proliferator. The terrorist threat and vulnerability to unconventional attacks continue to require special attention, notably due to the changing profile of terrorists and the globalised nature of terrorism.
- Proliferators are dynamic and devise evolving proliferation strategies to exploit the vulnerability of the interconnected global trading and information systems. They elaborate techniques to evade controls using increasingly sophisticated support networks characterised by the presence of a variety of non-state actors (including unsuspecting legitimate operators such as suppliers unfamiliar with proliferation risks, financing agencies, transport operators, scientific and academic bodies) and moving sensitive items through areas with weak domestic institutions and trans-shipment hubs.

### **2.2. Rapid technological and scientific developments**

- Innovation and the spread of technological advances play a key role in the emergence of new proliferation risks: the security of governments, but also of companies and citizens, has a growing technological component. New technologies put weapons design and manufacture within the reach of a larger group of persons, thereby multiplying threats. Furthermore, the rapid diffusion of information technology is exposing modern economies to new risks induced by the connectivity associated with global trade and global data networks - including the emergence of specific "cybertools" for mass surveillance, monitoring, tracking and interception. Cyber-security is now crucial for the security of the EU and "cyber-proliferation" has become an important dimension of export controls.
- Exports are increasingly transmitted, not transported. In the age of cloud computing, information flows containing sensitive technology can be used to produce unlimited quantities of sensitive goods and present a major challenge for export control, especially due to the inapplicability of border controls, and the difficulty for companies to ensure compliance (e.g. with respect to IT architecture, engineering

collaboration, travel of experts etc). Export controls thus need to operate 'online' in the context of a globally connected world, in which intangible technology transfers (ITT)<sup>6</sup> have become increasingly significant *vis à-vis* the physical movement of goods.

- Scientific research leads to extraordinary advances that benefit society, but the risk that research could be misused creates a growing tension between the principle of openness in science and security concerns. Debates have highlighted the need to take into consideration the global nature of science and the free flow of scientific information<sup>7</sup>, but have also emphasised the need to address the risk associated with potential abuse of scientific research and to ensure independent assessment of the security implications.

### **2.3. Global supply chains and the level-playing field**

- Security has become a key element for responsible supply chains. Export controls need to protect legitimate trade from the risks associated with illicit transactions at a time when trade flows are becoming more complex and vulnerable, as a more rapid and dematerialized global trade emerges from the multiplication of cross-border flows of goods, investment, services, know-how and people associated with international production networks. The use of intermediaries, front companies, diversion and transshipment points have multiplied the number and types of actors and activities involved in proliferation-sensitive transfers. The development of on-line services and e-commerce adds new challenges as digital trade must remain open and secure.
- The rise of global value chains and expanding international manufacturing capacities lead to an increasing foreign availability of dual-use items. The ownership and operation of dual-use industries is increasingly internationalised and there is now a remarkable variety of actors involved. This fundamentally affects the notion of "supplier" which lies at the core of the export control and illustrates the need for flexible export controls adjusting to changing economic realities.
- The profile of high-technology industries is also changing. The blurring of civilian and defense technology and industrial bases and the multiplication of items with uncertain dual-use features make it increasingly difficult to distinguish between purely civilian or dual-use transfers. As a result, dual-use trade has steadily increased over the years to represent a sizeable portion of external trade<sup>8</sup>. Its wide-ranging sector and product ramifications create operational challenges due to the growing volume and diversity of applications.
- Export controls represent a key competitive factor, as Europe's economy shifts towards innovative high value-added manufacturing, and European value chains are integral parts of global value chains. In this context, differentiated levels of controls in

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<sup>6</sup> Intangible technology transfer includes both the transfer of technical information via electronic means and the transfer of knowledge and skills by persons.

<sup>7</sup> C(2012) 4890 final on access to and preservation of scientific information.

<sup>8</sup> EU controlled dual-use exports are estimated to value approximately 2.5% of EU total exports. For more information on EU dual-use trade, please refer to COM(2013) 710 final.

third countries create distortions of competition to the detriment of EU companies operating globally. Also, some remaining divergent control parameters and instances of "asymmetric implementation" of controls may occasionally affect the consistent implementation of controls and the level-playing field within the EU.

