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OUTCOME OF PROCEEDINGS

of: Ad hoc Working Party on Dual-use Goods

on: 11 January 1999

1. Continuation of discussion of Commission proposal for a Council regulation setting up a Community regime for the control of exports of dual-use goods and technology (Chapters I and II and Article 10) (docs. 8888/98, DS 7/98, DS 8/98 DS 9/98, DS 10/98, DS 19/98)

At the meeting of the ad hoc Working Party on 10 December, suggestions had been made for the redrafting of certain articles, in an attempt to accommodate delegations' views expressed during the in-depth discussion of the proposal which had taken place during the Austrian presidency. Delegations were invited to clarify their positions with regard to these suggested amendments. The Commission could take such positions into account should it choose to submit a modified proposal.

The results of the discussion are set out in the Annex to the present report.

2. Transfer of intangible technology and provision of technical services

The Presidency invited delegations to table papers on this subject for discussion at the next meeting of the ad hoc Working Party.

3. Amendments to and updating of annexes to Decision 94/942 CFSP

i) Draft Council Decision amending categories 4 and 5 and Annex IV to take account of recent changes to the Wassenaar Arrangement List of Dual Use Goods and Technologies

At the 10 December meeting of the ad hoc Working Party some delegations had felt that in order to avoid European exporters being at a disadvantage vis à vis their US counterparts, the changes in controls agreed at the December Plenary of the Wassenaar Arrangement (in particular the relaxation of certain controls in Categories 4 and 5) should be incorporated into the EU list and published as a matter of urgency. Revised versions of categories 4 and 5, and a revised Annex IV reflecting the changes in such categories, together with DS 1/99

(Change Note 16 part 1) had been drawn up by the Member State performing the function of technical secretariat and circulated to delegations on 22 December.

The Presidency informed delegations that on the basis of the above-mentioned revised versions of categories 4 and 5 and Annex IV, the Council Secretariat would draw up a draft Council decision and transmit it to delegations before 15 January. Delegations were invited to agree on the text of the draft decision under silent procedure expiring on 25 January, with a view to adoption by the Council after finalisation by the legal linguistic experts.

ii) Updating of Annexes with a view to the publication of a consolidated version

The Presidency reminded delegations that a meeting of the ad hoc Working Party on Dual Use Goods (List Experts) had been convened for 26 January. Revised versions of Annexes I, IV and V to the Decision containing all amendments published since the last consolidated version (Decision 96/613/CFSP), together with recently agreed changes to the Wassenaar List and in the Nuclear Suppliers' Group, as well as explanatory notes, were being prepared by the technical secretariat and would be circulated to delegations by the Council Secretariat before that date. (Copies of the revised versions of Categories 1, 2 (first part), 3, 6, 7, 8 and 9, as well as categories 4 and 5 as mentioned in (i) above were available for delegations at the present meeting). It was hoped that the revised annexes could be agreed at the meeting on the 26 January, with a view to early adoption by the Council.

The Presidency confirmed the following dates for the regular meetings of the ad hoc Working Party on Dual Use Goods over the next six months : 23 February, 18 March, 22 April, 20 May and 24 June.

Proposal for a Council regulation setting up a Community regime for the control of exports of dual-use goods and technology (Chapters I and II and Article 10) as resulting from discussions on 11 January 1999

- NB: i) The changes to the Commission proposal upon which consensus has been reached are indicated in ***bold italics***;
- ii) Text requiring further discussion is contained between square brackets, with suggested changes to the Commission proposal indicated in **bold**;
- iii) Delegations' comments are set out in footnotes.

"CHAPTER I

Subject and definitions

Article 1

This Regulation sets up a Community system of export controls for dual-use *items*.⁽¹⁾

Article 2

For the purpose of this Regulation:

- (a) "dual-use items" shall mean goods, *including software and* technology which can be used for both civil and military purposes;
- (b) "export" shall mean a procedure referred to in Article 161 of the Community Customs Code under which Community goods temporarily or definitively leave the customs territory of the Community. It includes re-export, that is to say a transaction of the kind referred to in Article 182 of the Community Customs Code by which non-Community goods leave the customs territory of the Community. It also includes transmission of *software or* technology by electronic media⁽²⁾, fax and telephone⁽³⁾ *to a destination outside the Community*;

⁽¹⁾ A reiterated its concern about the absence of any reference to single use items.

⁽²⁾ UK (supported by D/ES) felt there should be a common understanding concerning the control of technology transferred via Internet. Although one might argue that data available on the Internet fell within the public domain and was not therefore subject to controls, there could be grounds for considering that data available against payment was indeed an export to be controlled. It was agreed that the Coordinating Group would consider this question further.

