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**PROPOSAL**

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	30 September 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2016) 616 final
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)

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Delegations will find attached document COM(2016) 616 final.

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Encl.: COM(2016) 616 final



Brussels, 28.9.2016  
COM(2016) 616 final

2016/0295 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)**

{SWD(2016) 314 final}

{SWD(2016) 315 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

In May 2009, the Council of the European Union adopted Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items<sup>1</sup> (hereunder "the Regulation"). In line with Article 25(2) of the Regulation, the Commission presented in October 2013 a comprehensive report to the European Parliament and the Council<sup>2</sup> on the implementation of the Regulation. The report concluded that the EU export control system provides solid legal and institutional foundations but cannot remain static and must be upgraded in order to face new challenges. In April 2014, the Commission adopted a Communication<sup>3</sup> setting out concrete policy options for the review of the EU export control regime and its adaptation to rapidly changing technological, economic and political circumstances. In 2015, the Commission conducted an impact assessment of the review options outlined in that Communication to identify the most suitable regulatory and non-regulatory actions to bring them into effect. This proposal has been prepared in light of the conclusions of the impact assessment.

The export control policy review has been identified as an initiative under the Regulatory Fitness and Performance Programme (REFIT) in consideration of its potential regulatory simplification and burden reduction.

Council Regulation (EC) No 428/2009 has been amended on several occasions. Since further amendments are to be made, it should be recast in the interests of clarity and readability.

- **Consistency with existing policy provisions in the policy area**

The proposal aims at supporting the overall policy objectives of the Union, as laid out in Article 3 of the Treaty on European Union, i.e. "contribute to peace and security, as well as free and fair trade and the protection of human rights". The proposal will contribute to the European Security Strategy<sup>4</sup>, and in particular responds to the 2013 Council Conclusions on the new challenges presented by the proliferation of weapons of mass destruction (WMD)<sup>5</sup>. The proposal will also ensure that the EU and its Member States effectively comply with their international obligations, in particular with respect to WMD non-proliferation. Moreover, the proposal will enhance the EU's efforts to prevent non-state actors from gaining access to sensitive items and will thus contribute to the fight against terrorism<sup>6</sup>. Lastly, in light of the increasing blurring between the civilian and defence sectors, the proposal forms part of the EU's efforts to counter hybrid threats<sup>7</sup>.

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<sup>1</sup> OJ L134, 29.5.2009, p.1

<sup>2</sup> COM(2013) 710 final, 16.10.2013.

<sup>3</sup> COM(2014) 244 final, 24.4.2014.

<sup>4</sup> The European Security Strategy was adopted by the European Council on 12 December 2003.

<sup>5</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), 21 October 2013.

<sup>6</sup> OJ L 164, 22.06.2002, p. 3.

<sup>7</sup> JOIN(2016)18 of 6 April 2016.

The proposal is fully in line with EU trade policy's aim to foster competitiveness and reduce distortions to trade, and with the 2015 "Trade for All" Communication<sup>8</sup> which announced "*an ambitious modernisation of the EU's policy of export controls of dual-use goods, including the prevention of the misuse of digital surveillance and intrusion systems that results in human rights violations*".

- **Consistency with other Union policies**

The proposal – and in particular provisions relating to the control of cyber-surveillance technologies – will contribute to the protection of human rights globally, in line with the 2015 Human Rights Action Plan<sup>9</sup> and the EU Guidelines for Freedom of Expression<sup>10</sup>, which explicitly call for tightening controls on the export of such technologies.

The proposal will also support the digital single market strategy, as the introduction of controls on cyber-surveillance technology aims at addressing risks associated with digital trade. Since the proposal aims, in particular, to reduce administrative burden by making EU law simpler and less costly, it also serves the objectives of the REFIT programme.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

Dual-use export controls form an integral part of the Common Commercial Policy under Article 207 TFEU.

- **Subsidiarity**

Trade in dual use items must be based on common principles in compliance with Article 207 of the Treaty on the Functioning of the European Union (TFEU), while respecting Member States' prerogatives in the area of security. Moreover, EU intervention is necessary as the security objectives pursued can only be achieved collectively, if competent authorities act in close collaboration and in accordance with the same principles. Action at EU level is also necessary to address distortions of competition within the Single Market and to promote the convergence of controls with third countries and a more level playing field globally.

EU intervention is justified in light of the Charter of Fundamental Rights, since a number of human rights have been identified as potentially affected by exports of certain dual-use items, in particular in relation to exports of cyber-surveillance technology.

- **Proportionality**

The provisions in this proposal are limited to what is necessary in order to attain the objectives of the Regulation and therefore comply with the principles of proportionality.

The proposal consists mostly of amendments to existing provisions of Regulation (EC) No 428/2009, where they are duly justified to enhance the effectiveness or the consistency of controls throughout the EU. Amendments are also proposed that aim at simplifying the administration of controls and reducing the burden for operators across the Single Market.

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<sup>8</sup> COM(2015) 497 of 14 October 2015.

<sup>9</sup> JOIN(2015)16 of 28 April 2015.

<sup>10</sup> Foreign Affairs Council, 12 May 2014.

The proposal however also introduces new provisions to control the export of certain specific cyber-surveillance technology, in order to fill a regulatory gap identified during the export control policy review, i.e. the insufficient legal basis for control in this area.

As illustrated by the impact assessment, other instruments such as guidelines could usefully complement and support the implementation of legislative changes, but would not address the lack of legal clarity of some provisions of the Regulation or the lack of sufficient control of cyber-surveillance technology. Amendments to the Regulation are therefore necessary.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Results of ex-post evaluation**

In 2011, the Commission issued a Green Paper<sup>11</sup>, inviting stakeholders to express their views about the EU export-control regime. The Commission reported on the outcome of this process in the Staff Working Document "Strategic export controls: ensuring security and competitiveness in a changing world"<sup>12</sup>. The Staff Working Document concluded that stakeholders called for various adjustments to the EU export control system in order to adapt it to rapidly changing technological, economic and political circumstances. The Staff Working Document formed the basis for the presentation of a Report from the Commission to the Council and the European Parliament on the implementation of the Regulation<sup>13</sup> which opened the way to the review of EU export control policy.

- **Stakeholder consultations**

The Commission conducted wide-ranging stakeholder consultations to support the preparation of this proposal. The consultation strategy included regular dedicated conferences and outreach to key stakeholders in order to develop a dialogue with dual use industry, civil society and Member States.

The Impact Assessment also involved dedicated stakeholder consultations. A 'data collection study' was commissioned in 2014-2015, which included targeted surveys of industry associations and companies, national administrations, academia and non-governmental organizations. Also as part of the impact assessment, the Commission conducted a public consultation in 2015 regarding review options and their impact<sup>14</sup>. Stakeholders generally agreed that a review of current rules would improve the export control system, in particular with regards to its capacity to address evolving security risks such as WMD proliferation and terrorism and to respond to rapid scientific and technological developments, and could also enhance the efficiency of export control administration and companies' competitiveness. On the other end, many stakeholders raised concerns regarding the potential economic impact of options to control exports that could be misused for human rights violation in third countries.

- **Collection and use of expertise**

In the absence of official statistics on dual-use production or trade, the Commission has developed, since 2013, a statistical methodology to assess dual-use trade flows, and also

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<sup>11</sup> COM(2011)393, 30.6.2011.

<sup>12</sup> SWD(2013)7, 17.1.2013.

<sup>13</sup> COM(2013)710 final, 16.10.2013.

<sup>14</sup> [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=190](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=190).

makes use of licensing data shared by Member States. The data collection study commissioned as part of the impact assessment validated that methodology and provided further details e.g. on dual-use related trade flows and on specific sectors.

Data obtained from the private sector through interviews and surveys, as well as open sources and specialised research, provided additional insights on dual-use trade.

- **Impact assessment**

The impact assessment report was presented to the Regulatory Scrutiny Board (RSB) in March 2016 and received a positive opinion with comments. The RSB opinion is available on the Europa website at [http://ec.europa.eu/smart-regulation/impact/iab/iab\\_en.htm](http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm).

Besides the baseline scenario (no policy change), the impacts of four other scenarios were assessed, including Option 2 "Implementation and Enforcement Support" (consisting in soft law and guidance), Option 3 "EU System Upgrade" (adjustments to the regulatory framework), Option 4 "EU System Modernisation" (focusing on cyber-surveillance technologies and human rights) and Option 5 "EU System Overhaul" (implying full centralisation of controls at EU level).

As a result, a combination of Option 3 and 4 was selected as the 'preferred option'. Option 3 "EU System Upgrade" appears as the most efficient and effective option to address problems identified and in light of economic and social (security and human rights) impact criteria. Option 4 "EU System Modernisation" was also retained in spite of concerns expressed by some stakeholders. It is recognised that option 4 could result in a higher administrative burden for operators and authorities, since a new category of goods and technology would be subject to control. It also involves a risk that distortions of competition be introduced at global level, as it cannot be assured that other key technology suppliers will introduce similar controls. However, option 4 is expected to have a significant positive impact on security and human rights: it appears as an indispensable condition to prevent human rights violations resulting from the export of EU items to third countries and to address security risks, to the EU and its citizens, associated with new cyber-surveillance technologies. In light of this assessment, the proposal sets out a two-fold approach, combining detailed controls of a few specific listed items with a "targeted catch-all clause" to act as an "emergency brake" in case where there is evidence of a risk of misuse. The precise design of those new controls would ensure that negative economic impact will be strictly limited and will only affect a very small trade volume.

In spite of its positive long term impact, Option 2 appeared relatively costly in the short to medium term and could only be achieved with additional resources both at national and EU level. Therefore, Option 2 was not retained, although a gradual implementation of some actions could be envisaged (e.g. development of electronic licensing systems, technical consultations with industry) on the basis of a clear prioritisation of tasks and provided the necessary resources can be allocated, including through joint commitments by relevant stakeholders such as Member States and industry.

Option 5 would have implied radically changing the EU approach to export controls, including the centralisation of the implementation of controls and the establishment of a central licensing agency at EU level. Considerable the costs – administrative, financial as well as in terms of legal transition – and the lack of stakeholder support, this option was not retained.

- **Regulatory fitness and simplification**

As a REFIT initiative, the proposal is expected to bring benefits in terms of reduction of administrative burden both for operators and public administrations, in particular due to positive impact on staff resources and processing times. Thus, thanks to the introduction of new EU General Export Authorisations (EUGEAs), controls would become four times less costly for companies, and up to 11 times less costly for licensing authorities. The proposal is also expected to enable a reduction of administrative burden within the Single Market, in particular as the number of products subject to control on transfers within the EU would be reduced by approximately 40%.