### **3. Beyond materiality and borders: towards an integrated risk-based strategic trade control system.**

With the current export control regime, the EU has tried to strike a balance between security and trade. The system is generally considered robust and effective and provides solid legal and institutional foundations. But it cannot remain static: it must be re-evaluated and upgraded in order to face new challenges and generate the modern control capabilities the EU needs for the coming decade and beyond. This could be achieved by giving new impetus to the development of an integrated risk-driven strategic trade control model, based on the following directions:

- A risk-based review of the balance between the necessity of trade regulation and the reduction of regulatory burdens to ensure that legislation is clear and proportionate. Non-regulatory actions - guidelines, pooling of resources etc. - could also be envisaged to equip the EU control regime with flexible tools to respond to new challenges while ensuring a level playing field in the EU internal market.
- An integrated approach to enhance the coherence of all export control "pillars" (legislation, pre-licensing, implementation, enforcement, outreach) through the development of a common EU control network supporting a greater focus on consistent implementation and enforcement with a view to reducing distortions of competition and improving security.
- Transparency and engagement with stakeholders and a more prominent role for the private sector would be key to an integrated approach allowing operators to fully play their complementary roles, thereby optimising the use of resources and supporting effective compliance.
- Proliferation is carried out in an international context and export control policy needs to include an international dimension. The development of an integrated system would allow more active EU external action, strengthening multilateral processes that constitute the core of the global export control system while also providing a basis for mutually beneficial relations with key partners. This, in turn, would strengthen the EU's own security.

#### **3.1. Priority 1: Adjust to an evolving security environment and enhance the EU contribution to international security**

The EU export control system must respond to shifting foreign policy considerations and keep pace with new approaches to security. It needs to integrate the security implications of an ever growing number of emerging technologies and a broader range of dual-use items, in order to ensure their peaceful use. It needs to move beyond the increasingly artificial divide between

internal and external security and tackle evolving proliferation risks that move across borders and jurisdictions.

- The Commission will consider evolving towards a "human security"<sup>9</sup> approach recognising that security and human rights are inextricably interlinked. This may involve evolving towards a notion of 'strategic' items addressing not only and strictly, items with possible military and WMD proliferation end-uses, but taking a wider security approach. This may also imply a clarification of control criteria to take into consideration broader security implications, including the potential effect on the security of persons e.g. through terrorism or human rights violations. This approach would also strengthen the coherence with other security trade controls and converge with international trends, e.g. the Arms Trade Treaty (ATT)<sup>10</sup> and the UN Firearms Protocol.
- The Commission will consider developing a "smart security" approach to adjust to the transformations of dual-use items and the proliferation of new technologies and address the increasing complexity of the international supply chain. This may involve consideration of the following options:
  - Development of an "EU technological reaction capacity" for an active contribution to the highly technical discussions of control lists, but also to ensure rapid reaction to the challenges posed by emerging technologies (such as cloud computing, additive manufacturing (3-D printing), nanotechnology) as well as de-control of items that have become obsolete or widely available commercially. This mechanism could build upon the expertise available within export control authorities and on structured engagement with industry. It may also imply developing guidance where technologies represent a key development for business that presents risks and calls for transparency, legal clarity and a common approach.
  - Design of an effective EU response to the use of cyber-space for proliferation activities and clarification of controls of cyber-tools<sup>11</sup>. This may imply EU actions to promote multilateral decisions on cyber-tools, or alternative options such as the introduction of EU autonomous lists or a dedicated catch-all mechanism, without hindering the competitiveness of the EU information and communication technology (ICT) industry and its integration into global supply chains.
  - Modernised control approaches addressing the porosity of legal and illicit trade may include options for strengthening the legal basis and upgrading certain control modalities in order to cover all aspects and actors in the chain of controls and address divergent applications of controls and related vulnerabilities. This may involve

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<sup>9</sup> The "human security approach" intends to place people at the heart of EU export control policy, in particular by recognising the interlinkages between human rights, peace and security.

<sup>10</sup> The ATT aims at reducing illicit arms trade by setting transparency rules and common ethical standards for the international trade of conventional weapons.

