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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Dual-Use Goods
Subject:	Recast of Dual Use regulation - PRES compromise proposals for recitals

Delegations will find attached draft compromise proposals for the recitals of the Dual Use regulation (Recast), as prepared by the Presidency.

HR PRES compromise proposals for Recitals

*Changes to the latest PRES mandate of 5.02.2020 are indicated in **bold/underlined***

Whereas:

- (1) Council Regulation (EC) No 428/2009¹ has been substantially amended several times. Since further amendments are to be made, that Regulation should be recast in the interests of clarity, effectiveness and efficiency.
- (1a) The Regulation aims to ensure that in the area of dual-use items, the Union and its Member States fully take into account all relevant considerations including international obligations and commitments, obligations under relevant sanctions as well as considerations for national foreign and security policy, including those ~~contained in the~~ Council Common Position of 8 December 2008 defining common rules governing control of exports of military technology and equipment, among them human rights, and considerations about intended end use and the risk of diversion. The European Union is committed to maintain robust legal requirements through this Regulation with regard to dual-use items, as well as to strengthen exchange of relevant information and greater transparency.
- (1b) This regulation also aims at strengthening the guidance regarding responsible practices to be given to the exporters, especially to small- and medium-sized enterprises **(SMEs)**, while not impairing the global competitiveness of exporters of dual-use items or other associated industry or academia which are resident or established in the Member States of the European Union.

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) United Nations Security Council Resolution 1540, adopted on 28 April 2004, decided that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials, equipment and technology for exports, transit, brokering, technical assistance and, in some cases, transfers. **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.
- (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, regional peace, security and stability and respect for human rights and international humanitarian law, are complied with.
- (4) The EU Strategy against proliferation of Weapons of Mass Destruction of 12 December 2003 (EU WMD Strategy), 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 emphasises the Union's commitment to strong national and internationally-coordinated export controls.
- (5) In order to address the risk that certain non listed dual-use items exported from the customs territory of the Union may be misused by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law, it is appropriate to control place the export of those such items under control. This includes cyber-surveillance items (hardware, software, technology), meaning dual-use items specially designed to enable the covert surveillance of information and telecommunication systems with a view to monitoring, extracting, collecting or analyzing data.
- (6) In order to enable the Union to react rapidly to serious misuse of existing technologies, or to new risks associated with emerging technologies, a mechanism should be

Commented [A1]: The proposed addition, as it is currently formulated, is misleading as it does not accurately reflect the text of the resolution. Concepts are taken out of their context in the resolution, and combined with concepts not mentioned in the text at all. ('materials, equipment and technology' is mentioned in a footnote on page 1; 'exports' and 'transit' are mentioned in section 3(d); 'brokering', 'technical assistance' and 'transfers' are not mentioned at all).

Commented [A2]: The EU strategy has been misrepresented. It is focused on multilateral action and support to third countries. In terms of EU MS, the focus was on national-level controls on NBC materials, and 'criminal sanctions for illegal export, brokering and smuggling of WMD-related material'. The FAC Conclusions of 12 Dec 2003 does not 'call for the strengthening of the export control policies and practices of the Union'. There is a more specific reference to 'strengthened export controls, to control both tangible and intangible transfers'.

The suggested new wording is a quote from the Strategy's Para 14, 5th bullet point.

Commented [A3]: Includes catch-all better.

introduced enabling Member States to coordinate their responses when a new risk is identified. Such coordination should be followed by initiatives to introduce equivalent controls at the multilateral level in order to broaden the response to the identified risk.

