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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	10 October 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2018) 6511 final
Subject:	COMMISSION DELEGATED REGULATION (EU) …/... of 10.10.2018 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

Delegations will find attached document C(2018) 6511 final.

Encl.: C(2018) 6511 final

EUROPEAN
COMMISSION

Brussels, 10.10.2018
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COMMISSION DELEGATED REGULATION (EU) …/...

of 10.10.2018

amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

According to Council Regulation (EC) No 428/2009[1] dual-use items - items that can be used for both civilian and military purposes or can contribute to the proliferation of weapons of mass destruction - are to be subject to effective control when they are exported from or transit through the European Union, or are delivered to a third country as a result of brokering services.

Annex I to Council Regulation (EC) No 428/2009 establishes a common list of dual-use items subject to controls in the Union: the 'list of dual-use items'.. Decisions on the items subject to controls are taken within the framework of the international non-proliferation regimes and export control arrangements, namely the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Chemical Weapons Convention.

The list of dual-use items set out in Annex I to Council Regulation (EC) No 428/2009 needs to stay current in order to ensure full compliance with international security obligations, guarantee transparency, maintain the Union competitiveness and facilitate references for export control authorities and economic operators. This requires updating and consolidating Annex I to Council Regulation (EC) No 428/2009, which should be published at regular intervals.

Article 15(1) and (3) of Council Regulation (EC) No 428/2009 provides that '*the Commission shall be empowered to adopt delegated acts … concerning updating the list of dual-use items set out in Annex I*'…'*in conformity with the relevant obligations and commitments, and any modifications thereof, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties*'. Article 15(3) further sets out that '*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*'.

The current list of dual-use items was last updated by Commission Delegated Regulation (EU) No 2017/2268[2], taking account of the control list changes adopted by the international non-proliferation regimes and export control arrangements until the end of 2016. The changes to the control lists adopted by the international non-proliferation regimes and export control arrangements in 2017 now require another amendment of Annex I to Council Regulation (EC) No 428/2009. The delegated act therefore presents a variety of amendments to the EU list of dual-use items concerning the control parameters, the technical definitions and descriptions and the removal or addition of dual-use items. The amendments to the list of dual-use items in Annex I also necessitate consequential amendments to Annexes IIa to IIg and Annex IV.

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1 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.)

2 Commission Delegated Regulation (EU) No 2017/2268 of 26 September 2017 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 334, 15.12.2017, p. 1).

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In line with paragraph 4 of the Common Understanding on delegated acts between the European Parliament, the Council and the European Commission[3], appropriate and transparent consultations, including at expert level, have been carried out in the preparation of this delegated act. The relevant documents have been transmitted in a timely and appropriate manner to the European Parliament and to the Council. The Dual-Use Coordination Group was duly consulted at its meeting on 17 May 2018.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Regulation (EU) No 599/2014 of the European Parliament and of the Council amended Council Regulation (EC) No 428/2009 by adding Article 15(3) to this Regulation, which empowers the Commission to adopt delegated acts concerning the updating of the list of dual-use items set out in Annex I, Annexes IIa to IIg, and Annex IV.

[3] See Annex to the Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

COMMISSION DELEGATED REGULATION (EU) …/...

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amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[4], and in particular Article 15(3) thereof,

Whereas:

(1) Regulation (EC) No 428/2009 requires dual-use items to be subject to effective control when they are exported from or transit through the Union, or are delivered to a third country as a result of brokering services provided by a broker resident or established in the Union.

(2) Annex I to Regulation (EC) No 428/2009 establishes the common list of dual-use items that are subject to controls in the Union. Decisions on the items subject to controls are taken within the framework of the Australia Group[5], the Missile Technology Control Regime[6], the Nuclear Suppliers Group[7], the Wassenaar Arrangement[8] and the Chemical Weapons Convention.

(3) The list of dual-use items set out in Annex I to Regulation (EC) No 428/2009 needs to be updated regularly so as to ensure full compliance with international security obligations, to guarantee transparency, and to maintain the competitiveness of economic operators. The changes to the control lists adopted by the international non-proliferation regimes and export control arrangements in 2017 now require another amendment of Annex I to Regulation (EC) No 428/2009. In order to facilitate references for export control authorities and economic operators, Annex I to that Regulation should be replaced.

(4) Annexes IIa to IIf to Regulation (EC) No 428/2009 establish Union General Export Authorisations.

(5) Annex IIg to Regulation (EC) No 428/2009 establishes a list of dual-use items that are to be excluded from the scope of national general export authorisations and Union General Export Authorisaitons.

(6) Annex IV to Regulation (EC) No 428/2009 establishes authorisation requirements for certain intra-Community transfers.

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4 OJ L 134, 29.5.2009, p. 1.
5 http://www.australiagroup.net/en/index.html
6 http://mtcr.info/
7 http://www.nuclearsuppliersgroup.org/index.php?lang=en
8 https://www.wassenaar.org/

(7) The amendments to the list of dual-use items set out in Annex I necessitate consequential amendments to Annexes IIa to IIg and Annex IV for dual-use items which are also listed in Annexes IIa to IIg and Annex IV.

(8) Regulation (EC) No 428/2009 empowers the Commission to update the list of dual-use items set out in Annex I as well as Annexes IIa to IIg and Annex IV by means of delegated acts, in conformity with the relevant obligations and commitments, and any modifications thereto, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties.

(9) Considering the importance of ensuring full compliance with international security obligations as soon as practically possible, this Regulation should enter into force on the day following that of its publication.

(10) Regulation (EC) No 428/2009 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Council Regulation (EC) No 428/2009 is amended as follows:

(1) Annex I is replaced by the text set out in Annex I to this Regulation.

(2) Annexes IIa to IIg are replaced by the text set out in Annex II to this Regulation.

(3) Annex IV is replaced by the text set out in Annex III to this Regulation.

Article 2

This Regulation shall enter into force on the 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, 10.10.2018

For the Commission
The President
Jean-Claude JUNCKER