<sup>11</sup> See as well the joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace", JOIN(2013) 1 final, 7 February 2013.

clarifying the notion of export and exporter to capture the variety of activities and actors involved in global supply chains, reviewing the determination of the competent authority (especially for non-EU companies), updating the control of technical assistance, enhancing the consistency and enforcement of brokering and transit controls as well as introducing specific legal provisions to counter circumvention and address transactions involving EU persons irrespective of their location. Furthermore, options regarding the introduction of new control modalities and the partnership with the private sector could contribute to shifting emphasis on end-use monitoring and facilitate legitimate exports and the detection of illicit trade.

- The Commission could examine options to promote a specific strategy to ensure "immaterial control" and address the challenge posed by Intangible Transfers of Technology (ITT), including the need to clarify the control of 'dual-use research', while avoiding undue obstacles to the free flow of knowledge and the global competitiveness of EU science and technology.
  - The clarification of the legal framework applying to ITT may involve reviewing legal provisions and/or providing guidance relating to basic notions applying to electronic transfers of controlled technology. It may also concern the control modalities and the introduction of specific tools to facilitate the free flow of technology (e.g. EU General Export Authorisations (EUGEAs) for intra-company research and development) while enhancing ITT traceability and enforcement through an approach shifting the focus on pre-transfer control provisions - e.g. registration, self-auditing - and post-transfer monitoring - e.g. compliance audits - rather than on the transmission itself;
  - Targeted and coordinated outreach for academic research communities throughout the EU could raise awareness about applicable rules and promote effective implementation by scientists and laboratory workers. Other options such as the preparation of a code of conduct for scientists engaged in the performance of dual-use research could also be envisaged.

### **3.2. Priority 2: Promote export control convergence and a global level-playing field**

In spite of the growing international recognition of export controls, differentiated control standards in third countries create distortions of competition and weak links in the global supply chain that proliferators can take advantage of. EU policy should therefore promote convergence towards global and effective controls for global supply chains, in order to remove the challenge for industry of concurrent compliance with differing regulations and support a level playing-field.

- The Commission could consider setting up an effective mechanism for a regular update of EU control lists drawing on expertise from national authorities, to ensure that control lists are in tune with technological and commercial developments and minimise distortions of competition associated with outdated controls.
- Although the EU licensing architecture is generally considered satisfactory, licensing processes continue to impact competitiveness. The Commission will therefore seek

ways to optimise the licensing architecture and processes in order to avoid burdensome licensing procedures and to minimise delays and distortions of competition. This could include options for the:

- Introduction of a system for a regular review of National General Export Authorisations (NGEAs) and discussion of their possible transformation into EUGEAs and extension to the whole EU;
- Shift towards open licensing through the introduction of additional EUGEAs, reviewing the balance between efficiently acting to counter proliferation and reducing the burden for licensing authorities and exporters through a proportionate level of control, e.g.:
  - "Low Value Shipments" to facilitate export of small quantities of items presenting a low proliferation risk;
  - "Encryption", to allow the export of ICT items which are widely used in industrial processes and operate in a highly competitive environment;
  - "Intra-company technology transfers" for research and development purposes;
  - "Intra-EU transfers" for Annex IV items<sup>12</sup>, allowing for control modalities that do not hinder the free-flow of goods and technology within the Single Market;
  - "Large projects" allowing authorities to look at the "bigger picture" rather than an accumulation of individual licensing applications.
- Review of the parameters (destinations, items) for existing EUGEAs to ensure that they are up-to-date, and harmonisation of some licensing conditions and requirements in order to promote consistent implementation throughout the EU, including the validity period of individual licences and of denials. Preparation of guidelines for consistent licensing practices, including best practices e.g. on processing times, could also be considered.
- The Commission will assess options to promote the global convergence of export controls with a view to facilitating trade in dual-use items. This could include actions to promote coherent, comprehensive and unified EU representation in the regimes<sup>13</sup> as a reflection of its role in counter-proliferation and trade. It could also involve pursuing active external outreach and cooperation to assist partner countries in developing convergent regulations, as well as developing export control dialogues with key trading partners with a view to avoiding conflicting regulatory requirements and reducing the administrative burden on export-oriented industries.