- (7) Transmission of dual-use software and technology by means of electronic media, fax or telephone to destinations outside the customs territory of the Union should also be controlled. In order to limit the administrative burden for exporters and the competent authorities of the Member States, facilitations in the form of general or global licenses or harmonised interpretation of provisions should be provided for certain transmissions, e.g., to a cloud.
- (7a) Considering the important role of customs authorities in the enforcement of export controls, the definitions of terms used should, to the extent possible, be consistent with the definitions in **Council Regulation (EU) No 952/2013 of the European Parliament and of the Council² (hereinafter the Union Customs Code) ~~the Union Customs Code.~~**
- (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, it is essential they are aware of the risks associated with the export and technical assistance regarding sensitive items. In particular academic and research institutions face distinct challenges in export control due to, inter alia, **their general commitment to the free exchange of ideas, the fact that their research work often involves cutting edge technologies,** their organizational structures, ~~technological developments,~~ and the international nature of their scientific exchanges. The Member States and the Commission should, where necessary, raise awareness among the academic and research community and provide tailored guidance to them to address these distinct challenges. In alignment with the **international multilateral** export control regimes and to the extent possible, the implementation of controls should provide for a common approach with respect to certain provisions, in particular regarding the academia related de-control notes "basic scientific research" and "public domain".
- (9) [...]

Commented [A4]: First mention of the UCC. See also recital 28

Commented [A5]: Moved before with better description.

Commented [A6]: Alignment with terminology in recitals 2, 6 and 29 & Art 27.1. Note: follow-on change needed to 'international non-proliferation regimes and export control arrangements' in Art 14.1(a); 15a.1(a), 15a.2;

² 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).

(10) The definition of broker should be revised to include legal persons and partnerships not resident or established in a Member State of the Union who carry out brokering services from the customs territory of the Union.

(11) With the entry into force of the Lisbon Treaty, it has been clarified that the supply of technical assistance involving a cross-border movement falls under Union competence. It is therefore appropriate to clarify the controls applicable to technical assistance, and to introduce a definition of those services. For reasons of effectiveness and consistency, controls on the supply of technical assistance should be harmonised.

(12) As in Dual-use Regulation (EC) No 428/2009, ~~provides there should be for~~ a possibility for Member States' authorities to under certain circumstances prohibit ~~under certain circumstances~~ the transit of non-Union dual-use items, where they through intelligence- or other sources 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 or for a military end-use in a country subject to an arms embargo.

Commented [A7]: References to the current DU-regulation should not be in the present tense, as if it still applies after the Recast has been adopted.

(13) Licensing conditions and requirements should be harmonised, where ~~necessary and~~ appropriate, in order to avoid distortions of competition and ensure the consistent and effective application of controls throughout the customs territory of the Union. To this effect, it is also necessary to ensure a clear determination of the competent authority of the Member State in all control situations. The responsibility for deciding on individual, global or national general export authorisations, on authorisations for brokering services and technical assistance, [...] on transits of non-Union dual-use items ~~or and on~~ authorisations for the transfer within the customs territory of the Union of the dual-use items listed in Annex IV lies with national authorities.

Commented [A8]: better harmonization.

Commented [A9]: 'or' does not seem appropriate in a straight listing of MS responsibilities, and could give rise to misinterpretations.

(14) Guidelines for "internal compliance programmes" (ICPs) should be introduced in order to contribute to the level-playing field between exporters and to enhance the effective application of controls. These guidelines should take into account the differences in sizes, resources, fields of activity and other features and conditions of exporters, thus avoiding any 'one model for all' and helping each exporter to find its own solutions for compliance and competitiveness. Exporters using global export authorisations should implement an ICP unless that is considered unnecessary by the competent authority due

to other ~~information~~ **circumstances** it has taken into account when processing the application for a global export authorisation submitted by the exporter.

- (15) Additional Union general export authorisations should be introduced in order to reduce administrative burden on companies, in particular ~~small and medium-sized enterprises (SMEs)~~ and authorities while ensuring an appropriate level of control of the relevant items to the relevant destinations. Where deemed necessary, Member States ~~may~~ **can** provide guidance to exporters regarding the application of general authorisations. Member States can also introduce national general export authorisations for low-risk exports where they consider it necessary. An authorisation for large projects should also be introduced to adapt licensing conditions to the particular needs of industry.

Commented [A10]: The abbreviation is explained upon first use in in Recital 1b instead

Commented [A11]: Conformity with next sentence.

