



Council of the European Union
General Secretariat

Brussels, 14 May 2018

WK 5675/2018 INIT

LIMITE

**CONOP
COMER
CFSP/PESC
ECO
UD
ATO**

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

CONTRIBUTION

From:	DK Delegation
To:	Working Party on Dual-Use Goods
Subject:	Danish comments on the Commission proposal for Regulation 428/2009 (recast)

With a view to the 16 + 17 May Dual Use meeting, delegations will find attached Danish comments.

OVERVIEW MSs POSITIONS


Review Issue 4. Convergence of catch-all controls, Review of brokering controls, Review of transit controls

Commission Proposal	EP Position	MSs Proposals	MSs Positions
Article 4.1			
<p>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:</p> <p>(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;</p>			
<p>(b) for a military end-use if the purchasing country or country of destination is subject to an arms embargo;</p>			
<p>5. (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</p>			

<p>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;</p>			
<p>(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;</p>	<p>(d) with regard to cyber-surveillance items, for use by natural or legal persons in connection with violations of international human rights law or international humanitarian law in countries where serious violations of human rights have been identified by the competent bodies of the UN, the Council of Europe, the Union, or national competent authorities, and there is reason to suspect that this or similar items may be used for the purpose of directing or implementing such violations by the proposed end-user:</p>		<p>Denmark reserves the rights for comments at a later stage.</p>
<p>(e) for use in connection with acts of terrorism.</p>	<p>Deleted</p>		
<p>Article 4.2</p>			
<p>42. If an exporter, under his obligation to exercise due diligence, 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.</p> <p>5. A Member State may adopt or maintain national legislation imposing an</p>	<p>2. If an exporter, becomes aware while exercising due diligence that dual-use items not listed in Annex I which he or she proposes to export, may be intended, in then entirety or in part, for any of the uses referred to in paragraph 1. he or she must notify the competent authority of the Member State in which he or she is established or resident in, which will decide whether or not it is expedient to make the export concerned subject to authorisation.</p>		

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.			
	2.23a "due diligence" shall mean the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems;	Accept EP' s proposal	NL, FI
		Not accept EP' s proposal	BE
		To be discussed in conjunction with article 4.2 since they are connected.	SE, FI, RO, FR
		The UK would like further clarification from the Commission about the "obligation to exercise due diligence" – Article 4(2) – before we can comment on this definition. Where does this obligation come from? What does this look like and entail in practice? Denmark agrees with the UK.	UK, DK
		23a. 'due diligence' shall mean the risk analysis and management process through which enterprises can identify, prevent and , mitigate risks involved in their transaction and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems; <u>Note:</u> The term "due diligence" is a highly debated notion. We consider due diligence to be a part of compliance through which exporters analyze and manage risks involved in the transaction.	DE

Article 4.3			
<p>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 <u>one year</u>, and may be renewed by the competent authority.</p>	<p>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 two years, and may be renewed by the competent authority.</p>	<p>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 in principle be valid for <u>two years</u>, unless <u>decided differently by the competent authority</u>, and may be renewed by the competent authority.</p>	<p>Denmark believes that the deleted text is redundant since the relevant situations would be caught by the revised exporter definition.</p>
Article 4.4			
<p>6.4. 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</p>		<p>Delete</p>	<p>Denmark believes that article 4.4 is irrelevant and should be deleted. We further believe that the proposed text will add significant administrative burdens on the authorities with not enough security benefits. Information about catch-all denials is currently shared and should of course be continued.</p>

<p>period. However, the extension may not exceed 30 working days.</p> <p>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 .</p> <p>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.</p> <p>The Commission and the Member States will maintain an updated</p>	<p>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" meaning an item with essentially identical parameters or technical characteristics to the same end user or consignee. They shall inform their customs administration and other relevant national authorities about the authorisations requirements. The Commission shall publish in the Official Journal of the European Union a short description of the case, the reasoning of the decision and indicate, if applicable, the new authorisation requirement in a new Section E of Annex II.</p> <p>If objections are received from at least four Member States representing at least 35 % of the population of the Union, 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 or its human rights obligations, hi 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.</p> <p>The Commission and the Member States shall maintain an updated register of authorisation requirements in place. The</p>		
---	---	---	--

register of authorisation requirements in place.	data available in that register shall be included in the report to the European Parliament, referred to in Article 24(2), and shall be accessible to the public.		
Article 4.5			
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.			
Article 4.6			
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 8			
<p>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.</p> <p>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.</p> <p>3. Member States shall also immediately notify the Commission and the other Member States of any modifications to measures adopted pursuant to paragraph 1.</p>	<p>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, for human rights considerations or for the prevention of acts of terrorism.</p>		

<p>4. The Commission shall publish the measures notified to it pursuant to paragraphs 2 and 3 in the C series of the <i>Official Journal of the European Union</i>.</p>			
<p align="center">Article 2.6</p>			
<p><u>56.</u> ‘brokering services’ shall mean:</p> <p> <u>(a)</u> 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</p> <p> <u>(b)</u> the selling or buying of dual-use items that are located in third countries for their transfer to another third country.</p> <p>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;</p>	<p>No amendments.</p>		




Article 2.7

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


No amendments.

Article 5

<p>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).</p> <p>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.</p> <p>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).</p> <p>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).</p> <p>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.</p>	<p>2. If a broker is aware that the dual-use items for which he or she proposes brokering services are intended, in their entirety or in part, for any of the uses referred to in Article 4(1), he or she must notify the competent authority which shall make such brokering services subject to authorisation.</p>	<p>Delete</p> 	<p>Denmark sees no need to make any changes to the current articles concerning brokering controls. We see no need to expand the current controls also to include non-listed items.</p>
Article 2.10			



<p>710. '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:</p> <p>(a) which are placed under the external transit procedure and only pass through the customs territory of the Union;</p> <p>(b) which are trans-shipped within, or directly re-exported from, a free zone;</p> <p>(c) which are in temporary storage and are directly re-exported from a temporary storage facility;</p> <p>(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;</p>	No amendments.		
Article 6			
<p>1. The transit of non-Community non-Union dual-use items listed in Annex I may be prohibited at any time by the competent authorities authority of the Member State where the transit occurs the items are situated 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.</p> <p>2. Before deciding whether or not to prohibit a transit a Member State may provide that its the competent authorities</p>	No amendments.		

<p>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).</p> <p>The competent authority may impose the authorisation requirement on any of the following:</p> <ul style="list-style-type: none"> (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. 			
--	--	---	--