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<sup>12</sup> Annex IV to Regulation (EC) N° 428/2009 lists particularly sensitive dual-use items subject also to intra-EU transfer controls.

<sup>13</sup> See, for example, General Arrangements on EU Statements in multilateral organisations, doc.15901/11, 24 October 2011

### **3.3. Priority 3: Develop an effective and competitive EU export control regime**

The multilevel structure of EU export controls provides for a unique and flexible system, but instances of divergent application may occasionally compromise their overall effectiveness. The Commission should thus assess options to address the "asymmetric implementation" of controls in order to minimise distortions of competition and transactions costs associated with controls within the EU.

- Divergent control decisions are often attributed to a perceived lack of harmonised EU export control policy and especially to a divergent risk assessment underlying control decisions. A risk-based approach, based on the development of a common risk management framework could ensure greater consistency in the identification of high-risk transactions while optimising the EU-wide use of resources and reducing distortions of competition due to divergent control decisions.
- Catch-all controls<sup>14</sup> remain essential tools to prevent the use of non-listed items for proliferation, but uneven implementation has raised concerns in terms of legal clarity, distortions of competition and potential weak links in the chain of controls. A greater convergence could be achieved through the harmonisation of the notion of catch-all controls and the strengthening of consultation to ensure their EU-wide application and reinforce a policy of no-undercutting. This could be supported by regular exchange of information and the establishment of an EU catch-all database. Some information could be shared with customs and other agencies in order to enhance enforcement, or be made available publicly. Transparency can support operators' due diligence to ensure that the supply chain is secure.
- The Commission could assess options for a critical re-evaluation of intra-EU transfer controls in order to minimise remaining barriers in the Single Market, while keeping strict controls on the most sensitive dual-use items. This could include a review of Annex IV to focus on an updated list of most sensitive items and/or the introduction of an EUGEA for intra-EU transfers, including technology transfers. Appropriate conditions and requirements, including options for post-shipment verification within the EU, could be designed to compensate for the removal of pre-transfer licensing and to ensure the security of transfers and the availability of information.

### **3.4. Priority 4: Support effective and consistent export control implementation & enforcement**

Export control policy should not only focus on setting rules for the control of legitimate trade, but also consider the pre-emption and disruption of illicit trade. Consistent implementation and enforcement across the EU is essential to address the risk of evasion of control processes, but a lack of solid EU-wide statistics and intelligence still hampers effective policy and operational responses. The Commission will review the following options to develop a more integrated implementation and enforcement framework:

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<sup>14</sup> So-called "catch-all controls" apply to non-listed dual-use items with potential military or proliferation end-use.

- With over 40 000 applications per year, export controls are demanding in terms of administrative resources within control authorities. The development of an EU export control network could strengthen the overall capacity of the system while optimising the use of resources and keeping administrative costs under control, through the following options:
  - Enhanced structured exchange of information between export control authorities on licensing data as well as other relevant information (e.g. destinations, end-users, incidents and violations) could allow access to critical information for all competent authorities, based on clearly identified needs in order to avoid information overload. The secured IT infrastructure "DUeS"<sup>15</sup> could be expanded to support enhanced information sharing.
  - Enhanced strategic and operational cooperation with enforcement agencies, e.g. customs, could be achieved by ensuring integration of export control priorities in relevant policy cycles<sup>16</sup>, by sharing information through an EU-wide exchange system, developing common risk management tools and implementing joint operations. Targeted information exchange on enforcement activity would allow a better strategic overview of the effectiveness of controls across the EU and the sharing of best practices, and could feed back into policy formulation e.g. for the detection of illicit trade.
  - Improved coherence between different EU institutions and Member States and the identification of synergies between security-related trade control instruments, e.g. through the development of a common IT infrastructure as a shared platform to support exchange of information across the EU, could increase the overall impact of EU counter-proliferation actions. Coherence with other closely-related EU policies and regulations, e.g. under the EU Action Plan on chemical, biological, radiological and nuclear security, Regulation (EU) N° 98/2013 on explosive precursors and Regulation (EU) N° 258/2012 on firearms should also be ensured.
  - The past decade has seen extensive capacity-building on WMD-related matters, including significant export control outreach programmes to third countries, while initiatives within the EU are still at their early stages. The development of a targeted EU-wide capacity-building programme and training for relevant officials, including customs and border agencies, could increase capacity to prevent and detect cross-border trafficking of strategic items. The pooling of expertise e.g. through the further development of the "Pool of experts", could also strengthen the EU chain of control.
- In modern economies, the private sector plays the most crucial role in the control chain. Therefore, partnerships with the private sector could greatly enhance the security and resilience of the global supply chain. Operators are well-placed to spot illicit trade and protect sensitive technology, while uneven trade compliance creates trade distortions and