- (15.a) The Commission, in close consultations with the Member States and stakeholders, should develop guidelines and/or recommendations for best practices to support practical applications of controls. In the preparation of the guidelines and/or recommendations for best practice, the information needs of ~~small and medium-sized companies~~ SMEs should be duly taken into consideration.**

Commented [A12]: New recital, provisionally agreed at 2nd trilogue on 13.11.2019

Commented [A13]: The abbreviation is explained upon first use in in Recital 1b instead

- (16) Common lists of dual-use items, destinations and guidelines are essential elements for an effective export control regime.
- (16a) Member States establishing national control lists pursuant to this regulation should inform the Commission and the other Member States of such lists. The Member States should also inform the Commission and ~~the~~ other Member States of all their decisions to refuse an authorisation for an export for which an authorisation is required on the basis of a national control list.
- (17) [...] *Moved to recital 18*
- (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 Annex I, Annex II and Annex IV to this Regulation. Decisions to update the common list of dual-use items subject to export controls in Annex I should be in conformity with the obligations and

commitments that Member States ~~and or~~ the Union have accepted as members of the relevant international non-proliferation ~~regimes agreements~~ and ~~multilateral~~ export control ~~arrangements regimes~~, or by ratification of relevant international treaties.

Decisions to update the common list of dual-use items subject to export controls in 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 H of Annex II should be made in consideration of the assessment criteria set out in 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 receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

Commented [A14]: The Union is not a participant in all the relevant international non-proliferation agreement and export control regimes.

Commented [A15]: Alignment with terminology in recitals 2, 6 and 29 & Art 27.1. Note: follow-on change needed to articles. Can be done in review later.

- (18a) The Commission should publish in all EU languages the updates to Annex I through delegated acts.
- (18b) The Commission should publish and keep updated in all EU languages a compilation of national control lists in force in the Member States.
- (19) National provisions and decisions affecting exports of dual-use items should be taken in the framework of the common commercial policy, and in particular Regulation (EU)2015/479 of the European Parliament and of the Council³. Appropriate exchange of information and consultations on national provisions and decisions should ensure the effective and consistent application of controls throughout the customs territory of the Union.
- (20) The existence of a common control system is a prerequisite for establishing the free movement of dual-use items inside the customs territory of the Union.

³ Regulation (EU) 2015/479 of the European Parliament and of the Council on common rules for exports (OJ L83, 27.03.2015, p. 34).

(21) Pursuant to and within the limits of Article 36 of the Treaty on the Functioning of the European Union and ~~pending a greater degree of harmonisation; in view of~~ **international obligations undertaken.** Member States retain the right to carry out controls on transfers of certain dual-use items within the customs territory of the Union in order to safeguard public policy or public security. The list of items subject to intra-Union transfer controls in Annex IV should be periodically reviewed in light of **the further evolution of the underlying international obligations, taking into account** technological and commercial developments ~~and as~~ regards the assessment of the sensitivity of transfers.

Commented [A16]: To better reflect that Annex IV licensing requirements depend on obligations by MS undertaken in the export control regimes and not on unwillingness to harmonize further.

Commented [A17]: Technological and commercial developments should relate to the assessment of the sensitivity of transfers – therefore the “and” does not fit.

Commented [A18]: Technological and commercial developments or changed MS assessments of sensitivity cannot in themselves trigger changes in Annex IV.

(22) On 22 September 1998 the Member States and the 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.

(23) ~~It is desirable~~ **In order** to achieve a uniform and consistent application of controls throughout the ~~customs territory of the~~ Union ~~in order to promote Union and international security and to provide a level playing field for EU exporters. It is~~ **therefore** appropriate, ~~in accordance with the EU WMD Strategy,~~ to broaden the scope of consultation and information exchange between the Member States and the Commission, and to introduce tools to support the development of a common export control network throughout **the customs territory of** the Union, such as electronic licensing procedures, technical expert groups and the setting up of an enforcement coordination mechanism. **It is in particular important to ensure that stakeholders concerned by this Regulation, including industry and civil society organisations, are consulted, where appropriate, by the Dual-Use Coordination Group and the technical expert groups.**

Commented [A19]: Recital was provisionally agreed with the EP on 13.11.2019

Commented [A20]: See comment to Recital 4.