The proposal also contains amendments to certain key control provisions whose implementation experience has demonstrated to be unclear. The proposal is thus expected to enhance legal clarity and, thus, reduce compliance costs due to complex and unclear control provisions.

The proposal does not provide for exemptions in favour of Small and Medium Enterprises (SMEs): due to overriding security reasons, it is imperative that SMEs comply with controls. However, the scope of certain provisions which may be particularly demanding in terms of human and IT resources has been limited to avoid excessive regulatory burden on SMEs. Thus, the requirement for companies to implement an effective Internal Compliance Programme (ICP) – a set of formal measures and procedures ensuring compliance with export controls – mainly applies in relation to global licences, while small companies that cannot afford to develop a formal ICP can export under most general authorisations and/or individual licences. Moreover, the proposal's simplification of licensing procedures and enhanced legal clarity will bring important benefits to SMEs.

Lastly, the proposal is expected to improve the international competitiveness of EU operators as certain provisions – e.g. on technology transfers, on the export of encryption – will facilitate controls in areas where third countries have already introduced more flexible control modalities. The proposal's new chapter on cooperation with third countries is also expected to promote the convergence of controls with key trade partners and a global level-playing field, and thus to have a positive impact on international trade.

- **Fundamental rights**

Surveillance activities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties must be laid down by law and constitute a necessary and proportionate measure in a democratic society with due regard for the legitimate interests of the individuals concerned. In recent years however, there have been numerous reports of cyber-surveillance technologies being exported to repressive regimes and/or into conflict areas and misused in violation of human rights. Cyber-surveillance technologies, which have legitimate and regulated law enforcement applications, have thus been misused for internal repression by authoritarian or repressive governments to infiltrate computer systems of dissidents and human rights activists, at times resulting in their imprisonment or even death. As evidenced by those reports, the export of cyber-surveillance technology under such conditions poses a risk to the security of those persons and to the protection of fundamental human rights, such as the right to privacy and the protection of personal data, freedom of expression, freedom of association, as well as, indirectly, freedom from arbitrary arrest and detention, or the right to life.

By subjecting exports of specific cyber-surveillance technologies to authorisation, the proposal provides for an effective response to threats for human rights resulting from their uncontrolled export, which was identified as a key issue in the impact assessment. While the measures will have some effects on the freedom to conduct a business for exporters, these measures will be appropriate to the overall objective of an effective response to threats to human rights resulting from the export of these technologies. The proposal is thus expected to have an overall significant positive impacts for the protection of fundamental rights. The Commission, in close consultations with the Member States and stakeholders, will develop guidelines to support the practical applications of the targeted catch-all controls. The Commission will endeavour to finalise the adoption of these guidelines in a synchronised manner with the entry into force of the Regulation.

#### **4. BUDGETARY IMPLICATIONS**

Some specific provisions in the proposal are expected to have implications on the resources of relevant services at EU or national levels. The implementation of the extended competence for the Commission to amend lists of dual-use items and general export authorisations by delegated acts is expected to require about 50% of a Full Time Expert (FTE), depending on the number of modifications to EUGEAs that could be expected each year. In addition, cyber-surveillance controls are expected to require some additional administrative costs (staff) for administrations, both at national and EU level (1 FTE).

The proposal also provides a legal basis to enable the realisation of certain actions – such as the development of electronic licensing systems – while the financing and budgetary implications remain to be assessed in detail before any decision is taken regarding their implementation.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Monitoring of implementation will be carried out in cooperation with Member States in order to ensure that competent authorities and exporters implement effectively and consistently the requirements of the proposed regulation. Periodic (annual) reporting will allow for appropriate monitoring of the implementation of the proposed Regulation and to inform the European Parliament and the Council regularly.

In addition, as indicated in the impact assessment report, the Commission will undertake an evaluation of its new initiative five years after its entry into force in order to assess the actual economic, social, and environmental impacts and evaluate its efficiency and effectiveness and the extent to which its results are consistent with the objectives. The Commission will communicate the results of the evaluation to the European Parliament and the Council.

#### **6. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSAL**

- **Modernisation of existing control provisions**

The proposal provides for amendments to various control provisions in order to clarify, simplify and improve the regulatory framework in light of "lessons learnt" and to tackle new developments:



- The proposal contains amendments to key export control notions in order to reflect new realities. The definition of dual-use items is thus revised to reflect the emergence of new types of dual-use items, such as cyber-surveillance technologies. The proposal also amends the definition of "export" and "exporter", as well as provisions relating to the determination of the competent authority, in order to clarify the application of controls to natural persons, who may be "exporters", especially when it comes to technology transfers (e.g. service providers, researchers, consultants and even a person downloading "controlled technology").
- Intangible technology transfers (ITT): The proposal clarifies ITT controls and facilitates low-risk technology transfers, as they only become subject to control when the dual-use technology is made available to a person in a third country, which is in particular expected to facilitate the use of cloud services;
- Technical assistance: With the entry into force of the Lisbon Treaty, the provision of technical assistance involving a cross-border movement has become EU competence and is subject to controls. The proposal therefore clarifies applicable controls and defines technical assistance.
- Strengthening of brokering controls: the proposal reduces the risk that controls are circumvented by extending the definition of the broker to subsidiaries of EU companies outside of the EU, as well as to brokering services supplied by third country nationals from within the EU territory. Moreover, in order to ensure their consistency and effectiveness, the proposal harmonises their application to non-listed items and military end-uses and extends their application to terrorism and human rights violations.
- Strengthening of transit controls: in order to ensure the consistency of control, and avoid distortions of competition and the risk of weak links in the chain of controls, the proposal harmonises the application of transit controls to non-listed items and military end-uses, and extends controls to the risk of misuse for terrorist acts and human rights violations.
- Tackling illicit trade: in order to counter illicit trafficking, and in line with other trade security instruments (restrictive measures), the proposal provides for certain controls – e.g. on brokering, technical assistance - to apply throughout the EU jurisdiction – including controls on the activities of EU persons located in third countries, and introduces an anti-circumvention clause, thus establishing an EU-wide legal basis for the prosecution of export control violations.
- **Optimisation of EU licensing architecture**

The proposal further harmonises licensing processes with a view to reducing the administrative burden associated with licences:

- Harmonisation of licensing processes: the proposal provides for a definition of authorisations and for common licensing parameters (e.g. validity period) and conditions for use of the EUGEAs (registration, reporting requirements...) and for global licences (requirement for an Internal Compliance Programme). A

standard requirement for transparency on licensing timelines is proposed with a view to reducing divergences within the Single Market.

A new authorisation for 'large-projects' is proposed for certain large multiannual projects e.g. construction of a nuclear power plant, providing the benefit of one single licence covering all related export operations, for the duration of the project and subject to certain conditions (e.g. reporting, auditing).

- Introduction of new EUGEAs: the proposal introduces new general authorisations to facilitate trade while ensuring a sufficient level of security through robust control modalities e.g. registration, notification and reporting, auditing:
  - Encryption: this EUGEA could be especially useful given the commercial importance and wide circulation of these items and to ensure a level-playing field in light of license exceptions existing in certain non-EU countries;
  - Low Value Shipments: this EUGEA aims at facilitating controls for shipments under a certain value provided the items and destinations are eligible and certain conditions are met;
  - Intra-company transmission of software and technology: this EUGEA aims at facilitating transfers of dual-use technology within a company and its affiliates in non-sensitive countries, in particular for research and development purposes, as long as the technology remains under the ownership or control of the parent company;
  - "Other dual-use items": in light of the experience of certain Member States, the proposal aims at equipping the EU with a capacity to facilitate controls of certain "other dual-use items" (e.g. frequency changers) when it is considered appropriate for certain items and destinations.
- Delegation of competence: the proposal expands the delegation of competence for the Commission to modify destinations or items on EUGEAs, with a view to ensuring that the EU export control regime becomes more flexible and capable of reacting to technological or economic developments.

- **Convergence of catch-all controls**

The proposal provides for a clarification and harmonisation of the definition and scope of catch-all controls to ensure their uniform application across the EU. The proposal also provides for a mandatory consultation procedure between competent authorities to ensure the EU-wide application and validity of catch-all decisions. It introduces regular exchange of information between the Commission and Member States to be supported by a "catch-all database" recording catch-all licensing requirements, end-users and items of concern.

- **Re-evaluation of intra-EU transfers**

The proposal revises the list of items subject to control within the EU in order to focus controls on an updated list of most sensitive items (in Section B of Annex IV), taking account

of technological and commercial developments. It also introduces a general transfer authorisation in Section A of Annex IV for the updated list of sensitive items. It thus minimises administrative burden and disruptions to trade within the EU while ensuring the security of transfers of most sensitive items through robust control modalities (e.g. registration, notification, reporting, auditing, post-shipment verification).

- **An initiative to control exports of cyber-surveillance technologies**

The proposal responds to the need to protect national security and public morals, in consideration of the proliferation of cyber-surveillance technologies whose misuse poses a risk to international security as well as the security of the EU, its governments, companies and citizens, and to the protection of human rights and digital freedoms in a globally connected world,

The proposal sets out new provisions for an effective control focusing on specific and relevant cyber-surveillance technologies. It introduces an EU autonomous list of specific cyber-surveillance technologies of concern to be subject to controls (monitoring centres and data retention systems), with detailed technical parameters. This systematic control is complemented by a targeted catch-all control, which allows controlling the export of non-listed cyber-surveillance technologies in certain situations where there is evidence that they may be misused. The targeted catch-all control applies where there is evidence that the items may be misused by the proposed end-user for directing or implementing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination.

Controls of cyber-surveillance technology are supported by a revised definition of "dual-use items", reflecting the evolution towards a wider approach to security also taking into consideration the security of the EU, its citizens and companies. The revised definition of "dual-use items" is combined with a definition of "cyber-surveillance technology" and revised control criteria, explicitly providing for controls to prevent exports where there is a clear risk of human rights violations and terrorism.

- **Enhanced cooperation on implementation and enforcement**

The proposal provides for enhanced information exchange between competent authorities and the Commission with a view to support effective and consistent application of controls. It introduces a legal basis regarding the introduction of electronic licensing systems and their interconnection with the Dual-Use Electronic System (DUeS) with a view to supporting more effective licensing procedures for all competent authorities, and for the setting up of 'technical expert groups' bringing together key industry and Government experts into a dialogue on the technical parameters for controls.

With due respect to the competences of the Member States, the proposal introduces provisions to support information-exchange and cooperation on enforcement, in particular with the setting up of an enforcement coordination mechanism under the Dual-Use Coordination Group.