⁽³⁾ UK (supported by A) repeated its concern that controls over telephone conversations were probably unenforceable and suggested controls be narrowed down to cover only the deliberate imparting of information which would normally be transferred in a document. It was agreed that

- [(c) "exporter" shall mean any natural or legal person on whose behalf the export declaration is made, **i.e. 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 Community. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the power for determining the sending of the item out of the customs territory of the Community shall be decisive.**

"exporter" shall also mean any natural or legal person **who decides to transmit technology or software** by electronic media, fax and telephone **to a destination outside the Community;**

Where the benefit of the right to dispose of the dual-use items belongs to a person established outside the Community pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party established in the Community;]⁽⁴⁾

- (d) "export declaration" shall mean the act whereby a person indicates in the prescribed form and manner the wish to place dual-use items under an export or re-export procedure.

(5)

the Coordinating Group would consider defining transfers by telephone, and suggested that any definition drafted might be inserted in a statement to the Council Minutes upon adoption of the regulation, rather than in the regulation itself.

- (4) This revised definition of "exporter" was put forward on the basis of discussions in the Coordinating Group in December. UK/IRL/DK required time to consider it further.

- (5) D/I/A felt it would be useful to define the word "established" and pointed out that this matter had been discussed in the Coordinating Group. The Cion considered it unnecessary to define words routinely used in Community law and not intended to be interpreted in a specific manner in the proposed regulation. However, D undertook to draw up a draft definition for examination by the Coordinating Group or the ad hoc Working Party.

CHAPTER II

Scope

Article 3

1. An authorization shall be required for the export of the dual-use items listed in Annex I.
2. In pursuance of Article 4 or Article 5, an authorization may *also* be required for the export to all or certain destinations of certain dual-use items not listed in Annex I.
3. (First sentence deleted). This Regulation does not apply to the supply of services or the transmission of technology requiring cross-border movement of natural persons.⁽⁶⁾
- [4. This Regulation does not apply to dual-use items which only pass through the territory of the Community, that is those 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.]⁽⁷⁾
- [5. Dual-use items which are exported by governments of Member States or legal or natural persons acting on behalf of governments of Member States are not subject to the authorization requirement laid down in paragraph 1.]⁽⁸⁾

⁽⁶⁾ Delegations agreed to delete the first sentence of this paragraph. D felt the paragraph should contain a reference to software.

⁽⁷⁾ NL stated that it intended to propose an alternative text for this paragraph in view of technical problems which it presented for the Netherlands customs authorities.

⁽⁸⁾ In view of A/F/DK/FIN/GR/P/S reservations on this general exemption expressed at a previous meeting, the Cion had suggested its deletion. However, D preferred to retain this paragraph, at least concerning exports by governments of Member States.

Article 4

1. An authorization 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 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, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or the development, production, maintenance or storage of missiles capable of delivering such weapons.
- [2. An authorization 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 a military end-use⁽⁹⁾ in a country subject to ***an arms embargo imposed by a binding resolution of the Security Council of the United Nations or an arms embargo decided by a common position or a joint action adopted by the European Union.***⁽¹⁰⁾

⁽⁹⁾ The Presidency noted the general consensus on the idea of extending the current Article 4 to encompass dual-use items for conventional weapons in countries subject to arms embargoes.

D and UK, in attempts to further define "military end use", had tabled DS 10/98 and 19/98 respectively.

All delegations (except UK, with a reservation by GR, which could accept the Cion's revised version of Article 4) could agree to the D proposal to use the Wassenaar Military List as a basis for the definition of military end use, although F/I/S/PT expressed their preference for national military lists as criteria.

D's suggestion in paragraph 2(a) of DS 10/98 to extend the definition of military end use to include items for the construction or operation of a plant for the exclusive or partial manufacture, modernisation or maintenance of items of military equipment listed in the Wassenaar Arrangement list was acceptable for L/A/IRL/I/F/PT and B (which had a reservation on the proposed "de minimis" clause).

L/DK//E/S/GR expressed their preference for retaining the Cion's revised version of Article 4.2 as shown above, although they would not oppose the D proposal.

NL preferred to retain the wording suggested by the Cion. It did not favour an extension, but felt that should such extension be considered necessary, the UK proposed wording was more acceptable.

⁽¹⁰⁾ The Presidency noted that it would endeavour, in consultation with the Cion, to draw up a new version of this paragraph, taking into account delegations' views concerning a possible definition of military end use.