(23.a) While customs authorities share certain information with other customs authorities using a risk management system in accordance with Union customs rules, it is also necessary to ensure close cooperation between licensing and customs authorities.

- (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 the protection of natural persons with regard to the processing of personal data and on the free movement of such data in accordance with the rules laid down in Regulation 2016/679 of the European Parliament and of the Council and Regulation (EC) No 45/2001 of the European Parliament and of the Council.
- (24a) Member States and the Commission should take all necessary measures to ensure the protection of confidential information in compliance with, in particular, Commission Decision (EU, Euratom) 2015/443⁴, Commission Decision (EU, Euratom) 2015/444⁵ and the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union⁶. This includes, in particular, the obligation not to downgrade or declassify classified information without the prior written consent of the originator⁷. Any non-classified sensitive information or information which is provided on a confidential basis should be handled as such by the authorities.
- (25) Outreach to the private sector, in particular to SMEs, and transparency are essential elements for an effective export control regime. It is therefore appropriate to provide for the continued development of guidelines guidance, where necessary, to support the application of this Regulation and for the publication of an EU annual report on the implementation of controls, in line with current practice.

(25a) The annual report should include relevant information on the licensing and enforcement of controls under this Regulation, with due respect to the need to ensure the protection of the confidentiality of certain data, in particular where the publication of licensing data could jeopardise commercial confidentiality and allow non-EU suppliers to undercut restrictive licensing decisions by Member States.

⁴ Commission Decision (EU, Euratom) 2015/443 of 13 March 2015 on security in the Commission (OJ L 72, 17.3.2015, p. 41)

⁵ Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information (OJ L 72, 17.3.2015, p. 53)

⁶ OJ C 202, 8.7.2011, p. 13

⁷ Point (a) of Article 4(1) of the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union and Article 4(2) of Decision (EU, Euratom) 2015/444.

~~The annual report should respect current Union regulations protecting national security, commercial, and statistical confidentiality. Due regard should also be paid to, in this way lessening the risk that the publication of certain licensing and denial details could alert potential competitors outside the Union to new business opportunities, thereby undermining any licensing restrictivity shown by Member States.~~

- (26) In order to ensure that this Regulation is properly applied, each Member State should take measures giving the competent authorities appropriate powers.
- (27) Each Member State should, **in accordance with the EU WMD Strategy**, 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 [...] support effective enforcement of controls, inter alia, through an Enforcement Coordination Mechanism.
- (28) The ~~Union has adopted a body of customs rules, contained in Council Regulation (EU) No 952/2013 of the European Parliament and of the Council⁸ (hereinafter the Union Customs Code)~~ **which** lays down, among other things, provisions relating to the export and re-export of goods. Nothing in this Regulation constrains any powers under and pursuant to the Union Customs Code and its implementing provisions.
- (29) **Export controls** ~~have an impact on~~ **contribute to** international security and have **an impact on 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; ~~promote upward convergence~~ and enhance international security. ~~To promote those goals, the Council, the Commission and-~~ **In particular, Member States and the Commission should enhance the EU's contribution to the activities of pro-actively engage in the relevant international fora, in particular the multilateral export control regimes and support their efforts in developing robust export controls as a model for international best practice and a global basis and an important tool for ensuring international peace and stability., inter alia, to promote international adherence to the rules and controls set out in this Regulation as an international standard. In addition, assistance to third countries with regard to the development**

Commented [A21]: See comment to Recital 4.

Commented [A22]: First mention: see Recital 7a

Commented [A23]: Recital provisionally agreed on 2nd trilogue, 13.11.2019

⁸ 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).

~~of a dual-use items export control regime should be strengthened and expanded, in particular with regard to customs services.~~

- (30) This Regulation applies without prejudice to the Commission Delegated Decision of 15 September 2015⁹ 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 [...].

⁹ C(2015)6123 final.