- **Transparency and outreach – private sector partnership**

The proposal sets out transparency measures and expands outreach and information-sharing with operators in order to develop a "partnership with the private sector", as the "first line of defence" against evolving security risks, and in light of stakeholders' observation that

regulatory compliance and competitiveness are mutually reinforcing,. The proposal also provides a legal basis for the development of tools for operators as a key element of that partnership and e.g. supports the introduction of electronic licensing systems in all Member States, which will allow for more timely and efficient management of licensing processes and relations with economic operators.

In response to industry's call for a common interpretation and application of the Regulation, the proposal provides for the publication of guidance for exporters on topical issues. Transparency, e.g. with the publication of annual reports, will also enable civil society organisations to fully contribute to the formulation and implementation of export control policy.

- **Export control dialogue with third countries**

In order to enhance regulatory convergence and a global level-playing field, the proposal provides a basis for the development of regular dialogues between the EU and key trade partners, and for the negotiation of mutually beneficial measures such as end-user verification programmes (whereby selected third-country companies could be granted special status of "Verified end-user" and obtain EU-wide recognition and facilitation of controls). The EU is also implementing an "EU P2P Export Control Programme" in order to assist third countries to establish well-functioning export control systems, which offers a basis for updating third countries on developments with respect to EU legislation.

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↓ 428/2009 (adapted)

2016/0295 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**setting up a ~~Community~~  Union  regime for the control of exports, transfer, brokering  , technical assistance  and transit of dual-use items (recast)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty ~~establishing the European Community~~  on the Functioning of the European Union  , and in particular Article ~~133~~  207(2)  thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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↓ 428/2009 recital 1 (adapted)

- (1) Council Regulation (EC) No ~~1334/2000~~ of 22 June 2000 ~~setting up a Community regime for the control of exports of dual-use items and technology~~<sup>15</sup>  428/2009<sup>16</sup>  has been ~~significantly~~  substantially  amended ~~on several occasions~~  times . Since further amendments are to be made, ~~it~~  that Regulation  should be recast in the interests of clarity.

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↓ 428/2009 recital 2

~~Dual-use items (including software and technology) should be subject to effective control when they are exported from the European Community.~~

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↓ 428/2009 recital 15 (adapted)

⇒ new

- (2) United Nations Security Council Resolution 1540, adopted on 28 April 2004, ~~decides~~  decided  that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological

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<sup>15</sup> OJ L 159, 30.6.2000, p. 1.

<sup>16</sup> 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 (OJ L 134, 29.5.2009, p. 1).

weapons and their means of delivery, including by establishing appropriate controls over related materials ~~and to this end shall, among others, establish transit and brokering controls. Related materials are materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.~~ ⇒ Controls are also required under relevant international agreements, such as the Chemical Weapons Convention and the Biological and Toxin Weapons Convention, and in line with commitments agreed upon in multilateral export control regimes. ⇐

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↓ 428/2009 recital 3 (adapted)

- (3) An effective common system of export controls on dual-use items is ☒ therefore ☒ necessary to ensure that the international commitments and responsibilities of the Member States ☒ and of the Union ☒ , especially regarding non-proliferation, ~~and of the European Union (EU)~~, are complied with.
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↓ 428/2009 recital 14 (adapted)

- (4) ~~The Heads of State or Government of the EU adopted in June 2003 an Action Plan on Non-Proliferation of Weapons of Mass Destruction (Thessaloniki Action Plan). This Action Plan was complemented by ¶The EU Strategy against proliferation of Weapons of Mass Destruction adopted by the European Council on ☒ of ☒ 12 December 2003 (EU WMD Strategy). According to Chapter III of this Strategy, the European Union must make use of all its instruments to prevent, deter, halt, and if possible eliminate proliferation programmes that cause concern at global level. Subparagraph 30.A(4) of that Chapter specifically refers to ☒ , as updated by the Council Conclusions of 21 October 2013 on "ensuring the continued pursuit of an effective EU policy on the new challenges presented by the proliferation of weapons of mass destruction", calls for the ☒ strengthening ☒ of the ☒ export control policies and practices ☒ of the Union ☒ .~~
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↓ new

- (5) Considering the emergence of new categories of dual-use items, and in response to calls from the European Parliament and indications that certain cyber-surveillance technologies exported from the Union have been misused by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression, it is appropriate to control the export of those technologies in order to protect public security as well as public morals. These measures should not go beyond what is proportionate. They should, in particular, not prevent the export of information and communication technology used for legitimate purposes, including law enforcement and internet security research. The Commission, in close consultations with the Member States and stakeholders, will develop guidelines to support the practical applications of those controls.
- (6) As a result, it is also appropriate to revise the definition of dual-use items, and to introduce a definition of cyber-surveillance technology. It should also be clarified that assessment criteria for the control of exports of dual-use items include considerations

regarding their possible misuse in connection with acts of terrorism or human rights violations.

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↓ 428/2009 recital 8 (adapted)  
⇒ new

- (7) Transmission of ~~the~~ dual-use ~~software and technology~~ software and technology by means of electronic media, fax or telephone to destinations outside the ~~Community~~ Union should also be controlled. ⇒ In order to limit the administrative burden for exporters and the competent authorities of the Member States, the definition of export should however be revised to exclude transmissions which do not pose a grave risk of proliferation or other misuse covered by this Regulation. ⇐
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↓ new

- (8) Considering that various categories of persons may be involved in the export of dual-use items, including natural persons such as service providers, researchers, consultants and persons transmitting dual-use items electronically, the definition of exporter, and its application to natural persons, should be clarified.
- (9) The scope of "catch-all controls", that apply to non-listed dual use items in specific circumstances, should be clarified and harmonised, and should address the risk of terrorism and human rights violations. Appropriate exchange of information and consultations on "catch all controls" should ensure the effective and consistent application of controls throughout the Union. Targeted catch-all controls should also apply, under certain conditions, to the export of cyber-surveillance technology.
- (10) The definition of broker should be revised to avoid the circumvention of controls on the provision of brokering services by persons falling within the jurisdiction of the Union. Controls on the provision of brokering services should be harmonised to ensure their effective and consistent application throughout the Union and should also apply in order to prevent acts of terrorism and human rights violations.
- (11) With the entry into force of the Lisbon Treaty, it has been clarified that the supply of technical assistance services involving a cross-border movement falls under Union competence. It is therefore appropriate to clarify the controls applicable to technical assistance services, and to introduce a definition of those services. For reasons of effectiveness and consistency, controls on the supply of technical assistance services should be harmonised and apply also in order to prevent acts of terrorism and human rights violations.
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↓ 428/2009 recital 16 (adapted)  
⇒ new

- (12) ~~This Regulation (EC) No 428/2009 provides for includes items which only pass through the territory of the Community, that is, those items which are not assigned a customs approved treatment or use other than the external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to be kept in an approved stock record. Accordingly,~~ a possibility for Member States' authorities to prohibit on a case-by-case basis the transit of non-

~~Community~~ ☒ non-Union ☒ dual-use items ~~should be established~~, where they have reasonable grounds for suspecting from intelligence or other sources that the items are or may be intended in their entirety or in part for proliferation of weapons of mass destruction or of their means of delivery. ⇒ For reasons of effectiveness and consistency, transit controls should be harmonised and apply also in order to prevent acts of terrorism and human rights violations. ⇐

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↓ 428/2009 recital 5 (adapted)  
⇒ new

- (13) ⇒ Licensing conditions and requirements, including the period of validity and licensing timelines for individual and global authorisations, should be harmonised in order to avoid distortions of competition and ensure the consistent and effective application of controls throughout the Union. To this effect, it is also necessary to ensure a clear determination of the competent authority in all control situations ⇐ The responsibility for deciding on individual, global or national general export authorisations, on authorisations for brokering services ⇒ and technical assistance ⇐, ☒ as well as ☒ on transits of ~~non-Community~~ ☒ non-Union ☒ dual-use items, ~~or on authorisations for the transfer within the Community of the dual-use items listed in Annex IV~~ lies with national authorities.
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↓ new

- (14) A standard requirement for compliance in the form of "internal compliance programmes" should be introduced in order to contribute to the level-playing field between exporters and to enhance the effective application of controls. For reasons of proportionality, this requirement should apply to specific control modalities in the form of global authorisations and certain general export authorisations.
- (15) Additional Union general export authorisations should be introduced in order to reduce administrative burden on companies and authorities while ensuring an appropriate level of control of the relevant items to the relevant destinations. A global authorisation for large projects should also be introduced to adapt licensing conditions to the peculiar needs of industry.
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↓ 428/2009 recital 7

- (16) Common lists of dual-use items, destinations and guidelines are essential elements for an effective export control regime.
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↓ 428/2009 recital 6 (adapted)  
⇒ new

- (17) Decisions to update the common list of dual-use items subject to export controls ☒ in Section A of Annex I should ☒ ~~must~~ be in conformity with the obligations and commitments that Member States ☒ and the Union ☒ have accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties. ⇒ Decisions to update the common list of dual-use items subject to export controls in Section B of Annex I, such as cyber-surveillance technology, should be made in consideration of the risks that the export of



such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States. Decisions to update the common list of dual-use items subject to export controls in Section B of Annex IV should be made in consideration of the public policy and public security interests of the Member States under Article 36 of the Treaty on the Functioning of the European Union. Decisions to update the common lists of items and destinations set out in Sections A to J of Annex II should be made in consideration of the assessment criteria set out in this Regulation. ↩

↓ new

- (18) In order to allow for a swift Union response to changing circumstances as regards the assessment of the sensitivity of exports under Union General Export Authorisations as well as technological and commercial developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending Section A of Annex I, Annex II and Section B of Annex IV to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

↓ 428/2009 recital 5 (adapted)  
⇒ new

- (19) National provisions and decisions affecting exports of dual-use items ~~must~~  should  be taken in the framework of the common commercial policy, and in particular ~~Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports<sup>17</sup> Regulation (EU) 2015/479 of the European Parliament and of the Council<sup>18</sup>~~. ⇒ Appropriate exchange of information and consultations on national provisions and decisions should ensure the effective and consistent application of controls throughout the Union. ↩

↓ 428/2009 recital 4 (adapted)

- (20) The existence of a common control system ~~and harmonised policies for enforcement and monitoring in all Member States~~ is a prerequisite for establishing the free movement of dual-use items inside the ~~Community~~  Union .