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<sup>15</sup> Dual-Use Electronic System

<sup>16</sup> In relation specifically to customs, the development of a new *Strategy and Action Plan on risk management and supply chain security* requested by the Council on 18<sup>th</sup> June 2013 provides a key opportunity to consider how an enhanced *Common Risk Management Framework* for customs controls can best be exploited to support customs-licensing collaboration, enforcement and trade facilitation for the future.

opens opportunities for the exploitation of weak points in supply chains. The creation of these conditions relies on better coordination and understanding between governments and the private sector and could imply various actions such as:

- Compliance efforts could be recognised through the facilitation of control and fast-track export processes by setting clear private sector compliance standards for use of simplified mechanisms (such as EUGEAs, NGEAs, Global Licences) as a substantial privilege granted to reliable exporters. This may include legal requirements and/or guidelines for operators to identify, manage and mitigate their risk of exposure to proliferation by undertaking enhanced vigilance for items of high proliferation concern through due-diligence and disclosure requirements, including the reporting of suspicious transactions. While costs for business should be minimised and self-regulation encouraged, standard requirements for 'Internal Compliance Programmes' (ICPs) could support a level-playing field within the EU. Compliance and competitiveness are mutually reinforcing, as compliance reduces the risk of inadvertent supply of dual-use items to programmes of concern that exposes firms to penalties and reputational damage. Furthermore, options to promote convergence with customs' "trusted operators" programme (AEO) could reduce duplication of controls and offer cost-effective avenues for both operators and administrations.
- Transparency and coordinated outreach could be critical steps to provide clarity on requirements, support operators' compliance efforts and improve their capacity to implement controls, thereby creating conditions in which each element of the supply chain is resistant to "contamination" by illicit trade. This could involve the publication of reports and non-sensitive control information, including guidance promoting good compliance practices.
- The development of common EU support tools for economic operators e.g. standardised IT tools and electronic licensing systems, could also support compliance efforts by companies.
- Export controls reflect international commitments and represent a key safeguard for the integrity of international trade and it is therefore essential to enhance their global effectiveness. Options for the co-operative implementation of controls with external partners could be examined to facilitate a secure trade in strategic items, e.g. through the development of end-use monitoring of third-country companies, as well as the mutual recognition of assessments.

#### **4. Conclusion**

Economic operators, Member States and citizens in the EU all have an interest in effective export controls, ensuring security by combating illicit trade while facilitating legitimate trade. An updated EU approach and regulatory framework will reinforce the security and integrity of the supply chain. This will require a more systematic exchange of risk information and coordination between licensing and other authorities as well as engagement with the private sector and closer international cooperation.

Before taking concrete initiatives for action, the Commission invites the Council and the European Parliament to consider the approach set out in this Communication. In parallel, the Commission will conduct an impact assessment of the review options outlined in this Communication to identify the most suitable regulatory and non-regulatory actions to bring them into effect. With reference to REFIT, the Commission will assess the costs and benefits associated with the various options, notably as regards potential regulatory simplification and burden reduction.

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## **List of acronyms**

ATT	Arms Trade Treaty
DUEs	Dual-Use Electronic System
EU	European Union
EUGEA	EU General Export Authorisation
ICP	Internal Compliance Programme
ICT / IT	Information (and Communication) Technology
ITT	Intangible Technology Transfer
NGEA	National General Export Authorisation
REFIT	Regulatory Fitness and Performance Programme
WMD	Weapons of Mass Destruction
UNSCR	United Nations Security Council Resolution