The Presidency also noted that the UK's proposal (contained in para. 6 of DS 19/98) to include a clause allowing a Member State to control the export of military end use items to destinations subject to arms embargoes or exceptional restrictions imposed by that Member State should be discussed in the context of Article 5.

- [3. **An authorization 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 to military equipment that has been exported or reexported from the territory of that Member State without authorization or in violation of an authorization prescribed by national legislation of that Member State.]**⁽¹¹⁾
4. If the exporter is aware that the dual-use items are intended, in their entirety or in part, for one of the purposes referred to in paragraphs 1, [2 and 3]⁽¹²⁾, he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorization.
5. Member States may adopt or maintain national legislation providing that the exporter must notify the authorities referred to in paragraph 1 where he has grounds for suspecting that the dual-use items are intended wholly or in part, for one of the purposes referred to in paragraphs 1 and 2, and that in such a case the export operation may be made subject to authorization.
6. A Member State which imposes an authorization requirement, in application of paragraphs 1 to 4 on an unlisted dual-use item, shall inform the other Member States and the Commission. The other Member States shall give all due consideration to this information and shall inform, to the extent possible, their customs offices and other relevant national authorities.
7. *The provisions of Article 9.2 and 9.3 shall apply to cases concerning unlisted dual-use items.*

⁽¹¹⁾ NL/FI maintained reservations on the insertion of this new paragraph suggested by S in DS 9/98. UK felt it was superfluous.

⁽¹²⁾ UK suggested in DS 19/98 that an exporter who is aware that items to be exported are intended for military end use should not be bound to report the fact to his authorities. This suggestion was not supported by other delegations.

Article 5

- [1. A Member State may exceptionally⁽¹³⁾ prohibit or make subject to authorization the export of dual-use items not listed in Annex I for reasons of **public security and human rights considerations.**]⁽¹⁴⁾
2. Member States shall notify any measures adopted pursuant to paragraph 1 to the other Member States and the Commission immediately after their adoption and indicate the precise reasons for the measures and their envisaged duration.

Member States shall also immediately notify the other Member States and the Commission of any modifications to measures adopted pursuant to paragraph 1.
3. The Commission shall publish the measures notified to it pursuant to paragraph 2 in the "C" series of the *Official Journal of the European Communities*.

⁽¹³⁾ DK withdrew its reservation on the use of the word "exceptionally" (expressed at the 6 July meeting of the ad hoc Working Party). D requested its deletion, fearing it may increase the burden of proof on the Member State.

The Cion undertook to consult its authorities in connection with this requested deletion.

⁽¹⁴⁾ In attempt to accommodate some Member States' concerns that Article 5 of proposal did not give them enough scope to set up their national export policies, bearing in mind the lack of a harmonized EU policy, the Cion now suggested the above revised wording. It reminded delegations that the core of the proposal was the list of items contained in Annex I, and that Article 5.1 was intended merely as a safeguard clause, without giving Member States the possibility to overturn the whole regulation without sufficient grounds. In addition, it considered that the above proposed wording took account of the notion expressed by the UK in DS 19/98, paragraph 6.

D wondered whether the paragraph should not contain a reference to the EU Code of Conduct on arms exports.

UK conceded that the suggested new wording was an improvement on the original proposal, but was considering pressing for the wording it had suggested at the 6 July meeting, i.e. that the paragraph should end "**...for reasons of national security, public policy and the protection of the life and health of humans.**"

The Presidency invited delegations to consider whether the suggested new wording suggested by the Cion met their concerns, and noted that this article would be the subject of discussion at a future meeting.

The Cion invited delegations to provide examples illustrating cases which would not be covered by its proposed new wording.

Article 10

1. All individual **and global** export authorizations shall be issued on forms in accordance with the model set out in Annex IIIa.

(paragraph 2 of original proposal deleted)

2. At the request of exporters, global authorizations that contain quantitative limitations **shall** be split.v
3. **National general authorisations shall be published in accordance with national laws and practices. They shall be issued in accordance with the indications set out in Annex IIIb.**

New Annex IIIb:

Annex IIIb **Common elements for publication of general licences**

- 1) **Title of general export authorization**
- 2) **Authority issuing the authorization**
- 3) **EC validity. The following text shall be used:**

“This is a general authorisation under the terms of Article 6.2 of EC Regulation N° XXXX(99). This authorization, in accordance with Article 6.5 of that Regulation, is valid in all Member States of the European Community”.

- 4) **Product scope: the following introductory statement shall be used:**

“This export authorization covers the following products”:

- 5) **Country coverage: the following introductory statement shall be used:**

“This export authorization is valid for exports to the following destinations”:

- 6) **Conditions and requirements.”**