↓ 428/2009 recital 9

~~Particular attention needs to be paid to issues of re-export and end-use.~~

<sup>17</sup> ~~OJ L 324, 27.12.1969, p. 25.~~

<sup>18</sup> ~~Regulation (EU) 2015/479 of the European Parliament and of the Council on common rules for exports (OJ L83, 27.03.2015, p. 34).~~

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↓ 428/2009 recital 12 (adapted)  
⇒ new

- (21) Pursuant to and within the limits of Article ~~30~~ 36 of the Treaty on the Functioning of the European Union and pending a greater degree of harmonisation, Member States retain the right to carry out controls on transfers of certain dual-use items within the ~~Community~~ Union in order to safeguard public policy or public security. ⇒ For reasons of proportionality, controls on the transfer of dual-use items within the Union should be revised in order to minimise the burden for companies and authorities. ~~↵ Where these controls are linked to the effectiveness of controls on exports from the Community, they~~ ⇒ Moreover, the list of items subject to intra-Union transfer controls in Section B of Annex IV ~~↵ should be periodically reviewed by the Council~~ ⇒ in light of technological and commercial developments and as regards the assessment of the sensitivity of transfers ~~↵~~ .
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↓ 428/2009 recital 10 (adapted)  
⇒ new

- (22) On 22 September 1998 ~~representatives of~~ the Member States and the European Commission signed Protocols additional to the respective safeguards agreements between the Member States, the European Atomic Energy Community and the International Atomic Energy Agency, which, among other measures, oblige the Member States to provide information on transfers of specified equipment and non-nuclear material. ⇒ Intra-Union transfer controls should allow the Member States and the Union to fulfil their obligations under these agreements. ~~↵~~
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↓ 428/2009 recital 18 (adapted)  
⇒ new

- (23) It is desirable to achieve a uniform and consistent application of controls throughout the ~~EU~~ Union in order to promote ~~EU~~ Union and international security and to provide a level playing field for EU exporters. It is therefore appropriate, in accordance with ~~the recommendations of the Thessaloniki Action Plan and the calls of the EU WMD Strategy,~~ to broaden the scope of consultation ⇒ and information exchange ~~↵ between the Member States prior to granting an export authorisation~~ ⇒ and the Commission, and to introduce tools to support the development of a common export control network throughout the Union, such as electronic licensing procedures, technical expert groups and the setting up of an enforcement coordination mechanism. While customs authorities share certain information with other customs authorities using risk management system in accordance with Union customs rules, it is also appropriate to ensure close cooperation between licensing and customs authorities ~~↵~~ . ~~Among the benefits of this approach would be, for example, an assurance that a Member State's essential security interests would not be threatened by an export from another Member State. Greater convergence of conditions implementing national controls on dual-use items not listed in this Regulation, and harmonisation of the conditions of use of the different types of authorisations that may be granted under this Regulation would bring about more uniform and consistent application of controls. Improving the definition of intangible transfers of technology, to include making available controlled technology to persons~~

~~located outside the EU, would assist the effort to promote security as would further alignment of the modalities for exchanging sensitive information among Member States with those of the international export control regimes, in particular by providing for the possibility of establishing a secure electronic system for sharing information among Member States.~~

↓ new

(24) It is appropriate to clarify that, to the extent that it concerns personal data, processing and exchange of information should comply with the applicable rules on processing and exchange of personal data in accordance with the rules laid down in Directive 95/46/EC of the European Parliament and of the Council<sup>19</sup> and Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>20</sup>.

(25) Outreach to the private sector and transparency are essential elements for an effective export control regime. It is therefore appropriate to provide for the continued development of guidance to support the application of this Regulation and for the publication of an annual report on the implementation of controls, in line with current practice.

↓ 428/2009 recital 13

(26) In order to ensure that this Regulation is properly applied, each Member State should take measures giving the competent authorities appropriate powers.

↓ 428/2009 recital 19  
⇒ new

(27) Each Member State should determine effective, proportionate and dissuasive penalties applicable in the event of breach of the provisions of this Regulation. ⇒ It is also appropriate to introduce provisions to tackle specifically instances of illicit trafficking of dual-use items in order to support effective enforcement of controls. ⇐

↓ 428/2009 recital 11 (adapted)

(28) ~~The Community~~ ☒ Union ☒ has adopted a body of customs rules, contained in ~~Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code<sup>21</sup>~~ Council Regulation (EU) No 952/2013 of the European Parliament and of the Council<sup>22</sup> (hereinafter the Community ☒ Union ☒ Customs Code) and ~~Commission Regulation (EEC) No 2454/93<sup>23</sup> implementing Regulation (EEC) No 2913/92~~ which lay ☒ down, among other things, provisions

<sup>19</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

<sup>20</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>21</sup> ~~OJ L 302, 19.10.1992, p. 1.~~

<sup>22</sup> Council Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

<sup>23</sup> ~~OJ L 253, 11.10.1993, p. 1.~~

relating to the export and re-export of goods. Nothing in this Regulation constrains any powers under and pursuant to the ~~Community~~  Union  Customs Code and its implementing provisions.

↓ new

- (29) Export controls have an impact on international security and trade with third countries and it is therefore appropriate to develop dialogue and cooperation with third countries in order to support a global level-playing field and enhance international security.
- (30) It is appropriate to clarify that this Regulation is without prejudice to the Commission Delegated Decision of 15 September 2015<sup>24</sup> supplementing Decision No 1104/2011/EU of the European Parliament and of the Council, which establishes specific rules for the control of the export of items for the Public Regulated Service (PRS) under the Galileo Programme.
- (31) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the freedom to conduct business,

↓ 428/2009 recital 17

~~Controls should also be introduced on the provision of brokering services when the broker has been informed by competent national authorities or is aware that such provision might lead to production or delivery of weapons of mass destruction in a third country.~~

↓ 428/2009 (adapted)  
⇒ new

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### SUBJECT AND DEFINITIONS

#### *Article 1*

This Regulation sets up a ~~Community~~  Union  regime for the control of exports, ~~transfer~~, brokering  , technical assistance, ~~and~~  transit  and transfer  of dual-use items.

#### *Article 2*

For the purposes of this Regulation:

<sup>24</sup> C(2015)6123 final.

1. 'dual-use items' shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include:

⇒ (a) items which can be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery, including ↯ all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices;

↓ new

(b) cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States.

↓ 428/2009 (adapted)

2. 'export' shall mean:

(~~ia~~) an export procedure within the meaning of Article ~~161~~ 269 of Regulation (EEC) No 2913/92 (the ~~Community~~  Union  Customs Code);

(~~ib~~) a re-export within the meaning of Article ~~182~~ 270(1) of ~~that~~  the Union Customs  Code ~~but not including items in transit; and~~

↓ new

(c) outward processing procedure within the meaning of Article 259 of the Union Customs Code; and

↓ 428/2009 (adapted)

⇒ new

(~~iid~~) transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means ~~to a destination outside the European Community; it includes making available in an electronic form such software and technology~~ to legal and natural persons and partnerships outside the  Union  Community. ~~Export also applies to oral transmission of technology when the technology is described over the telephone;~~

3. 'exporter' shall mean any natural or legal person or partnership:

(~~ia~~) on whose behalf an export ⇒ or re-export ↯ declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining the sending of the item out of the customs territory of the  Union  Community. If no export contract has been concluded ~~or if the holder of the contract does not act on its own behalf,~~ the exporter shall mean

the person who has the power for determining the sending of the item out of the customs territory of the  Union  ~~Community~~;

(~~h~~b) which decides to transmit or make available software or technology by electronic media including by fax, telephone, electronic mail or by any other electronic means to ~~a destination~~  legal and natural persons and partnerships  outside the  Union  ~~Community~~.

Where the benefit of a right to dispose of the dual-use item belongs to a person  resident or  established outside the  Union  ~~Community~~ pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party  resident or  established in the ~~Community~~;  Union.

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new

'Exporter' shall also mean any natural person carrying the goods to be exported where these goods are contained in the person's personal baggage within the meaning of Article 1(19)(b) of Regulation (EU) 2015/2446 of 28 July 2015<sup>25</sup>.

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428/2009 (adapted)

4. 'export declaration' shall mean the act whereby a person indicates in the prescribed form and manner the wish to ~~place~~  export  dual-use items  specified in point 1  ~~under an export procedure~~;

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new

5. 're-export declaration' shall mean the act within the meaning of Article 5(13) of the Union Customs Code;

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428/2009 (adapted)

new

~~56~~. 'brokering services' shall mean:

(a) the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or

(b) the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

For the purposes of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion;

~~67~~. 'broker' shall mean any natural or legal person or partnership resident or established in a Member State of the ~~Community~~  Union   , or a legal person or partnership owned or controlled by such person, or another person  that carries

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<sup>25</sup> OJ L 343, 29.12.2015, p. 1

out ~~☒~~ brokering ~~☒~~ services ~~defined under point 5~~ from the ~~Community~~  
~~☒~~ Union ~~☒~~ into the territory of a third country;

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↓ new

8. 'technical assistance' shall mean 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 verbal forms of assistance;

9. 'supplier of technical assistance' means any natural or legal person or partnership resident or established in a Member State of the Union, or a legal person or partnership owned or controlled by such person, or another person which supplies technical assistance from the Union into the territory of a third country;

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↓ 428/2009 (adapted)  
⇒ new

~~7~~10. 'transit' shall mean a transport of ~~non-Community~~ ~~☒~~ non-Union ~~☒~~ dual-use items entering and passing through the customs territory of the ~~Community~~  
~~☒~~ Union ~~☒~~ with a destination outside the ~~☒~~ Union ~~☒~~ ~~Community~~; ~~⇒~~ including items: ⇐

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↓ new

- (a) which are placed under the external transit procedure and only pass through the customs territory of the Union;
  - (b) which are trans-shipped within, or directly re-exported from, a free zone;
  - (c) which are in temporary storage and are directly re-exported from a temporary storage facility;
  - (d) which were brought into the customs territory of the Union on the same vessel or aircraft that will take them out of that territory without unloading;
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↓ 428/2009

~~8~~11. 'individual export authorisation' shall mean an authorisation granted to one specific exporter for one end user or consignee in a third country and covering one or more dual-use items;

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↓ 428/2009 (adapted)

~~10~~12. 'global export authorisation' shall mean an authorisation granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users ~~and/or~~ in one or more specified third countries;

↓ new

13. 'large project authorisation' shall mean a global export authorisation granted to one specific exporter, in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users in one or more specified third countries for the duration of a specified project the realisation of which exceeds one year;

↓ 1232/2011 Art. 1.1  
⇒ new

~~14.~~ 'Union general export authorisation' shall mean an export authorisation for exports to certain countries of destination available to all exporters who respect its conditions and requirements for use as listed in Sections ~~Annexes H~~ A to ~~H~~ J of Annex II;

↓ new

15. 'Union general transfer authorisation' shall mean an authorisation granted for transfers of certain dual-use items between Member States available to all operators who respect its conditions and requirements for use as listed in Section A of Annex IV;

↓ 428/2009 (adapted)  
→<sub>1</sub> 1232/2011 Art. 1.2

~~16.~~ 'national general export authorisation' shall mean an export authorisation ~~granted in accordance with Article 9(2) and~~ defined by national legislation in conformity with Article 9 10(6) and Section C of Annex III;

~~17.~~ 'customs territory of the ~~European~~ Union' shall mean the territory within the meaning of Article 3 4 of the ~~Community~~  Union  Customs Code;

~~18.~~ '~~non-Community~~  non-Union  dual-use items' shall mean items that have the status of ~~non-Community~~  non-Union  goods within the meaning of Article 4(8) 5(24) of the ~~Community~~  Union  Customs Code;

~~19.~~ ~~An authorisation shall also be required for the export of dual-use items not listed in Annex I if the purchasing country or country of destination is subject to~~  'arms embargo' shall mean  an arms embargo →<sub>1</sub> imposed by a decision or a common position ← adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations ~~and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for a military end-use.~~

~~20.~~ ~~For the purposes of this paragraph,~~ 'military end-use' shall mean:

- (a) incorporation into military items listed in the military list of Member States;



(b) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the abovementioned list;

(c) use of any unfinished products in a plant for the production of military items listed in the abovementioned list;

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↓ new

21. 'cyber-surveillance technology' shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, extracting, collecting and analysing data and/or incapacitating or damaging the targeted system. This includes items related to the following technology and equipment:

(a) mobile telecommunication interception equipment;

(b) intrusion software;

(c) monitoring centers;

(d) lawful interception systems and data retention systems;

(e) digital forensics;

22. 'internal compliance programme' shall mean effective, appropriate and proportionate means and procedures, including the development, implementation, and adherence to standardised operational compliance policies, procedures, standards of conduct, and safeguards, developed by exporters to ensure compliance with the provisions and with the terms and conditions of authorisations set out in this Regulation;

23. 'terrorist act' shall mean a terrorist act within the meaning of Article 1(3) of Common Position 2001/931/CFSP.

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↓ 428/2009 (adapted)

## CHAPTER II

### SCOPE

#### *Article 3*

1. An authorisation shall be required for the export of the dual-use items listed in Annex I.
2. Pursuant to Article 4 or Article 8, an authorisation may also be required for the export to all or certain destinations of certain dual-use items not listed in Annex I.

#### Article 4

1. An authorisation shall be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the competent ~~authorities~~  authority  of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part:

(a) for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons;

↓ new

(b) for a military end-use if the purchasing country or country of destination is subject to an arms embargo;

↓ 428/2009 (adapted)

~~3. (c) An authorisation shall also be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part~~ for use as parts or components of military items listed in the national military list that have been exported from the territory of ~~that~~  a  Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State;

↓ new

(d) for use by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination, as identified by relevant public international institutions, or European or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such serious violations by the proposed end-user;

(e) for use in connection with acts of terrorism.

↓ 428/2009 (adapted)

⇒ new

42. If an exporter  $\Rightarrow$ , under his obligation to exercise due diligence,  $\Leftarrow$  is aware that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1, ~~2~~ and ~~3~~, he must notify the  competent authority  ~~authorities referred to in paragraph 1~~, which will decide whether or not it is expedient to make the export concerned subject to authorisation.

~~5. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds~~

~~for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1.~~

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↓ new

3. Authorisations for the export of non-listed items shall be granted for specific items and end-users. The authorisations shall be granted by the competent authority of the Member State where the exporter is resident or established or, in case when the exporter is a person resident or established outside the Union, by the competent authority of the Member State where the items are located. The authorisations shall be valid throughout the Union. The authorisations shall be valid for one year, and may be renewed by the competent authority.

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↓ 428/2009 (adapted)  
⇒ new

~~64.~~ A Member State which imposes an authorisation requirement, in application of paragraphs 1 ~~to 5~~, 2 ⇒ and 3 ⇐ on the export of a dual-use item not listed in Annex I, shall, ~~where appropriate,~~ ⇒ immediately ⇐ inform the other Member States and the Commission ⇒ and provide them with the relevant information, in particular concerning the items and end-users concerned ⇐ . The other Member States shall give all due consideration to this information and shall ⇒ make known within 10 working days any objections they may have to the imposition of such an authorisation requirement. In exceptional cases, any Member State consulted may request an extension of the 10-day period. However, the extension may not exceed 30 working days. ⇐

⇒ If no objections are received, the Member States consulted shall be considered to have no objection and shall impose authorisations requirements for all "essentially similar transactions". ⇐ ☒ They shall ☒ inform their customs administration and other relevant national authorities ⇒ about the authorisations requirements ⇐ .

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↓ new

If objections are received from any consulted Member State, the requirement for authorisation shall be revoked unless the Member State which imposes the authorisation requirement considers that an export might prejudice its essential security interests. In that case, that Member State may decide to maintain the authorisation requirement. This should be notified to the Commission and the other Member States without delay.

The Commission and the Member States will maintain an updated register of authorisation requirements in place.

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↓ 428/2009 (adapted)  
⇒ new

~~75.~~ The provisions of Article ~~13~~ 15(1), (2) and (5) to (7) shall apply to cases concerning dual-use items not listed in Annex I.

~~86.~~ This Regulation is without prejudice to the right of Member States to take national measures under Article ~~11~~ 10 of Regulation (EU) 2015/479 ~~(EEC) No 2603/69~~.

## Article 5

1. An authorisation shall be required for brokering services of dual-use items ~~listed in Annex I~~ if the broker has been informed by the competent ~~authorities~~  authority  ~~of the Member State in which he is resident or established~~ that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4(1).

2. If a broker is aware that the dual-use items ~~listed in Annex I~~ for which he proposes brokering services are intended, in their entirety or in part, for any of the uses referred to in Article 4(1), he must notify the competent ~~authorities~~  authority  which will decide whether or not it is expedient to make such brokering services subject to authorisation.

~~2. A Member State may extend the application of paragraph 1 to non-listed dual-use items for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).~~

~~3. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the brokering of dual-use items, if the broker has grounds for suspecting that these items are or may be intended for any of the uses referred to in Article 4(1).~~

~~4. The provisions of Article 8(2), (3) and (4) shall apply to the national measures referred to in paragraphs 2 and 3 of this Article.~~

## Article 6

1. The transit of ~~non-Community~~  non-Union  dual-use items ~~listed in Annex I~~ may be prohibited  $\Rightarrow$  at any time  $\Leftarrow$  by the competent ~~authorities~~  authority  of the Member State where ~~the transit occurs~~  $\Rightarrow$  the items are situated  $\Leftarrow$  if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1). ~~When deciding on such a prohibition the Member States shall take into account their obligations and commitments they have agreed to as parties to international treaties or as members of international non-proliferation regimes.~~

2. Before deciding whether or not to prohibit a transit ~~a Member State may provide that its~~  the  competent ~~authorities~~  authority  may impose in individual cases an authorisation requirement for the specific transit of dual-use items ~~listed in Annex I~~ if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1).

The competent authority may impose the authorisation requirement on any of the following:

- (a) the declarant within the meaning of Article 5(15) of the Union Customs Code;
- (b) the carrier within the meaning of Article 5(40) of the Union Customs Code;
- (c) the natural person carrying the goods to be exported where these goods are contained in the person's personal baggage within the meaning of Article 1(19)(b) of Regulation (EU) 2015/2446.

## Article 7

1. An authorisation shall be required for the provision, directly or indirectly, of technical assistance related to dual-use items, or related to the provision, manufacture, maintenance and use of dual-use items, if the supplier of technical assistance has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4.

2. If a supplier of technical assistance is aware that the dual-use items for which he proposes to supply technical assistance are intended, in their entirety or in part, for any of the uses referred to in Article 4, he must notify the competent authority which will decide whether or not it is expedient to make such technical assistance subject to authorisation.

↓ 428/2009 (adapted)  
⇒ new

~~3. A Member State may extend the application of paragraph 1 to non-listed dual-use items for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).~~

~~4. The provisions of Article 8(2), (3) and (4) shall apply to the national measures referred to in paragraphs 2 and 3 of this Article.~~

## ~~Article 7~~

~~This Regulation does not apply to the supply of services or the transmission of technology if that supply or transmission involves cross-border movement of persons.~~

## Article 8

1. A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security or  for  human rights considerations.

2. Member States shall notify the Commission  and the other Member States  of any measures adopted pursuant to paragraph 1 immediately after their adoption and indicate the precise reasons for the measures.

3. Member States shall also immediately notify the Commission  and the other Member States  of any modifications to measures adopted pursuant to paragraph 1.

4. The Commission shall publish the measures notified to it pursuant to paragraphs 2 and 3 in the C series of the *Official Journal of the European Union*.

## Article ~~22~~ 9

1. An authorisation shall be required for ~~intra-Community~~  intra-Union  transfers of dual-use items listed in Section B of Annex IV. ~~Items listed in Part 2 of Annex IV shall not be covered by a general authorisation.~~

2. A Member State may impose an authorisation requirement for the transfer of other dual-use items from its territory to another Member State in cases where at the time of transfer:

- the operator  $\Rightarrow$  or the Member State  $\Leftarrow$  knows that the final destination of the items concerned is outside the  $\boxtimes$  Union  $\boxtimes$  Community,  $\boxtimes$  and  $\boxtimes$
- export of those items to that final destination is subject to an authorisation requirement pursuant to Articles 3, 4 or 8 in the Member State from which the items are to be transferred, and such export directly from its territory is not authorised by a general authorisation or a global authorisation,  $\boxtimes$  and  $\boxtimes$
- no processing or working as defined in Article  $\boxtimes$  60(2)  $\boxtimes$  24 of the ~~Community~~  $\boxtimes$  Union  $\boxtimes$  Customs Code is to be performed on the items in the Member State to which they are to be transferred.

~~3. The transfer authorisation must be applied for in the Member State from which the dual-use items are to be transferred.~~

~~4. In cases where the subsequent export of the dual-use items has already been accepted, in the consultation procedures set out in Article 11, by the Member State from which the items are to be transferred, the transfer authorisation shall be issued to the operator immediately, unless the circumstances have substantially changed.~~

53. A Member State which adopts legislation imposing such a requirement shall inform the Commission and the other Member States of the measures it has taken  $\Rightarrow$  without delay  $\Leftarrow$  . The Commission shall publish this information in the C series of the *Official Journal of the European Union*.

64. The measures pursuant to paragraphs 1 and 2 shall not involve the application of internal frontier controls within the  $\boxtimes$  Union  $\boxtimes$  Community, but solely controls which are performed as part of the normal control procedures applied in a non-discriminatory fashion throughout the territory of the  $\boxtimes$  Union  $\boxtimes$  Community.

75. Application of the measures pursuant to paragraphs 1 and 2 may in no case result in transfers from one Member State to another being subject to more restrictive conditions than those imposed for exports of the same items to third countries.

96. A Member State may, by national legislation, require that, for any ~~intra-Community~~  $\boxtimes$  intra-Union  $\boxtimes$  transfers from that Member State of items listed in Category 5, Part 2 of Section A of Annex I which are not listed in Section B of Annex IV, additional information concerning those items shall be provided to the competent authorities of that Member State.

107. The relevant commercial documents relating to ~~intra-Community~~  $\boxtimes$  intra-Union  $\boxtimes$  transfers of dual-use items listed in Annex I shall indicate clearly that those items are subject to controls if exported from the  $\boxtimes$  Union  $\boxtimes$  Community. Relevant commercial documents include, in particular, any sales contract, order confirmation, invoice or dispatch note.

## CHAPTER III

### EXPORT AUTHORISATION AND AUTHORISATION FOR BROKERING SERVICES ~~☒~~ , TECHNICAL ASSISTANCE AND TRANSFER ~~☒~~

#### Article ~~9~~ 10

↓ new

1. The following authorisations for export are established under this Regulation:

(a) individual export authorisation;

(b) global export authorisation, including global export authorisation for large projects;

(c) national general export authorisation;

↓ 1232/2011 Art. 1.3(a) (adapted)  
⇒ new

~~1.~~ (d) Union General Export Authorisations for certain exports as set out in Sections Annexes Ha A to Hf ~~⇒ J~~ ~~☒~~ of Annex II ~~are established by this Regulation.~~

All the authorisations shall be valid throughout the ~~☒~~ Union ~~☒~~ Community.

↓ new

2. The competent authority of the Member State where the exporter is resident or established shall be responsible for granting individual and global authorisations, for issuing national general export authorisations, as well as for all other decisions regarding the application of this Regulation to exporters resident or established on its territory.

When the exporter is resident or established outside the territory of the Union, the competent authority of the Member State where the items are located shall be responsible for granting individual and global authorisations, as well as for all other decisions regarding the application of this Regulation.

↓ 428/2009 (adapted)  
⇒ new

#### ~~Article 14~~

~~1.~~ All individual and global export authorisations ~~and authorisations for brokering services~~ shall be issued ~~⇒~~ , whenever possible, ~~☒~~ ~~in writing or~~ by electronic means on forms

containing at least all the elements and in the order set out in the models which appear in Section A of Annexes IIIa and IIIb.

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↓ new

3. Individual export authorisations and global export authorisations shall be valid for one year, and may be renewed by the competent authority. Global export authorisations for large projects shall be valid for a duration to be determined by the competent authority.

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↓ 428/2009 (adapted)

~~2. For all other exports for which an authorisation is required under this Regulation, such authorisation shall be granted by the competent authorities of the Member State where the exporter is established. Subject to the restrictions specified in paragraph 4, this authorisation may be an individual, global or general authorisation.~~

4. Exporters shall supply the competent ~~authorities~~  authority  with all relevant information required for their applications for individual and global export authorisation so as to provide complete information ~~to the national competent authorities~~ in particular on the end user, the country of destination and the end use of the item exported.

~~The authorisation~~  Authorisations  may be subject, if appropriate, to an end-use statement.

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↓ new

Global export authorisations shall be subject to the implementation, by the exporter, of an effective internal compliance programme. The exporter shall also report to the competent authority, at least once a year, on the use of this authorisation; the report shall include at least the following information:

- (a) the description of the dual-use items, including the relevant control entry from Section A of Annex I;
  - (b) the quantity and the value of the dual-use items;
  - (c) the name and address of the consignee;
  - (d) where known, the end-use and end-user of the dual-use items.
- 

↓ 428/2009 (adapted)

⇒ new

~~2.~~ At the request of exporters, global export authorisations that contain quantitative limitations shall be split.

~~35.~~  The competent authorities of the  Member States shall process requests for individual or global authorisations within a period of time to be determined by national law or practice.  The competent authorities shall provide to the Commission all information on the average times for processing applications for authorisations relevant for the preparation of the annual report referred to in Article 24(2).



46. National general export authorisations shall:

↓ 1232/2011 Art. 1.3(b)

(a) exclude from their scope items listed in Section K of Annex II~~g~~;

↓ 428/2009 (adapted)  
→<sub>1</sub> 1232/2011 Art. 1.3(c)

(b) be defined by national law or practice. They may be used by all exporters, established or resident in the Member State issuing these authorisations, if they meet the requirements set in this Regulation and in the complementary national legislation. They shall be issued in accordance with the indications set out in Section C of Annex III~~e~~. ~~They shall be issued according to national law or practice;~~

Member States shall notify the Commission immediately of any national general export authorisations issued or modified. The Commission shall publish these notifications in the C series of the *Official Journal of the European Union*;

(c) not be used if the exporter has been informed by ~~his authorities~~  the competent authority  that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in ~~paragraphs 1 and 3 of Article 4 or in paragraph 2 of Article 4 in a country subject to an arms embargo~~ →<sub>1</sub> ~~imposed by a decision or a common position~~ ← ~~adopted by the Council or a decision of the OSCE or an arms embargo imposed by a binding resolution of the Security Council of the United Nations~~, or if the exporter is aware that the items are intended for the abovementioned uses.

~~5. Member States shall maintain or introduce in their respective national legislation the possibility of granting a global export authorisation.~~

↓ 1232/2011 Art. 1.3(a)

7. The competent authorities of the Member State where the exporter is established can prohibit the exporter from using these authorisations if there is reasonable suspicion about his ability to comply with such authorisation or with a provision of the export control legislation.

The competent authorities of the Member States shall exchange information on exporters deprived of the right to use a Union General Export Authorisation, unless they determine that the exporter will not attempt to export dual-use items through another Member State. The system referred to in Article ~~19(4)~~ 20(3) shall be used for this purpose.

↓ 428/2009 (adapted)  
⇒ new

*Article ~~10~~ 11*

1. Authorisations for brokering services ⇒ and technical assistance ⇐ under this Regulation shall be granted by the competent ~~authorities~~  authority  of the Member State where the broker ⇒ or the supplier of technical assistance ⇐ is resident or established.

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↓ new

Where the broker or the supplier of technical assistance is not resident or established on the territory of the Union, authorisations for brokering services and technical assistance under this Regulation shall be granted, alternatively, by the competent authority of the Member State where the parent company of the broker or supplier of technical assistance is established, or from where the brokering services or technical assistance will be supplied.

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↓ 428/2009 (adapted)  
⇒ new

2. ~~These~~ ~~a~~ Authorisations ~~for~~ brokering services ~~and~~ technical assistance shall be granted for a set quantity of specific items ~~moving between two or more third countries~~. The location of the items in the originating third country, the end-user and its exact location must be clearly identified. The authorisations shall be valid throughout the ~~Union~~ ~~Community~~.

~~23.~~ Brokers and suppliers of technical assistance shall supply the competent ~~authorities~~ authority with all relevant information required for their application for authorisation under this Regulation ~~for brokering services~~, in particular details of the location of the dual-use items ~~in the originating third country~~, a clear description of the items and the quantity involved, third parties involved in the transaction, the third country of destination, the end-user in that country and its exact location.

~~34.~~ The competent authorities of the Member States shall process requests for authorisations for brokering services and technical assistance within a period of time ~~to be determined by national law or practice~~ and under the conditions as set out in Article 10(5).

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↓ new

5. All authorisations for brokering services and technical assistance shall be issued, whenever possible, by electronic means on forms containing at least all the elements and in the order set out in the models which appear in Section B of Annex III.

#### *Article 12*

A Union general transfer authorisation as set out in Section A of Annex IV is established by this Regulation for transfers between Member States of dual-use items listed in Section B of Annex IV.

↓ 428/2009 (adapted)  
→<sub>1</sub> 1232/2011 Art. 1.4  
→<sub>2</sub> 1232/2011 Art. 1.5  
⇒ new

*Article ~~11~~ 13*

1. If the dual-use items in respect of which an application has been made for an individual export authorisation to a destination not listed in Section A of →<sub>1</sub> Annex II ← or to any destination in the case of dual-use items listed in Section B of Annex IV are or will be located in one or more Member States other than the one where the application has been made, that fact shall be indicated in the application. The competent ~~authorities~~ ⊗ authority ⊗ of the Member State to which the application for authorisation has been made shall immediately consult the competent authorities of the Member State or States in question and provide the relevant information. The Member State or States consulted shall make known within 10 working days any objections it or they may have to the granting of such an authorisation, which shall bind the Member State in which the application has been made.

If no objections are received within 10 working days, the Member State or States consulted shall be regarded as having no objection.

In exceptional cases, any Member State consulted may request the extension of the 10-day period. However, the extension may not exceed 30 working days.

2. If an export might prejudice its essential security interests, a Member State may request another Member State not to grant an export authorisation or, if such authorisation has been granted, request its annulment, suspension, modification or revocation. The Member State receiving such a request shall immediately engage in consultations of a non-binding nature with the requesting Member State, to be terminated within 10 working days. In case the requested Member State decides to grant the authorisation, this should be notified to the Commission and other Member States using the electronic system mentioned in Article ~~13(6)~~ 20(3).

*Article ~~12~~ 14*

1. In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services ⇒ or technical assistance ⇐ under this Regulation, ⇒ or to prohibit a transit, ⇐ ⊗ the competent authorities of ⇐ ⊗ the Member States shall take into account ~~all relevant considerations including~~ ⇒ the following criteria ⇐ :

- (a) ⇒ Union and Member States' international obligations and commitments, in particular ⇐ the obligations and commitments they have each accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties ~~and~~ ⊗ and ⇐ ⊗ ~~(b)~~ their obligations under sanctions imposed by →<sub>2</sub> a decision or a common position ← adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;

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↓ new

(b) respect for human rights in the country of final destination as well as respect by that country of international humanitarian law;

(c) the internal situation in the country of final destination – competent authorities will not authorise exports that would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination;

(d) preservation of regional peace, security and stability;

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↓ 428/2009

⇒ new

(~~ee~~) considerations of national foreign and security policy, including ⇒ security of Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries ⇐ ~~those covered by Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment~~<sup>26</sup>;

(~~ef~~) considerations about intended end use and the risk of diversion ⇒ , including existence of a risk that the dual-use items will be diverted or re-exported under undesirable conditions ⇐ .

~~2. In addition to the criteria set in paragraph 1, when assessing an application for a global export authorisation Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation.~~

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↓ new

2. The Commission and the Council shall make available guidance and/or recommendations to ensure common risk assessments by the competent authorities of the Member States for the implementation of those criteria.

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↓ 428/2009 (adapted)

⇒ new

#### Article ~~13~~ 15

1. The competent authorities of the Member States, acting in accordance with this Regulation, may refuse to grant an export authorisation and may annul, suspend, modify or revoke an export authorisation which they have already granted. Where they refuse, annul, suspend, substantially limit or revoke an export authorisation or when they have determined that the intended export is not to be authorised, they shall notify the competent authorities of the other Member States and the Commission thereof and share the relevant information with them. In

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<sup>26</sup> ~~OJL 335, 13.12.2008, p. 99.~~

case the competent ~~authorities~~ authority of a Member State ~~have~~ has suspended an export authorisation, the final assessment shall be communicated to the competent authorities of the other Member States and the Commission at the end of the period of suspension.

2. The competent authorities of Member States shall review denials of authorisations notified under paragraph 1 within three years of their notification and revoke them, amend them or renew them. The competent authorities of the Member States will notify the results of the review to the competent authorities of the other Member States and the Commission as soon as possible. Denials which are not revoked shall remain valid and shall be reviewed within three years of their renewal .

3. The competent authorities of the Member States shall notify the Member States and the Commission of their decisions to prohibit a transit of dual-use items ~~listed in Annex I~~ taken under Article 6 without delay. These notifications will contain all relevant information including the classification of the item, its technical parameters, the country of destination and the end user.

4. Paragraphs 1 and 2 shall also apply to authorisations for brokering services and technical assistance .

5. Before the competent ~~authorities~~ authority of a Member State, acting under this Regulation, ~~grant~~ grants an authorisation for export or brokering services or technical assistance, or ~~decide~~ decides on a transit, ~~they~~ it shall examine all valid denials or decisions to prohibit a transit of dual-use items listed in Annex I taken under this Regulation to ascertain whether an authorisation or a transit has been denied by the competent authorities of another Member State or States for an essentially identical transaction (meaning an item with essentially identical parameters or technical characteristics to the same end user or consignee). ~~It~~ ~~They~~ shall first consult the competent authorities of the Member State or States which issued such denial(s) or decisions to prohibit the transit as provided for in paragraphs 1 and 3. If following such consultation the competent ~~authorities~~ authority of the Member State ~~decide~~ decides to grant an authorisation or allow the transit, ~~they~~ it shall notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision.

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↓ 1232/2011 Art. 1.6

6. All notifications required pursuant to this Article shall be made via secure electronic means including the system referred to in Article ~~19(4)~~ 20(3).

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↓ 428/2009 (adapted)

7. All information shared in accordance with the provisions of this Article shall be in compliance with the provisions of Article ~~19~~ ~~20(3)~~, ~~(4)~~ and ~~(64)~~ concerning the confidentiality of such information.

## CHAPTER IV

### ~~UPDATING~~ ~~AMENDMENT~~ ~~OF LIST~~ ~~LISTS~~ ~~OF DUAL-USE~~ ~~ITEMS~~ ~~AND DESTINATIONS~~

Article ~~15~~ 16

↓ 599/2014 Art. 1.3

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

↓ new

2. The Commission shall be empowered to adopt delegated acts in order to amend the lists of dual-use items set out in Annex I and Section B of Annex IV, as follows:

↓ 428/2009 (adapted)

⇒ new

~~1.~~ (a) ~~The~~ list of dual-use items set out in Section A of Annex I shall be ~~updated~~ ~~amended~~ ~~in~~ conformity with the relevant obligations and commitments, and any modification thereof, that Member States ~~⇒~~ and the Union ~~⇐~~ have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties. ~~Where~~ the amendment of Section A of Annex I concerns dual-use items which are also listed in Annexes II ~~⇐~~ and IV, Section B, ~~⇐~~ ~~those~~ Annexes shall be amended accordingly. ~~⇐~~

↓ new

(b) The list of dual-use items set out in Section B of Annex I may be amended if this is necessary due to risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States.

↓ 428/2009 (adapted)

~~2.~~ (c) ~~The~~ list of dual-use items set out in Section B of ~~Annex IV~~, which is a subset of Section A of Annex I, shall be ~~updated~~ ~~amended~~ ~~with~~ regard to Article ~~30~~ ~~36~~ of the Treaty ~~on the Functioning of the European Union~~ ~~establishing the European Community~~, namely the public policy and public security interests of the Member States.

↓ 599/2014 Art. 1.2 (adapted)

~~3. The Commission shall be empowered to adopt delegated acts in accordance with Article 23a concerning updating the list of dual use items set out in Annex I. The updating of Annex I shall be performed within the scope set out in paragraph 1 of this Article. Where the updating of Annex I concerns dual use items which are also listed in Annexes IIa to IIg or IV, those Annexes shall be amended accordingly.~~

↓ 599/2014 Art. 1.1 (adapted)

⇒ new

~~3. In order to ensure that only low risk transactions are covered by the Union General Export Authorisations included in Annexes IIa to IIg, ¶~~ The Commission shall be empowered to adopt delegated acts ~~in accordance with Article 23a~~ to ~~amend Annex II~~  amend Annex II  ⇒ by adding or  remove  removing  ⇒ items or  destinations from the scope of ~~those~~ Union ~~General Export Authorisations~~  set out in Annex II  ⇒ in consideration of the criteria set out in Article 14  , ~~if such destinations become subject to an arms embargo as referred to in Article 4(2).~~ Where, ~~in cases of such arms embargoes,~~ imperative grounds of urgency require a removal of particular destinations from the scope of a Union ~~General Export Authorisation~~, the procedure provided for in Article ~~23b~~ 17 shall apply to delegated acts adopted pursuant to this paragraph.

↓ 599/2014 Art. 1.3 (adapted)

⇒ new

#### ~~Article 23a~~

~~24.~~ The power to adopt delegated acts referred to in ~~this Article 9(1) and Article 15(3)~~ shall be conferred on the Commission for a period of five years from ~~2 July 2014~~ ⇒ the entry into force of this Regulation  . The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

~~35.~~ The delegation of power referred to in ~~this Article 9(1) and Article 15(3)~~ may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

6. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Inter-Institutional Agreement on Better Law-Making of 13 April 2016.

~~47.~~ As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

~~58.~~ A delegated act adopted pursuant to this Article 9(1) and Article 15(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

*Article ~~23b~~ 17*

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in this Article 23a(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council.

↓ 428/2009 (adapted)  
⇒ new

## CHAPTER V

### CUSTOMS PROCEDURES

*Article ~~16~~ 18*

1. When completing the formalities for the export of dual-use items at the customs office responsible for handling the export declaration, the exporter shall furnish proof that any necessary export authorisation has been obtained.

2. A translation of any documents furnished as proof into an official language of the Member State where the export declaration is presented may be required of the exporter.

3. Without prejudice to any powers conferred on it under, and pursuant to, the ~~Community~~  Union  Customs Code, a Member State may also, for a period not exceeding the periods referred to in paragraph 4, suspend the process of export from its territory, or, if necessary, otherwise prevent the dual-use items listed in Annex I which are covered by a valid export authorisation from leaving the ~~Community~~  Union  via its territory, where it has grounds for suspicion that:

- (a) relevant information was not taken into account when the authorisation was granted, or
- (b) circumstances have materially changed since the grant of the authorisation.



4. In the case referred to in paragraph 3, the competent ~~authorities~~  authority  of the Member State which granted the export authorisation shall be consulted forthwith in order that they may take action pursuant to Article ~~13~~ 15(1). If such competent ~~authorities decide~~  authority decides  to maintain the authorisation, ~~they~~  it  shall reply within 10 working days, which, at ~~their~~  its  request, may be extended to 30 working days in exceptional circumstances. In such case, or if no reply is received within 10 or 30 days, as the case may be, the dual-use items shall be released immediately. The  competent authority of the  Member State which granted the authorisation shall inform  the competent authorities of  the other Member States and the Commission.

⇒ 5. The Commission, in cooperation with the Member States, shall develop a guidance to support interagency cooperation between licensing and customs authorities. ⇐

#### *Article ~~17~~ 19*

1. Member States may provide that customs formalities for the export of dual-use items may be completed only at customs offices empowered to that end.

2. Member States availing themselves of the option set out in paragraph 1 shall inform the Commission of the duly empowered customs offices. The Commission shall publish the information in the C series of the *Official Journal of the European Union*.

#### *Article ~~18~~*

~~The provisions of Articles 843 and 912a to 912g of Regulation (EEC) No 2454/93 shall apply to the restrictions relating to the export, re-export and exit from the customs territory of dual-use items for the export of which an authorisation is required under this Regulation.~~

## CHAPTER VI

### ADMINISTRATIVE COOPERATION , IMPLEMENTATION AND ENFORCEMENT

#### *Article ~~19~~ 20*

↓ 1232/2011 Art. 1.9 (adapted)  
⇒ new

1. ~~Each Member State~~  States  shall inform the Commission ⇒ without delay ⇐ of the laws, regulations and administrative provisions adopted in implementation of this Regulation, including: ~~the measures referred to in Article 24. The Commission shall forward the information to the other Member States.~~

↓ 428/2009 (adapted)  
⇒ new

~~6.~~ (a) ~~Member States shall supply the Commission with~~ a list of the authorities empowered to:

- ~~(a)~~ grant export authorisations for dual-use items;
- ~~4.~~ ~~Member States shall supply the Commission with a list of the authorities empowered to~~ grant authorisations under this Regulation for the provision of brokering services ⇒ and technical assistance ⇐ ~~;~~ ~~The Commission shall publish the list of these authorities in the C series of the Official Journal of the European Union.~~
- ~~(b)~~ decide to prohibit the transit of ~~non-Community~~ ☒ non-Union ☒ dual-use items under this Regulation;

☒ (b) the measures referred to in Article 22. ☒

The Commission ☒ shall forward the information to the other Member States and ☒ shall publish the ~~list of these authorities~~ ☒ information ☒ in the C series of the *Official Journal of the European Union*.

~~12.~~ Member States, in cooperation with the Commission, shall take all appropriate measures to establish direct cooperation and exchange of information between ☒ the ☒ competent authorities; ~~in particular to eliminate the risk that possible disparities in the application of export controls to dual-use items may lead to a deflection of trade, which could create difficulties for one or more Member States.~~

~~2.~~ ~~Member States shall take all appropriate measures to establish direct cooperation and exchange of information between competent authorities~~ with a view to enhance the efficiency of the ~~Community~~ ☒ Union ☒ export control regime ⇒ and to ensure the consistent and effective implementation and enforcement of control throughout the EU ⇐ . Such information ~~may~~ ⇒ shall ⇐ include:

↓ new

(a) information regarding the application of controls, including licensing data (number, value and types of licences and related destinations, number of users of general and global authorisations, number of operators with ICPs, processing times, volume and value of trade subject to intra-EU transfers etc), and, where available, data on exports of dual-use items carried out in other Member States;

↓ 428/2009 (adapted)  
→<sub>1</sub> 1232/2011 Art. 1.7(a)  
⇒ new

~~(a)~~ ⇒ information regarding the enforcement of controls, including ⇐ details of exporters deprived; ~~by national sanctions;~~ of the right to use the national ☒ or Union ☒ general export authorisations ~~or~~ →<sub>1</sub> ~~Union General Export~~

Authorisations ~~←~~ ⇒ , reports of violations, seizures and the application of other penalties ~~←~~ ;

(bc) data on sensitive end users, actors involved in suspicious procurement activities, and, where available, routes taken.

↓ 428/2009

~~3. Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters<sup>27</sup>, and in particular the provisions on the confidentiality of information, shall apply *mutatis mutandis*, without prejudice to Article 23 of this Regulation.~~

↓ 1232/2011 Art. 1.7(b) (adapted)  
⇒ new

~~43. A secure and encrypted system for the exchange of information between Member States and, where appropriate, the Commission shall ⇒ be developed ← set up by the Commission, in consultation with the Dual-Use Coordination Group set up pursuant to Article ~~23~~ 21, ⇒ to support direct cooperation and exchange of information between the competent authorities of the Member States and the Commission. ⇒ The system shall be connected, where appropriate, to the electronic licensing systems of the competent authorities of the Member States. ← The European Parliament shall be informed about the system's budget, development, ~~provisional and final set-up~~ and functioning, ~~and network costs~~.~~

↓ 428/2009  
⇒ new

~~64. The processing of personal data shall be in accordance with the rules laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>28</sup> and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>29</sup>. ⇒ Personal data shall be used by the competent authorities of the Member States and the Commission only for the purpose of implementation and enforcement of this Regulation and in light of its objectives. These data shall be retained for the duration of the measures adopted by the competent authorities of the Member States pursuant to this Regulation and their renewal or amendment. ←~~

#### Article ~~23~~ 21

1. A Dual-Use Coordination Group chaired by a representative of the Commission shall be set up. Each Member State shall appoint a representative to this Group. It shall examine any

<sup>27</sup> OJ L 82, 22.3.1997, p. 1.

<sup>28</sup> OJ L 281, 23.11.1995, p. 31.

<sup>29</sup> OJ L 8, 12.1.2001, p. 1.

question concerning the application of this Regulation which may be raised either by the chair or by a representative of a Member State.

2. The Chair of the Dual-Use Coordination Group ~~or the Coordination Group~~ shall, whenever it considers it to be necessary, consult exporters, brokers and other relevant stakeholders concerned by this Regulation.

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↓ new

3. The Dual-Use Coordination Group shall, where appropriate, set up technical expert groups composed of experts from Member States to examine specific issues relating to the implementation of controls, including issues relating to the updating of the Union control lists in Annex I. Technical expert groups shall, where appropriate, consult exporters, brokers and other relevant stakeholders concerned by this Regulation.

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↓ 428/2009

#### *Article ~~24~~ 22*

1. Each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive.

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↓ new

2. The Dual-Use Coordination Group shall set up an Enforcement Coordination Mechanism with a view to establish direct cooperation and exchange of information between competent authorities and enforcement agencies.

#### *Article 23*

It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 3, 4, 5, 6, and 7.

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↓ 428/2009 (adapted)

⇒ new

## **CHAPTER VII**

### **⊠ TRANSPARENCY, OUTREACH, MONITORING, EVALUATION ⊠**

#### *Article 24*

~~51. The provision of guidance to exporters and brokers will be the responsibility of the Member States where they are resident or established. The Commission and the Council may~~

⇒ shall, where appropriate, ~~also~~ make available guidance and/or recommendations for best practices for the subjects referred to in this Regulation ⇒ to ensure the efficiency of the Union export control regime and the consistency of its implementation ~~.~~ ⇒ The competent authorities of the Member States shall also, where appropriate, provide complementary guidance for exporters, brokers and transit operators resident or established in that Member State. ⇐

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↓ 1232/2011 Art. 1.8 (adapted)  
⇒ new

~~32.~~ The Commission shall submit an annual report to the European Parliament ⇒ and the Council on the implementation and enforcement of controls in the Union and ⇐ on the activities, examinations and consultations of the Dual-Use Coordination Group, ~~which shall be subject to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>30</sup>.~~

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↓ 1232/2011 Art. 1.9  
⇒ new

~~2. Every 3 years the Commission shall review the implementation of this Regulation and present a comprehensive implementation and impact assessment report to the European Parliament and the Council, which may include proposals for its amendment. Member States shall provide to the Commission all appropriate information for the preparation of the report. ⇒ This annual report shall be public. ⇐~~

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↓ new

3. 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 European Parliament, the Council and the European Economic and Social Committee.

Member States shall be involved in this exercise and shall provide the Commission with necessary information for the preparation of that report.

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↓ 428/2009 (adapted)  
⇒ new

## CHAPTER ~~VII~~ VIII

### CONTROL MEASURES

#### Article ~~20~~ 25

1. Exporters of dual-use items shall keep detailed registers or records of their exports, in accordance with the national law or practice in force in the respective Member States. Such

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<sup>30</sup> OJL 145, 31.5.2001, p. 43.

registers or records shall include in particular commercial documents such as invoices, manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified:

- (a) the description of the dual-use items;
- (b) the quantity of the dual-use items;
- (c) the name and address of the exporter and of the consignee;
- (d) where known, the end-use and end-user of the dual-use items.

2. In accordance with national law or practice in force in the respective Member States, brokers  $\Rightarrow$  and suppliers of technical assistance  $\Leftarrow$  shall keep registers or records for brokering  $\Rightarrow$  or technical assistance  $\Leftarrow$  services ~~which fall under the scope of Article 5~~ so as to be able to prove, on request, the description of the dual-use items that were the subject of brokering  $\Rightarrow$  or technical assistance  $\Leftarrow$  services, the period during which the items were the subject of such services and their destination, and the countries concerned by those brokering services.

3. The registers or records and the documents referred to in paragraphs 1 and 2 shall be kept for at least three years from the end of the calendar year in which the export took place or the brokering  $\Rightarrow$  or technical assistance  $\Leftarrow$  services were provided. They shall be produced, on request, to the competent ~~authorities~~  $\boxtimes$  authority  $\boxtimes$  ~~of the Member State in which the exporter is established or the broker is established or resident.~~

~~4.~~ Documents and records of ~~intra-Community~~  $\boxtimes$  intra-Union  $\boxtimes$  transfers of dual-use items listed in Annex I shall be kept for at least three years from the end of the calendar year in which a transfer took place and shall be produced to the competent ~~authorities~~  $\boxtimes$  authority  $\boxtimes$  of the Member State from which these items were transferred on request.

#### *Article ~~21~~ 26*

In order to ensure that this Regulation is properly applied, each Member State shall take whatever measures are needed to permit its competent authorities:

- (a) to gather information on any order or transaction involving dual-use items;
- (b) to establish that the export control measures are being properly applied, which may include in particular the power to enter the premises of persons with an interest in an export transaction or brokers involved in the supply of brokering services under circumstances set out in Article 5  $\Rightarrow$  , or suppliers of technical assistance under the circumstances set out in Article 7  $\Leftarrow$  .

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↓ 1232/2011 Art. 1.10 (adapted)

## CHAPTER IX

### ⊠ COOPERATION WITH THIRD COUNTRIES ⊠

*Article ~~25a~~ 27*

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↓ new

1. The Commission and the competent authorities of the Member States shall, where appropriate, maintain regular and reciprocal exchange of information with third countries.

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↓ 1232/2011 Art. 1.10

2. Without prejudice to the provisions on mutual administrative assistance agreements or protocols in customs matters concluded between the Union and third countries, the Council may authorise the Commission to negotiate with third countries agreements providing for the mutual recognition of export controls of dual-use items covered by this Regulation and in particular:

(a) to eliminate authorisation requirements for re-exports within the territory of the Union;

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↓ new

(b) to enable the post-shipment verification of exports in third countries;

(c) to develop end-user verification programmes for trusted end-users in third countries.

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↓ 1232/2011 Art. 1.10

These negotiations shall be conducted in accordance with the procedures established in Article 207(3) of the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, as appropriate.

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↓ 428/2009

## CHAPTER ~~VIII~~X

### OTHER PROVISIONS

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↓ 1232/2011 Art. 1.9

#### ~~Article 25~~

~~3. Special sections of the report shall deal with:~~

~~(a) the Dual-Use Coordination Group and its activities. Information that the Commission provides on the Dual-Use Coordination Group's examinations and consultations shall be treated as confidential pursuant to Article 4 of Regulation (EC) No 1049/2001. Information shall in any case be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information;~~

~~(b) the implementation of Article 19(4), and shall report on the stage reached in the set-up of the secure and encrypted system for the exchange of information between Member States and the Commission;~~

~~(c) the implementation of Article 15(1);~~

~~(d) the implementation of Article 15(2);~~

~~(e) comprehensive information provided on the measures taken by the Member States pursuant to Article 24 and notified to the Commission under paragraph 1 of this Article.~~

~~4. No later than 31 December 2013, the Commission shall submit to the European Parliament and to the Council a report evaluating the implementation of this Regulation with a specific focus on the implementation of Annex IIb, Union General Export Authorisation No EU002, accompanied by, if appropriate, a legislative proposal to amend this Regulation, in particular as regards the issue of low-value shipments.~~

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↓ 428/2009 (adapted)  
⇒ new

#### Article ~~26~~ 28

This Regulation ~~does not affect~~. ⇒ is without prejudice to the Commission Delegated Decision of 15 September 2015 supplementing Decision No 1104/2011/EU of the European Parliament and of the Council. ⇐

~~the application of Article 296 of the Treaty establishing the European Community,~~



~~the application of the Treaty establishing the European Atomic Energy Community.~~

*Article ~~27~~ 29*

Regulation (EC) No ~~1334/2000~~  428/2009  is repealed with effect from ~~27 August 2009~~  [...] .

However, for export authorisation applications made before ~~27 August 2009~~  [...] , the relevant provisions of Regulation (EC) No ~~1334/2000~~  428/2009  shall continue to apply.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex VI.

*Article ~~28~~ 30*

This Regulation shall enter into force ~~90 days after the date~~  on the ninetieth day following that  of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*